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Hryniak: Two Years Later: The Multiple Applications of 'That Summary Judgment Case' From the Supreme Court of Canada

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(1) INTRODUCTION

In January 2014, the Supreme Court of Canada released its decision in *Hryniak v Mauldin*[2] and called for a "culture shift" in the approach to summary judgment and the civil justice system more generally. With the ambitious goal of reducing protracted, costly litigation that undermines access to justice – all the while ensuring the fair and just adjudication of disputes – it is surprising that *Hryniak* has not garnered more attention.

Or has it? It has been nearly two years since the Supreme Court's call for change was levied. Since that time, *Hryniak* has been cited more than 800 times – 606 of those cases are from Ontario.[3] This paper will explore the reach of *Hryniak* and, in particular, the shift in culture that it has begun to usher in; both in the context of motions for summary judgment and in civil justice system as a whole. We will also look at the use of one of the enhanced fact finding powers post *Hryniak*: the "mini-trial". Shrouded somewhat in mystery since its unveiling in 2010, the mini-trial appears to offer opportunities within the "significant alternative model of adjudication"[4] that summary judgment is intended to be in the wake of *Hryniak.*

Our review of these issues will be explored through case examples within the following categories:

- The *Hryniak* culture shift and motions for summary judgment;
- *Hryniak* and the civil justice system generally – the culture shift landslide; and
- Application of *Hryniak* to mini-trials:
    (a) Mini-trials ordered;
    (b) Mini-trials contrary to the interests of justice; and
    (c) Mini-trials and juries – are they compatible post-Hryniak?

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[2] 2014 SCC 7, [*Hryniak*].
[3] These estimates are as of November 9, 2015 and per the Westlaw Canada database.
[4] *Hryniak*, *supra* note 2 at para 45.

(2) "THAT SUMMARY JUDGMENT CASE" - *HRYNIAK*

A). Setting the stage: The legislative changes in Ontario

Summary judgment has been a feature of the Court process in Ontario since 1985. In January 2010, the *Rules of Civil Procedure* were amended with a view to expanding the reach of summary judgment. In keeping with this goal, the test for summary judgment was relaxed: from "no genuine issue for trial", the test became "no genuine issue requiring a trial."[5]

January 1, 2010 also marked the introduction of the enhanced powers for judges in Rules 20.04 (2.1) and (2.2) which included:

- the ability to weigh evidence;
- the ability to determine credibility;
- the ability to draw reasonable inferences; and
- the ability to hear oral evidence – the "mini-trial."[6]

In addition to the above, the principle of proportionality was codified in Rule 1.04 as follows:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> (1.1) In applying these rules, the court shall make orders and give direction that are proportionate to the importance and complexity of the issues and to the amount involved, in the proceeding.[7]

B). Background and the Court of Appeal's decision in *Combined Air*

At around the same time as the legislative changes were being introduced, *Hryniak*[8] was being litigated. The case was one of civil fraud. The plaintiff investors, known as the "Mauldin group", alleged that they had been defrauded by businessman, Robert Hryniak, and other defendants. Similar allegations were made against these defendants in a companion case.

In 2010, the plaintiff investors brought motions for summary judgment that were heard together. The motion record was extensive, including 28 volumes of documents.[9] In October 2010, and using the enhanced fact finding powers, including the ability to evaluate credibility and draw inferences from the evidence, the motion judge granted summary judgment to the plaintiffs in the action against Robert Hryniak.

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[5] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rules 20.04 (2a).
[6] *Ibid* Rules 20.04 (2.1) and (2.2).
[7] *Ibid* Rule 1.04.
[8] *Bruno Appliance & Furniture Inc v Cassels Brock & Blackwell LLP,* 2010 ONSC 5940, Grace J.
[9] *Combined Air Mechanical Services Inc v Flesch* 2011 ONSC 764 [*Combined Air*] at para 117.

The matter was appealed and heard by a five judge panel of the Court of Appeal, along with three other appeals, in a single hearing known as: *Combined Air Mechanical Services v Flesch*.[10] In interpreting and giving meaning to the changes to Rule 20, the Court of Appeal created the "full appreciation test" as the benchmark for determining when a trial was necessary.

The approach by the Court of Appeal has generally been regarded as cautious and as championing the merits of the conventional trial. Summary judgment was held *not* to be a substitute for a full trial. According to the Court of Appeal, the "full appreciation test" would generally be met in document-driven cases with limited testimonial evidence.[11] Cases with "limited contentious factual issues"[12] were also likely suitable for summary judgment. The role of oral evidence in motions for summary judgment, as contemplated by the Court of Appeal, was to be on discrete issues and should not "convert a summary judgement motion into a trial."[13]

C). *Hryniak:* The Supreme Court of Canada weighs in

The opening words of the *Hryniak* decision signaled the difference in the Supreme Court's approach to the changes to *Rules*, including Rule 20:

> *Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted*.[14]

Throughout *Hryniak*, Karakatsanis J. called for a "culture shift" that would promote timely and affordable access to the civil justice system.[15] That shift was stated to require "simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favor of proportional procedures tailored to the needs of a particular case."[16] According to one commentator, in *Hryniak* the Supreme Court set out to "dethrone the conventional trial as the gold standard for adjudication..."[17]

Summary judgment was viewed by the Supreme Court as one opportunity to restore access to justice.[18] Karakatsanis J. held that too high a premium had been put by the Court of Appeal on judges having a "full appreciation" of the evidence obtained through the conventional trial, given that "trial is not a realistic alternative for most litigants".[19] According to Karakatsanis J., a trial is not required if a

[10] *Ibid.*
[11] *Ibid* at para 52.
[12] *Ibid* at para 53.
[13] *Ibid* at paras 52 and 60-61.
[14] *Hryniak, supra* note 2 at para 1.
[15] *Ibid* at para 3.
[16] *Ibid* at para 2.
[17] Shantona Chaudhury, "*Hryniak v Mauldin:* The Supreme Court issues a clarion call for civil justice reform", (2014) Winter 2014 Adv J 7, page 9.
[18] *Hryniak, supra* note 2 at para 3.
[19] *Ibid* at para 4.

summary judgment motion can achieve a fair and just adjudication. That is achieved where the process (1) allows judges to make the necessary findings of fact, (2) apply the law to those facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.[20]

The culture shift in *Hryniak* was explicitly premised on the principle of proportionality. As Karakatsanis J. reasoned, "if the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result."[21]

(3) CASE EXAMPLES: *HRYNIAK* CULTURE SHIFT AND MOTIONS FOR SUMMARY JUDGMENT

Below we have provided a sampling of cases from the preceding two years which depict the application of *Hryniak* and the "culture shift" in the context of summary judgment motions.

- ***Hryniak* greatly expands the use of the summary judgment process in Ontario. Summary judgment is appropriate for cases of all shapes and sizes – there is no "hierarchy of suitability":** *Density Group Limited v HK Hotels LLC,* 2014 ONCA 605; *Sweda Farms Ltd v Egg Farmers of Ontario,* 2014 ONSC 1200, Corbett J; and *Danos v BMW Group Financial Services Canada,* 2014 ONSC 2060, Goldstein J.

In *Sweda Farms Ltd v Egg Farmers of Ontario*,[22] Corbett J. described the approach to summary judgment after *Hryniak* and confirmed that such motions come in all sizes:

> *Summary judgment motions come in all sizes and shapes, and this is recognized in the Supreme Court of Canada emphasis on 'proportionality' as a controlling principle for summary judgment motions. This principle does not mean that large, complicated cases must go to trial, while small, single-issue cases should not…* [23]

While this was not commented on when the Court of Appeal reviewed and upheld Corbett J.'s decision, it does appear to be the prevailing view in Ontario.[24] In *Density Group Limited v HK Hotels LLC,*[25] MacFarland J.A. for the Court of Appeal reiterated that the Supreme Court's decision in *Hryniak* "greatly expands the use of the summary judgment process for the resolution of civil disputes."[26]

In *Danos v BMW Group Financial Services Canada,*[27] a fraudulent misrepresentation case, Goldstein J. rejected the argument that limitation defences are not suitable for summary judgment. His Honour highlighted that it would be dangerous to build a "hierarchy of suitability" for summary judgment cases and in any event, this was "contrary to the policy articulated by the Court in *Hryniak"*.[28]

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[20] *Ibid.*
[21] *Hryniak*, *supra* note 2 at para 29.
[22] 2014 ONSC 1200 [*Sweda Farms*], Corbett J.
[23] *Ibid* at para 32.
[24] 2014 ONCA 878 [*Sweda Farms*, Court of Appeal], leave to appeal to SCC refused.
[25] 2014 ONCA 605.
[26] *Ibid* at para 3.
[27] 2014 ONSC 2060, Goldstein J.
[28] *Ibid* at para 61.

- **Pick your analogy – post *Hryniak* it is even more important for parties to take summary judgment seriously. Judges will assume parties have obtained and played their trump cards. And, according to one judge, the trump suit is not lawyers' affidavits:** *Sweda Farms Ltd v Egg Farmers of Ontario,* (2014) ONSC 1200, Corbett J., aff'd 2014 ONCA 878; and other cases, as cited.

The expectation that parties "put their best food forward" or "lead trump or risk losing" in motions for summary judgment applies with even more fervor after *Hryniak.*

There are numerous cases confirming that judges will generally assume that parties have played their best cards in bringing or responding to motions for summary judgment.[29] Based on this expectation, judges will infer that no better evidence will be available at trial. In *Danos v BMW Group,*[30] Goldstein J. stated as follows:

> *A party on a summary judgment motion cannot just sit back and wait for more favorable evidence to develop at trial. I am entitled to assume that the evidence filed by the Danos's is as good as it gets. I can and do draw an adverse inference from Peter Danos's failure to put forward any evidence whatsoever in relation to the critical issues in this case. Assuming there is no better evidence available, as I am entitled to do, it would be unjust to force the Defendant to carry on with this litigation to trial.*[31]

By way of further example, in *Brown v Williamson,*[32] a key witness could not be located to give *viva voce* evidence at a mini-trial. In granting summary judgment in favor of the third party insurer, Firestone J. held that he was entitled to assume that the witness would also not be available at trial.

What emerges from the summary judgment decisions post-*Hryniak,* where principles of proportionality and timely, cost effective justice reign supreme, is that the Courts will (still) hold parties to their choices – be they cost based or strategic. Trials are no longer the default procedure. The culture shift called for in *Hryniak* is premised on "moving the emphasis away from the conventional trial in favor of proportional procedures tailored to the needs of a particular case."[33] From the summary judgment cases reviewed, it is clear that parties and counsel must carefully consider and determine relatively early what productions to obtain, when to push for further productions from a party, when to bring a refusals motion, when or whether to obtain expert evidence, what evidence from lay witnesses is crucial, and, if a motion for summary is brought, whether to seek direction at the outset for an order of further productions and whether to cross-examine fully (including obtaining undertakings) on the affidavit evidence presented. Absent deliberate and well timed decisions on these issues, parties may be unprepared to lead trump in a motion for summary judgment and do risk losing.

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[29] See for example *Linesteel (1973) Ltd v APM Construction Services Inc,* 2015 ONSC 5802, Maddalena J. at para 136.
[30] *Danos v BMW Group,* supra note 21; See also *Brown v Williamson*, 2015 ONSC 4231, 2015 CarswellOnt 10173 [*Brown*] Firestone J. at para 57.
[31] *Danos v BMW Group, supra* note 21 at para 47.
[32] *Brown v Williamson,* 2015 ONSC 4231, Firestone J.
[33] *Hryniak*, supra note 2 at para 2.

As an example, in *Sweda Farms Ltd,*[34] the plaintiffs had appealed the motion judge's decision to grant summary judgment to the moving defendants which dismissed the action against them. The motion judge had relied heavily on the framework set out in *Hryniak* in his decision. The plaintiffs appealed. Their primary argument was that summary judgment had been granted prematurely and that the motion judge had "only two percent of the evidence."[35] In dismissing the appeal, the Court of Appeal noted that summary judgment had been argued 17 months after one of the defendants had delivered their affidavit of documents. If the plaintiffs' position was that this defendant had not complied with its disclosure obligations, they were required to "take steps to compel production. They did not do so. Accordingly, they did not meet their obligation to put their best foot forward on the motion."[36] It was further noted by the Court of Appeal that, as observed by the motion judge, the plaintiffs had not even put forward those aspects of the claim that were within their own knowledge.

Particularly post *Hryniak,* parties should not build nor time their cases on the assumption that their matter will proceed to trial. As Corbett J. stated in *Sweda Farms*,[37] a party that treats a motion for summary judgment as a "speed bump on the long highway to trial risks crashing its case in the deep ditch of dismissal."

As to what the trump suit is in a motion for summary judgment – according to Myers J. in *Ferreira v Cardenas* (2014)[38] – it is usually not lawyers' affidavits:

> *Generally, lawyers' affidavits are not appropriate for motions for summary judgment. Clients and/or eye witnesses firsthand evidence and expert opinion based on firsthand evidence are the trump suit.*[39]

In *Ferreira*, Myers J. directed counsel to the guidelines set out by Master MacLeod in *Mapletoft v Service*[40] on the use of lawyers' affidavits generally and further addressed the need for caution and restraint in the use of lawyers' affidavits on motions for summary judgment, depending on the legal issue.

Beyond the considerations noted above, it is also important for parties to "put their best foot forward on a motion" because as Corbett J. stated in *Sweda Farms* "on an unsuccessful motion for summary judgment, the court will now rely on the record before it to decide what further steps will be necessary to bring the matter to a conclusion."[41]

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[34] *Sweda Farms (Court of Appeal),* supra note 19.
[35] *Ibid* at para 2.
[36] *Ibid* at para 4.
[37] *Sweda Farms*, *supra* note 19 at para 201.
[38] 2014 ONSC 7119, [Ferreira], Myers J.
[39] *Ibid* at para 13.
[40] 2008 CarswellOnt 897, Master Macleod.
[41] *Sweda Farms,* supra note 19 at para 32.

- **The Court of Appeal has twice relied on the culture shift in *Hryniak* in finding that summary judgment can be granted to a responding party where no cross-motion was brought:** *King Lofts Toronto I Ltd v Emmons,* 2013 ONSC 6113, Perell J., aff'd 2014 ONCA 215; and *Kassburg v Sun Life Assurance Co of Canada*, 2014 ONCA 911, K van Rensburg J.A.

The obligation of parties to "put their best foot forward" and to "lead trump or risk losing" has been given new meaning in view of two decisions from the Court of Appeal confirming that judgment can be granted in favor of *respondents* – even where no cross-motion was brought.

In *King Lofts Toronto Ltd v Emmons*,[42] the plaintiff commenced professional negligence claims against a real estate broker and law firm. The defendants brought a motion for summary judgment seeking to dismiss the solicitor's negligence claim. Perell J. dismissed the defendants' motion but indicated that as a by-product of his findings in that regard, his Honour was in a position to and did grant partial summary judgment to the plaintiffs, who had not filed a cross-motion. The defendants appealed.

By the time the Court of Appeal heard the appeal, *Hryniak* had been released by the Supreme Court. The defendants argued in their oral submissions that Perell J. had erred in granting summary judgment in favor of a party who had not given advance notice of a claim for summary judgment.[43] In dismissing this ground of appeal, the Court reasoned as follows: "(1) the appellant did not request an adjournment of time; and (2) The Supreme Court of Canada in …[Hryniak] has approved a "culture shift" requiring judges to manage the process in line with the principle of proportionality in the application of Rule 20."[44]The Court further noted that the action involved a claim for $106,000.00 stemming from a multi-million-dollar transaction and that "[t]he principles of proportionality and sensible management of the court process support[ed] the motion judge's ruling."[45]

Similarly, in *Kassburg v Sun Life Assurance Co of Canada*,[46] the Court of Appeal upheld a motion judge's decision to grant summary judgement to the plaintiff, the non-moving party, against her LTD insurer. In doing so, the motion judge determined the applicable limitations period and that the plaintiff had commenced her claim in time. In finding that the motion judge had not erred in granting summary judgment where no cross-motion was brought, K. van Rensburg J.A. reasoned that the declaration given in favor of the plaintiff was consistent with the "Supreme Court's call for proportional, timely and affordable justice..."[47] The following was also noted:

> *Consistent with the decision of the Supreme Court in Hryniak and the clear wording and purpose of the summary judgment rule, it was open to the motion judge to determine the limitation defence on a final basis on the record before him in this case. The parties put a comprehensive record before the court, which the appellant [defendants] considered sufficient for the limitations period issues to be able to be determined. The appellant [defendants] could have cross-examined on the respondent's affidavit filed on the motion,*

[42] 2013 ONSC 6113, Perell J., aff'd 2014 ONCA 215.
[43] *Ibid* (*King Lofts Toronto,* Court of Appeal) at para 14.
[44] *Ibid.*
[45] *Ibid* at para 15.
[46] 2014 ONCA 214.
[47] *Ibid* at para 26.

> *but chose not to do so. It is in the interests of justice that the issue was determined on a final basis by the motion judge at this stage. In my view, the motion judge did not err in making the declaration he did as part of his disposition of the summary judgment motion*.[48]

- **Summary judgment motions brought pre-discovery can have teeth post *Hryniak*. Counsel will be held to their tactical choices. And, part of "leading trump" is utilizing the investigation opportunities within the motion process:** *Thyssenkrupp Elevator (Canada) Ltd v Amos,* 2014 ONSC 3910, Myers J.

The case of *Thyssenkrupp Elevator (Canada) Ltd v Amos,*[49] further illustrates the weighty obligations of parties to "lead trump or risk losing" post *Hryniak.*

In this case, the plaintiff employer alleged that its employee, subsequently employed by the corporate defendants in the action, had breached the applicable non-competition and non-solicitation clauses, as well as confidentiality and fiduciary obligations. The defendants brought a pre-discovery motion for summary judgment. The plaintiff defended the motion on the basis that there were material issues for trial and that the plaintiff required documentary discovery and examinations for discovery to compel the defendants to provide the evidence of solicitation that was uniquely within their knowledge. Myers J. rejected the plaintiff's "classic trial model" approach in defending the motion.

On the record before the Court, and per framework set out in *Hryniak,* Myers J. was able to determine that the non-solicitation clauses and restrictive covenants were invalid and that the defendant employee, who was in an entry level management position, was not a fiduciary. That left the breach of confidence claim. Relying heavily on the *Hryniak* decision and the culture shift mandated by the Supreme Court, Myers J. held that it was technically available to him to find there was no issue requiring a trial *because* the plaintiffs had failed to lead trump. His Honour highlighted the discovery options that the plaintiffs had not pursued:

(a) the plaintiff had not requested relevant files from the defendant employee which was available during cross-examination on the motion;[50]

(b) the plaintiff had not requested relevant files from the corporate defendant during cross-examination on the motion;[51]

(c) the plaintiff had not moved for directions at the outset of the motion (as suggested as a possibility by Karakatsanis J. in *Hryniak*) to compel the defendants to produce their affidavit of documents prior to the hearing of the motion. Myers J. also noted that the plaintiff had not produced its own affidavit of documents; and[52]

[48] *Ibid* at para 52.
[49] 2014 ONSC 2910, Myers J.
[50] *Ibid* at para 34.
[51] *Ibid.*
[52] *Ibid* at para 35.

(d) it was also noted that during the cross-examination of the defendant employee on the motion counsel for the plaintiff did not seek evidence from the defendant employee that would have assisted its case.[53]

In granting summary judgment to the defendants to dismiss the plaintiff's action in its entirety, Myers J. reasoned as follows:

> *In respecting counsels' choices, it seems to me that the motion should be allowed and the action dismissed. The plaintiff has not brought forward evidence to raise a material issue of fact requir[ing] a trial. I can be confident that I can find the necessary facts on the basis of Mr. Amos' unchallenged testimony. The only issue is whether to allow some discovery of documents which is tantamount to a fishing expedition. As noted above, I probably could find that there is no material issue of fact requiring a trial because the plaintiff has failed to "lead trump". However, I prefer to find that I am able to fairly and justly adjudicate the dispute and that defaulting to the "trial model" by just ordering discovery in this circumstances is not a timely, affordable, or proportionate procedure. I do not see how any other options under Rules 20.02(2.1) or (2.2) would assist. Absent production, which the plaintiff chose not to seek or make throughout the process, there is no genuine issue requiring a trial.*[54]

- **Two recent cases indicate that the Divisional Court is attuned to the direction in *Hryniak* for judges to seize themselves of a matter following a failed motion. And, an example of a case in which judge held there was no economy to be gained by being seized of a particular case:** *Forestall v Carroll* 2015 ONSC 5883 (Div Ct), Corbett J.; *Maria-Anthony v Selliah* 2015 ONSC 295 (Div Ct), Corbett J; and *Huang v Mai* 2014 ONSC 1156, Myers J.

In *Hryniak,* under the heading "Salvaging a Failed Summary Judgment Motion", Karakatsanis J. directed that "in the absence of compelling reasons to the contrary, [the motion judge] should also seize herself of the matter as the trial judge."[55] As stated in the Osborne Report and as relied upon by Karakatsanis J., the rationale for this course of action was to save judicial time and to provide predictability to parties.

Recent cases indicate that the Divisional Court is attuned to this issue.[56] In *Forestall v Carroll*, [57] one of the reasons accepted by the Divisional Court for granting leave to appeal following a motion judge's dismissal of a summary judgment motion was that the motion judge had failed to seize himself of the issue before him and gave no reason for not doing so.

In *Maria-Anthony v Selliah,*[58] the motion judge dismissed the defendants' motion for summary judgment to have the claim against it dismissed after finding that s. 29 of the *Workplace Safety and Insurance Act*

[53] *Ibid* at para 39.
[54] *Ibid* at para *45.*
[55] *Hryniak,* supra note 2 at para 78.
[56] *Ibid* at para 78.
[57] 2015 ONSC 5883 (Div Ct)[*Forestall*], Corbett J.
[58] 2015 ONSC 295 (Div Ct), [*Maria*-Anthony] Corbett J.

did not preclude the plaintiff's claim. The defendant sought leave to appeal. Corbett J. refused leave but flagged that although not argued by the defendant, the motion judge may have erred in principle in not seizing himself of the matter or providing reasons for not doing so. The following was noted:

> *The motions judge did not seize himself of the remaining steps in this case, nor did he provide a timetable for the completion of the case. Neither did he provide reasons for not doing these things. This, arguably, is an error in principle in failing to follow the direction of the Supreme Court of Canada in Hryniak v. Mauldin and could form the basis for granting leave to appeal. However, this was not the basis advanced on this motion.*[59]

Conversely, in a number of cases, judges have declined to seize themselves of the matter and have provided reasons for this. One example is *Huang v Mai*,[60] a medical negligence case in which Perell J. dismissed the defendant's motion that sought to dismiss the plaintiff's personal injury case on the basis that she had missed the limitation date. Perell J. held that there were genuine issues for trial. However, because his Honour had not made findings about the medical or other evidence presented on the motion it was reasoned that there were "no economies to be achieved and nothing to carry forward in having [him] remain seized of the matter."[61]

(4). CASE EXAMPLES: *HRYNIAK* AND THE CIVIL JUSTICE SYSTEM GENERALLY – THE CULTURE SHIFT LANDSLIDE

Hyrniak has also been extensively applied in Ontario outside of summary judgment motions. Below is a sampling of civil cases from the last two years in which the culture shift called for in *Hryniak* was considered or a factor in the judge or master's decision.

- **Judge ordered that witnesses residing internationally could participate at trial by video conference – the principle of proportionality in *Hryniak* supported it**: *Chandra v CBC,* 2015 ONSC 5385, Mew J.

In *Chandra v CBC,*[62] the plaintiff initiated claims for libel and invasion of privacy against a number of defendants. A few days prior to the commencement of trial, the CBC defendants brought a motion to allow several witnesses who resided out of the country to given evidence by video-conference.[63] It was estimated that each of the witnesses would be testifying for between half a day and 1.25 days. Beyond the costs to bring the witnesses to Canada, three of the witnesses had personal and professional circumstances that made it difficult, if not impossible for them to travel to the trial.

[59] *Ibid* at para 4 (emphasis added).
[60] 2014 ONSC 1156, Myers J.
[61] *Ibid* at para 52.
[62] 2015 ONSC 5385, Mew J.
[63] Four of the proposed witnesses resided in the United Kingdom, and a fifth resided in the United States.

The plaintiff argued that rule 1.08(5)(a) of the *Rules of Civil Procedure* – the general principle that evidence should be presented orally in open court – should be accorded considerable weight and the witnesses should have to appear in person. He argued that he had a right to examine the witnesses without the risk of "technological interference."

Mew J. took a different view and held that in light of the culture shift advocated in *Hryniak,* and the particular circumstances of this case, the witnesses could appear via video conferencing as it allowed for a proportionate, timely and affordable trial process. This type of technology is a part of the modern reality of trials and the process would be fair as the evidence would still be given orally, under oath and affirmation and as the witness could be observed "live" and understood by those present. Mew J. emphasized, however, that not all requests for video-conferencing will be permitted and each request will turn on its own facts and circumstance. In this case it was appropriate.

In the end, only two witnesses actually gave evidence by video-conference. Their evidence by video conference was subject to a number of terms, which addressed the manner in which documents would be put to the witnesses and the issue of cross-examination.[64]

- **Judge finds that culture shift in *Hryniak* makes efficiency a key consideration in trial planning. Plaintiffs were successful in a contested motion to limit trial time to 10 days, per the prior agreement between the parties:** *Bosworth v Coleman,* 2014 ONSC 4832. Myers J.

In *Bosworth v Coleman*,[65] the parties agreed to limit their trial time in a complex personal injury action to 10 days. When the new counsel for the defendants sought to renege on the agreement made by his predecessor, the plaintiffs moved for an order enforcing it. At the motion, the defendants argued that more than 10 days were required to complete the trial. Myers J. reframed the issue, stating: "the trial [would] likely take more than 10 days *if it [were to] proceed in the ordinary manner in which the civil trial bar is used to proceeding.*"[66]

In granting the plaintiffs' motion (in part) and ordering that the trial proceed in under 10 days, his Honour reasoned that "it is no longer appropriate to rest upon the historic way of doing things" and that the current status quo was unacceptable. Myers J. highlighted the culture shift required by the Supreme Court in *Hryniak* and concluded that, at a minimum, that shift makes efficiency a key priority in trial planning. In response to the defendant's argument that it was the role of counsel to determine the length of trial, his Honour noted as follows:

> *This is an anachronistic view. Improving access to the civil justice system requires all users of the system (litigants, counsel, judges and administrators) to focus on ensuring that the system provides fair and just processes short of the unaffordable, painstaking trial of yester-year.*[67]

[64] *Ibid* at para 28.
[65] 2014 ONSC 4832, Myers J.
[66] *Ibid* at para 12 (emphasis in original).
[67] Ibid at para 21.

- **Culture shift was a key consideration by master in motion to consolidate two actions:** *Glasjam Investments Ltd v Freedman,* 2014 ONSC 3878, Master MacLeod.

In *Glasjam Investments Ltd v Freedman*,[68] the court was asked to consolidate two actions. Ultimately, Master MacLeod did not need to formally decide the issue.

However, in finding that it was highly unlikely that consolidation would have been granted, Master MacLeod proceeded to discuss the recent movement towards unbundling trials under Rule 6.1 – which allows parties to agree on separate hearings of one or more issues in a proceeding – as a way to avoid "unwieldly and unaffordable trials".[69] A Court may also exercise its inherent jurisdiction to unbundle trials under rule 6.1. In this case, Master MacLeod reasoned that adding the claim to the existing litigation would only encumber an already complicated trial and further discussed how the principles in *Hryniak* are relevant to this issue:

> *The recent Supreme Court of Canada decision in* [*Hryniak*] *now stands as authority that a culture shift is necessary in which the court should mandate streamlined focused and targeted processes for adjudication eschewing the view that full trials of every issue are the best guarantee of fairness. Hryniak is of course dealing with summary judgment and not joinder but the principles are important. Procedural orders that increase the complexity and expense of litigation reduce access to justice in a very real way. Moreover as summary judgment motions are often focused on a single critical issue such as liability, contract interpretation or the passage of a limitation period, the ringing endorsement of robust and creative use of even a failed summary judgment motion to fashion trial of an issue has implications for motions such as this.*[70]

Master MacLeod further highlighted that post *Hryniak* the Court must pay "[v]igorous attention to considerations of litigation efficacy and proportionality…to avoid orders that make litigation less nimble and efficient."[71]

- **Trial by ambush and other tactics that add cost and time are the antithesis of the culture shift called for in *Hryniak:*** *Bosworth v Colemen,* 2014 ONSC 6135, Myers J.*; Unimac – United Management Corp v Cobra,* 2015 ONSC 5167, Master Wiebe.

In a number of strongly worded decisions, judges have rallied against "trial by ambush", "trial brinkmanship" and have relied on *Hryniak* in delivering the message that the culture shift requires counsel to be civil and to conduct themselves so as not to increase costs or time of a summary judgment. In *Bosworth v Coleman,*[72]counsel were ordered to work together to manage trial process. According to Myers J., the new paradigm mandated by *Hryniak* has no room for the "tactics and gamesmanship from another era".

[68] 2014 ONSC 3878.
[69] *Ibid* at para 77.
[70] *Ibid* at para 78 (emphasis added).
[71] *Ibid* para 79.
[72] 2014 ONSC 6135, Myers J.

In the post-*Hryniak* world, counsel will be discouraged from using strategic choices that are not aimed at providing a fair and efficient outcome. Though trial strategy is still in the hands of counsel and counsel is bound to fearlessly and zealously represent their client, counsel and court are obliged to provide for fair hearing. In *Unimac-United Management Corp v Cobra Power Inc.*[73] Master Wiebe reasoned as follows:

> *Fearlessly advancing the client's case does not mean that process should be manipulated to prevent the opponent's case from being heard. The lawyer's duty is to promote a fair outcome, expeditiously, and inexpensively. Each side is to advance all issues, claims, and defences zealously and fearlessly to be sure. But the issues are to be advanced as part of the civil justice system which requires a fair and just resolution of the issues, claims and defences on their merits.*[74]

- **Judge did not convert an application into an action, citing the proportionality required in H*ryniak***: *Blackberry Ltd v Marnineau-Mes,* 2014 ONSC 1790, McEwen J.

In *Blackberry Ltd v Marnineau-Mes*,[75] an executive vice-president resigned from the company and informed his employer he would be employed with a different company in two months' time. Following his resignation he was not called back to perform work but continued to receive salary and vacation pay. The company applied for a declaration that the executive vice-president was obligated to provide six months' prior written notice of his resignation, per his employment contract. The application was granted.

Prior to the application being granted, the defendant employee sought an order converting the application into an action, however, McEwen J. declined this, citing the recent changes in *Hryniak* and reasoning as follows: "[t]he filed materials, including the transcripts, allow for a fair and just process and allow me to find the facts necessary to resolve the dispute and apply the relevant legal principles to the facts as found."[76]

- **Culture shift was central in judge's decision to order costs against a successful party in a motion to dismiss an action where leisurely answers to undertakings rendered the motion unnecessary**: *Pinto v Kaur,* 2015 ONSC 2015*,* Myers J.

In *Pinto v Kaur,*[77] the plaintiff was injured in a motor vehicle accident. In an earlier motion in the case, *Pinto v Kaur,* 2014 ONSC 5329 summarized in full on page 19 of this paper, Myers J. ordered a 1-2 day mini-trial to determine whether the defendant owner of the vehicle in the accident had given consent to this former employee to drive his vehicle.

[73] 2015 ONSC 5167, Master Wiebe.
[74] *Ibid.,* at para 4.
[75] 2014 ONSC 1790, McEwen J.
[76] *Ibid* at para 2.
[77] 2015 ONSC 2015, Myers J. [costs decision]

The within decision is Myers J.'s decision on costs stemming from the mini-trial and the defendant' successful summary judgment motion. Unfortunately, for the defendant owner, Myers J. was of the view that had the defendant fulfilled his undertakings earlier, the whole motion for summary judgement, including the mini-trial, would not have been necessary. This delay was detrimental to the defendant seeking costs:

> *Waiting to leisurely fulfill undertakings until trial preparation begins in earnest is no longer sufficient. Law firm administrative structures that only assign a staff member to freshen document production and to fulfil undertakings on the eve of trial may be understandable as a desire to defer avoidable costs in the event that settlement occurs at a pre-trial conference as it so often did in past. But pre-trials are no longer necessarily going to happen in the post-*Hryniak *environment. Moreover, nothing can just wait any more. Counsel must be proactive in all steps to bring each action to the most efficient and affordable resolution*.[78]

The successful defendant was therefore ordered to pay costs for the "wasted summary judgement."[79]

- **Judge denied leave pursuant to Rule 48.04 for defendant to bring motion to compel a defence medical after action had been set down. The principle of proportionality and *Hryniak* were front and center in the decision:** *Vadivelu v Sundaram*, 2015 ONSC 331, Perell J.

In *Vadivelu v Sundaram*,[80] the plaintiff sustained serious physical and psychological injures in a motor vehicle accident. The defendant admitted liability.

After the action was set down for trial, the defendant sought leave to bring a motion requiring the plaintiff to attend a psychiatric defence medical examination. The motion was denied. The defendant was aware, or ought to have been aware, that the alleged psychological impairments were serious and were likely to be a part of the case to meet. He had sufficient time to order a defence medical examination prior to trial. Perell J. factored in the principles of proportionality from *Hryniak* when making his decision.

In *obiter dicta*, Perell J. stated that the administration of justice is now in a post-*Hryniak* world. This new era "introduces an element of proportionality that focuses on the litigation needs and not the litigation wants of the parties".[81] The developments from *Hryniak* "must be factored into the determination of what is required to level the litigation playing field, and when they are factored into the circumstances of the case at bar, they reinforce my opinion that [the defendant's] motion should be dismissed."[82]

[78] *Ibid* at para 18.
[79] *Ibid* at para 21.
[80] 2015 ONSC 331, Perell J.
[81] *Vadivelu v Sundaram*, 2015 ONSC 331 at para 31.
[82] *Ibid* at para 32.

- **Judge declined to use enhanced powers and held that in simplified actions the culture shift in *Hryniak* required consideration of the likelihood of a one-day trial:** *Wiseman v Carleton Place Oil,* 2014 ONSC 1987, Pedlar J.

In *Wiseman v Carleton Place Oil*,[83] the plaintiff was injured in slip and fall accident in a parking lot and commenced a Simplified Procedure action. The defendant brought a motion for summary judgment to dismiss the case. Pedlar J. dismissed the motion, as there was a triable issue on whether the defendant met the requisite standard of care.

Pedlar J. considered using the new powers under rules 20.04(2.1) and (2.2) to resolve the issue, but declined to do so. His Honour noted that this was not a complicated case; it could be resolved in a one-day trial. Electing to use the new powers would result in an additional half day in Court, with the risk of it not resolving the issue and being sent to trial. This did not align with the proportionality or efficiency principals determined in *Hryniak.* Pedlar J. reasoned as follows:

> *I do not find that it would lead to a fair and just result and serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole to continue this motion. I am not prepared to use the expanded fact-finding powers to call oral evidence, or ask for further written material, when, in my view, this matter can be resolved expeditiously in a one-day trial.*[84]

- **The forensic machinery of a trial was not required to decide the matters in issue. Judge relied on the principles of *Hryniak* om applying the test for whether an application should be converted into a trial:** *T Films SA v Cinemavault Releasing International Inc,* 2015 ONSC 6608, Penny J.

In *T Films SA v Cinemavault Releasing International Inc*,[85] the owner of a film brought an application for breach of trust and for relief against oppression by the distributor respondent.

Penny J. applied the principle in *Hryniak* when assessing whether an application should be converted into a trial. His Honour held that the test for this was congruent with the direction given by the Supreme Court in *Hryniak*. In this case, the issues largely turned on documentary evidence and the respondent's own evidence; they could be fairly disposed of without the forensic machinery of a trial. His Honour further concluded he would not be in a better position following a trial then he was with the evidence before him: "I therefore decline to order the trial of an issue. It would not represent the most expeditious, least cost means of resolving this dispute nor is it required to justly and fairly dispose of the central issues in this litigation."[86]

[83] 2014 ONSC 1987, Pedlar J.
[84] *Ibid* at para 29.
[85] 2015 ONSC 6608, Penny J.
[86] *Ibid* at para 85.

- **Culture shift tipped the balance in judge's decision to deny defendant's motion to adjourn trial for 90 days to permit further disclosure and discovery. There is no entitlement to perfect disclosure:** *Letang v Hertz Canada Ltd,* 2015 ONSC 72, Myers J.

In *Letang v Hertz Canada Ltd*,[87] the plaintiffs sought damages in relation to a failed franchise relationship with the defendants. The parties had been exchanging financial documents to calculate damages, which were approximately $3.5 million. It was discovered that the plaintiff had errors in their financial statement, missing an additional $120,000.00 in potential damages.

Upon receiving the documents in early December 2014, the defendants moved to adjourn the upcoming January trial for 90 days and requested unlimited time for discovery. In mid-December 2014, the plaintiffs did not consent to the adjournment but further discoveries prior to trial. The defendants declined to proceed with the discoveries as their expert who was going to examine the documents had already left on holidays.

Citing the culture shift in *Hryniak,* Myers J. denied the adjournment. His Honour noted that undue process and protracted trials with unnecessary expense and delay can prevent the fair and just resolution of disputes. In dismissing the motion for an adjournment, his Honour weighed the moving party's right to examine documents which it had recently acquired against the importance of those documents and the need for timely adjudication of the dispute.

Myers J. reasoned that allowing the adjournments in the quest for perfect disclosure and perfect discovery would have been "old brain thinking." The new culture adopted by *Hryniak*, requires timely, affordable, timely and proportionate justice, not perfection. Myers J reasoned as follows:

> *There does not need to be perfect disclosure and perfect discovery on every path and alleyway in order to achieve a fair and just outcome of the case on the merits. The Supreme Court of Canada has ruled that the goal of achieving a fair and just civil dispute resolution process becomes illusory unless it is proportionate, timely, and affordable. The idea that the defendants can ignore a trial date and sit on material for a month without bothering to call their expert and just deliver another fat motion record to buy 90 days of unlimited discovery time for more fishing for documents is old brain thinking.*[88]

In this case, a delay would not have been in accordance with the proportionality required in *Hryniak*. Myers J. emphasized the values of *Hryniak* stating: "[d]elay at all stages should be recognized as a serious form of prejudice that undermines affordability and proportionality and rots the uncompromisable goals of fairness and justice."[89]

[87] 2015 ONSC 72, Myers J.
[88] *Ibid* at para 18.
[89] *Ibid.*

(4) APPLICATION OF *HRYNIAK* TO MINI-TRIALS

The *Hryniak* decision is also generally cited and relied upon by judges deciding summary judgment motions, particularly when they are determining whether to make use of the enhanced fact finding powers available in Rule 20.04 (2.1) and (2.2).

In an ideal summary judgment motion, the judge will be able to fairly and justly reach a determination on the merits based solely on the evidentiary record before them.[90] If, however, there are or appear to be genuine issues requiring a trial, *Hryniak* directs judges to consider whether a trial can be avoided using the enhanced fact finding powers. Beyond the ability to weigh evidence, determine credibility and draw reasonable inferences, is the power for judges to hear oral evidence per section 20.04 (2.2) – the "mini-trial".[91] The threshold for the use of any of the enhanced powers: is their use in the interests of justice?[92]

According to Karakatsanis J. in *Hryniak,* the enhanced fact finding powers were designed to transform Rule 20 and summary judgment from motions to "weed out unmeritorious claims to a significant alternative model of adjudication."[93] In this paper, we have chosen to review the mini-trial given that it has remained somewhat mysterious since its introduction in 2010 and given its perceived importance in the culture shift mandated by the Supreme Court. How is the mini-trial being used? Have counsel and judges utilized the mini-trial in the ways contemplated by the Supreme Court? Does it have the potential to transform the summary judgment procedure in the manner contemplated by the Supreme Court?

As Karakatsanis J. set out in *Hryniak,* the mini-trial is not strictly limited to circumstances where there are a small number of witnesses, the evidence is crucial to the resolution of the matters in issue or where the issues to be determined on the mini-trial are narrow and discrete. While such scenarios (as flagged by the Court of Appeal) were held to be helpful guidance, it was reiterated by Karakatsanis J. that they are not absolute rules or limitations.[94] In fact, it was explicitly contemplated in *Hryniak* that extensive oral evidence could be a feature of a summary judgment motion in some cases:

> "*This power should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard on the motion for summary judgment, avoiding the need for a longer, more complex trial and without compromising the fairness of the procedure.*"[95]

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[90] According to Karakatsanis J., in *Hryniak* there will be no genuine issues for trial where the judge is able to reach a fair and just determination on the merits of the motion. This will occur when "the process allows (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[91] Rule 20.04, (2.2): Oral Evidence (Mini Trial): A judge may, for the purposes of exercising any of the power set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[92] *Hryniak*, *supra* note 2 at paras 66 and 52-60.

[93] *Ibid* at para 45 (emphasis added).

[94] *Ibid* at paras 61-65.

[95] *Ibid* at para 63 (emphasis added).

Karakatsanis J. further noted that where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the judge and should provide a "will say" statement or description of the evidence to provide a basis for the judge and to determine the scope.[96]

In the two years since *Hryniak*, there have been a number of cases in which mini-trials have been ordered. There are even more examples of judges declining to order mini-trials (although, as noted, by the time a judge is considering a mini-trial they have concluded that there are genuine issues requiring a trial). What remains very clear in both categories of cases is that mini-trials are both integral to and driven by the culture shift called for by the Supreme Court in *Hryniak*.

Our review of mini-trials, post *Hryniak*, has been divided as follows:

A). Case examples: When have judges ordered mini-trials?

B). Case examples: When is a mini-trial not in the interests of justice? and

C). Case examples: Are juries and the mini-trial compatible post *Hryniak*?

A). Case examples: When Have Judges Ordered Mini-Trials?

- **Judge ordered a mini-trial to obtain *viva voce* evidence on the issues of consent and ownership. Summary judgment granted to third party insurer to dismiss claim against it:** *Brown v Williamson*, 2015 ONSC 4231, Firestone J.

In *Brown v Williamson*,[97] the plaintiffs sued the driver of the other vehicle as well as Belair Insurance pursuant to the uninsured and underinsured provisions of the policy. Belair took the position that the vehicle was insured under a policy issued to the defendant's father and issued a third party claim against Wawanesa.

Wawanesa denied coverage and brought a motion for summary judgment to determine the issue. In the initial hearing of the motion,[98] a mini-trial was used to obtain *viva voce* evidence from the wife of the driver's father. Firestone J. ordered that the fair and just resolution of the matter also required *viva voce* evidence from the defendant's father. The father could not, however, be located and did not give evidence.

Relying on the Ontario Court of Appeal's decision in *Sweda Farms Ltd v Egg Farmers of Ontario*,[99] Firestone J. reiterated that parties are required to put their "best foot forward" and that the Court was entitled to presume that the parties had placed before the Court all of the documentary and oral evidence that would be available to the trial judge. On this basis, it was assumed that the father's evidence would also not be available to the trial judge.

[96] *Ibid* at para 64.
[97] *Brown, supra* note 26.
[98] See *Brown v Williamson,* 2014 ONSC 5487, Firestone J.
[99] *Sweda Farms* Court of Appeal, *supra* note 19 at paras 33-34.

Firestone J. ultimately held that there was enough information to properly and justly determine the issues of ownership and consent. These issues were resolved in favor of Wawanesa: at the time of the accident, the father was neither the legal nor the common law owner of the vehicle and could not, therefore, give his consent to the defendant to drive the vehicle. Wawanesa's motion for summary judgment was granted and Belair's third party claim against it, dismissed.

- **Judge ordered 1-2 day mini-trial to determine whether driver had consent to operate vehicle in motion described as a "contest between two insurers":** *Pinto v Kaur,* 2014 ONSC 5329, Myers J.

In *Pinto v Kaur*,[100] the defendant borrowed a vehicle from her former employer to bring her daughter to the doctor. During the trip, she rear-ended the plaintiff's vehicle. The plaintiff sued the driver and the owner of the vehicle as well as her own insurer. The owner brought a motion for summary judgment to have the claim against him dismissed on the basis that he had not given consent to his former employee to operate his vehicle.

Myers J. held that there was insufficient evidence in the record before the Court to fairly and justly resolve the dispute: not only were there inconsistencies and inherent probabilities to be resolved, there were gaps in the evidence. His Honour highlighted that not all parties had been fully cross-examined on all producible documents (had they been, then the "issue might have been different").[101]

Myers J. then considered whether a mini-trial would make the resolution of the overall case more efficient, affordable, timely and proportionate. In concluding that it would, it was emphasized that the motion was a "contest between insurers" and the sooner the issue of responsibility between the insurers was settled, the sooner the plaintiff's claim was likely to be resolved. Myers J. further emphasized: (1) that the mini-trial may well eliminate the need for a trial all together; (2) even if the plaintiff's claim proceeded, a trial on damages was completely distinct; (3) the witnesses on the mini-trial and on damages were distinct; and (4) there was no risk of allowing affidavits to mask a witness's testimony.[102]

On the basis of the above, a 1-2 day mini-trial was ordered to determine the issue of consent.

- **Leave to Divisional Court granted in motion brought to determine whether daughter had consent to operate vehicle. Motion judge mishandled the discovery evidence and the option of a mini-trial:** *Forestall v Carroll,* 2015 ONSC 5883 (Div Ct), Corbett J.

In *Forestall v Carroll*,[103] the mother of the driver that caused an accident brought a motion for summary judgment seeking to dismiss the action against her on the basis that she had not given consent to her daughter to drive the vehicle. The motion judge declined to order a mini-trial and dismissed the motion on the basis that there was a deficient evidentiary record.

[100] 2014 ONSC 5329, Myers J.
[101] *Ibid* at para 26.
[102] *Ibid* at para 34.
[103] 2015 ONSC 5883 (Div Ct), Corbett J.

In what was described as a rarity, Corbett J. of the Divisional Court granted leave to appeal from the dismissal of the motion for a summary judgment (despite the fact that the moving party's action continued).[104] It was noted that the resolution of the consent issue would "surely speed the resolution of this entire, longstanding, legal proceeding." Leave to appeal was granted for four reasons:

(1) The motions judge failed to rule on the admissibility of the discovery evidence of the mother [that consent was not given] as well as the failure to take into account or give weight to that evidence;

(2) The motion judge's refusal to admit the discovery evidence of the daughter because of its inconsistency with her pleading. The moving party, the mother, was adverse in legal interest to the daughter and on the ordinary principles should have been entitled to adduce the daughter's discovery evidence in aid of her case;

(3) The motion judge's conflation of the "mini-trial" with the broad range of alternatives to the traditional trial mandated in *Hryniak*;

(4) The motion judge failed to seize himself of the issue before him and he gave no reasons for so doing.[105]

- **Mini-trial used to obtain oral evidence from two witnesses. Plaintiff obtained summary judgment in contractual dispute after judge determined applicable limitations act and rejected estoppel defence:** *Toronto Standard Condominium Corp No 1487 v Market Lofts Inc.*, 2015 ONSC 1067, Perell J.

In *Toronto Standard Condominium Corp No. 1487 v Market Lofts Inc*,[106] the plaintiff condominium corporation sued one of the parties involved in a mixed-use condominium project to obtain $162,497.60 owed to it under a Shared Services Agreement. The defendant argued that the two year limitation period under the *Limitations Act, 2002* had expired, or in the alternative, that the plaintiff had breached the Shared Services Agreement or was estopped from enforcing same.

The plaintiff brought a motion for summary judgment to determine its claim. Based only on the evidence in the motion record, there were several genuine issues for trial. The need for a trial was, however, avoided through Perell J.'s use of the powers set out in Rules 20.04 (2.1) and (2.2). In particular, Perell J. ordered a mini-trial which provided *viva voce* evidence, including cross-examination of two witnesses, one of whom had already been cross-examined on her affidavit included in the motion record.

Based on all of the evidence, including that obtained in the mini-trial, Perell J. granted the plaintiff's motion for summary judgment. In doing so, his Honour noted that:

[104] *Ibid* at para 19.
[105] *Ibid* at para 17.
[106] 2015 ONSC 1067, Perell J.

- determining that an action to collect the charges imposed by the Shared Services agreement was governed by the ten year limitations period under the *Real Property Limitations Act* (rather than the *Limitations Act, 2002*) was "largely an issue of interpreting statutes";[107] and

- an evidentiary record and mini-trial were used to "resolve the contentious issues about the calculation of the sums payable under the Shared Services Agreement and about whether the [plaintiff] … [was] estopped from advancing its claim."[108]

➢ **A mini-trial was ordered to determine whether there was a juristic reason for a payment made to a common-law spouse under the unjust enrichment analysis:** *Solarblue LLC v Aus*, 2014 ONSC 3482, McDermot J.

In *Solarblue LLC v Aus*,[109] the plaintiff solar company brought a motion for summary judgement to determine whether one of the defendants was unjustly enriched to the tune of $750,000.00. The defendants were wrapped up in a fraudulent scheme where money for a solar energy project was allegedly misappropriated to renovate the defendant's personal property.

The question on the motion was whether one of the defendants, the common law spouse of the other defendant, was aware of the fraud. If her knowledge of the fraud was found to be irrelevant to the claim, there would be no need to determine the issue of credibility on that issue. McDermot J. held that the defendant should be permitted to lead evidence on her knowledge of the fraud and set out their position on whether there was a juristic reason for the payment of the funds.

A mini-trial was ordered to determine if there was a juristic reason for the payment made to the common-law spouse under the unjust enrichment analysis. Interestingly, and at the same time as ordering the mini-trial, McDermot J. made a number of important factual findings[110] on what had been established up to that point in the proceeding by the plaintiff under the unjust enrichment analysis.

➢ **1.5 day mini-trial ordered in construction dispute to resolve narrow factual issue that would determine whether the plaintiff's claim could proceed as a Construction Lien action:** *Boyd v Ashgrove Lane Properties Ltd*, 2014 ONSC 3037, Thompson J.

In *Boyd v Ashgrove Lane Properties Ltd*,[111] the parties entered into a contract for the installation of drywall. The defendant paid the plaintiff pursuant to the terms of the contract, and then asked the plaintiff to continue working on the defendant's property. The plaintiff did so but was not paid.

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[107] *Ibid* at para 47.
[108] *Ibid.*
[109] 2014 ONSC 3482, McDermot J.
[110] The findings made by McDermot J. prior to the mini-trial included: (1) that the first two parts of the test for unjust enrichment have been made out, and there is a finding that there was a deprivation of the plaintiff to the benefit of the defendants; (2) that there is no juristic reason under the established categories for the payment of the funds to the defendants; and (3) that the plaintiff has therefore established a *prima facie* case for a finding of unjust enrichment and the onus is on the defendants to provide on the balance of probabilities that there was a juristic reason for the payment of the funds to them under the second part of the third element of the unjust enrichment analysis.
[111] 2014 ONSC 3037, Thompson J.

The plaintiff registered a lien against the defendant's property for unpaid work. The defendant, who was in the process of re-financing its business operations when the lien was registered, brought a motion for summary judgment to resolve whether the plaintiff had registered its lien within 45 days of the last day it performed work on the defendant's property; which was required for the claim to continue as a Construction Lien action (rather than a Simplified Procedure action).

The parties filed affidavit evidence in support of the motion but no cross-examinations were conducted. Thompson J. could not determine from the affidavit evidence which party was being "truthful and reliably relating accurate facts." Consequently, his Honour ordered a 1.5 day mini-trial that would include *viva voce* evidence on the sole issue of "what was the last day that the plaintiff performed any substantial work on the defendant's hotel."[112]

- **Mini-trial ordered in an employment action to permit further affidavits and oral cross-examinations to determine reasonable notice and mitigation:** *Howard v Benson Group,* 2015 ONSC 2638, MacKenzie J.

In *Howard v Benson Group,*[113] the plaintiff employee brought a motion for summary judgment to determine his wrongful dismissal action. The plaintiff also moved under Rule 21 for a ruling on the validity and enforceability of the termination clause in his employment contract.

MacKenzie J. concluded that termination clause was not enforceable. His Honour then turned to whether there was a genuine issue for trial. The defendants argued that the plaintiff had not put his best foot forward and had not addressed the issue of mitigation and therefore a trial should be directed.

MacKenzie J. disagreed and ordered a mini-trial to address the issues of reasonable notice and mitigation. In framing the mini-trial, it was ordered that the plaintiff prepare an affidavit on these issues, to which the defendant could respond by way of affidavit – with cross-examinations on the affidavit evidence to follow. The parties were then directed to prepare oral submissions on the issues of reasonable notice and mitigation.

- **3-day mini-trial ordered to determine liability in a catastrophic personal injury file where there was expert evidence and one lay witness**: *Anjum v John Doe,* 2015 ONSC 5501, Myers J.

Anjum v John Doe,[114] is a catastrophic personal injury case in which Myers J. ordered a 3 day mini-trial to determine the issue of liability. A full summary of this case is provided at page 29.

[112] *Ibid* at para 44.
[113] 2015 ONSC 2638, MacKenzie J.
[114] 2015 ONSC 5501 [*Anjum*], Myers J.

B). Case Examples: When is a mini-trial *not* in the interests of justice?

- **Mini-trial not appropriate in waiver case where conflicting evidence on plaintiff's understanding of waiver, discrepancies in evidence and where out-of-province witnesses for mini-trial on waiver the same as those for trial on liability:** *Clarke v Alaska Canopy Adventures LLC*, 2014 ONSC 6816, Firestone J.

In *Clark v Alaska Canopy Adventures LLC*,[115] the plaintiff was injured while zip lining. The defendant adventure company brought a motion for summary judgment to have the claim against it dismissed on the basis that the plaintiff had signed a "participation agreement" that included a waiver of liability.

Firestone J. held that there were several genuine issues for trial. In assessing whether it was in the interest of justice to order a mini-trial, his Honour concluded that it was not because:

- Credibility at issue and discrepancies in the evidence**:** There were significant issues of credibility surrounding the circumstances in which the release was signed. And, there were discrepancies in the evidence before the court about what the plaintiff understood; and

- Overlapping out-of-province witnesses**:** Much of the evidence going to the context of the waiver would also relate to the issue of liability. Many of those witnesses had to travel from outside of Ontario. It was not in the interests of justice to have those same witnesses provide evidence at a mini-trial and again at the trial on liability.

Firestone J. concluded that he did not have the necessary confidence that the dispute could be resolved by way of the mini-trial. Consequently, the motion for summary judgment brought by the adventure company was dismissed.

- **Judge did not order mini-trial in an MVA case where the liability of one defendant could not be severed from the "fabric of the case as a whole" and where jury notice filed:** *Yusuf (Litigation guardian of) v Cooley,* 2014 ONSC 6501, 2015 ONSC 3244, Lederer J. (upheld by Div Ct).

In *Yusuf (Litigation guardian of) v Cooley,*[116] the (minor) plaintiff commenced claims against a number of individuals, including a motorist that allegedly waived the plaintiff to cross the street, following which she was struck by another vehicle. This defendant brought a motion for summary judgment seeking to have the claim against him dismissed.

Lederer J., held that there was a serious issue requiring a trial because there was insufficient context to determine this defendant's liability in isolation and as his evidence on whether he had waived the plaintiff by had been inconsistent.

[115] 2014 ONSC 6816, Firestone J.
[116] 2014 ONSC 3244, Lederer J., 2015 ONSC 3244 (upheld by Div Ct).

His Honour then went on to consider whether a mini-trial could be used. In the circumstances of this case, the interests of justice dictated that the new fact-finding powers (including the option of a mini-trial) should not be used to grant summary judgment to a single defendant. The following was considered in this regard:

- Duplication of evidence: Much of the evidence presented at the mini-trial would still have to be presented at the main trial;
- Facts intertwined: It was not possible to understand the context of the case by only examining one party's narrative - the actions of the defendant could not be severed from "the fabric of the case as a whole";
- Broader considerations: The most proportionate, timely and cost effective approach is not always met by acting in the interest of a single party; and
- Jury notice filed: A jury notice had been filed in the case. Lederer J. held that where there is no genuine issue regarding a trial, there is no need for a jury. However, "it cannot be that a mini-trial is to be used to have a factual issue, integral to an understanding of the case as a whole, decided by a judge with the remainder of the findings of fact being left to a jury."[117]

Lederer J.'s decision generally was upheld by the Divisional Court: *Yusuf (Litigation guardian of) v Cooley,* 2015 ONSC 3244.

- **Mini-trial not ordered in complex employment case where witness credibility at issue and there was the potential for overlapping adjudication:** *Lavergne v Dominion Citrus Ltd*, 2014 ONSC 1836, Brown J.

In *Lavergne v Dominion Citrus Ltd*,[118] the defendant by counterclaim, the vice president of the employer, brought a summary judgment motion to have the plaintiff's wrongful dismissal action dismissed on the grounds that it was commenced outside the limitation period or the claims had no chance of success.

Brown J. held that there were genuine issues requiring a trial which could not be resolved using the Court's fact finding powers. Not only were there key facts in dispute, but the resolution of those facts depended upon the credibility of the witnesses which could only be determined with *viva voce* evidence. In declining to order a mini-trial so that *viva voce* evidence could be obtained, her Honour reasoned as follows:

> *… I am of the view that conducting a mini-trial will not effectively reduce time and will not, in the end be in the interest of justice. Given the analysis of the facts and the factual determinations which the court will be called upon to make in the context of the summary*

[117] *Ibid* at para 27.
[118] 2014 ONSC 1836, Brown J.

> *judgment motion and the potential overlap of those findings with the issues which must go on to trial in the main action and counterclaim as against [the moving party], I am not satisfied that summary judgment or partial summary judgment in the circumstances of this litigation will serve the goals of timeliness, affordability or proportionality in light of the litigation as a whole, nor will they serve the interest of justice.*[119]

- **Ontario Court of Appeal held that a motion judge erred in failing to consider the use of a staged summary judgment process in the context of the "litigation as a whole", particularly where credibility was at issue:** *Baywood Homes Partnership v Haditaghi*, 2014 ONCA 450, Lauwers J.A. writing for the Court.

In *Baywood Homes Partnership v Haditaghi*,[120] the plaintiff home builder sued the defendant mortgage broker alleging fraud, breach of contract and other misconduct that occurred during the course of a series of related transactions. The mortgage broker defended the claim and relied on a Release signed by the plaintiff and also counterclaimed for $1.25 million dollars, the amount claimed pursuant to two promissory notes executed by the plaintiffs.

Despite the fact that the motion judge had found that the parties were bound up in a series of transactions that gave rise to "admittedly false" and "fake" documentation, the motion judge enforced the release signed in favor of the defendant mortgage broker. Conversely, and after conducting a "half-day mini-trial", the motion judge held that he was unable to determine whether the promissory notes signed in favor of the defendants were valid and referred the issue of their validity to trial. The plaintiffs appealed.

Lauwers J.A., writing for the Court of Appeal, set aside the decision of the motion judge and ordered that both the plaintiff's claim and the defendant's counterclaim proceed to trial. The decision was based on or included consideration of the following:

- Obligation to assess the litigation as a whole: The motion judge failed to assess the advisability of a staged summary judgement process in the context of the litigation as a whole.

- It was an error in principle to adjudicate the documents separately: The documents in this case were part and parcel of the same series of transactions and same business culture – they should have been adjudicated together. If the promissory notes were questionable, it was possible the release was as well.[121]

[119] *Ibid* at para 43.
[120] 2014 ONCA 450, [*Baywood Homes*], Lauwers J.A. for the Court.
[121] Lauwers J.A. noted at para 36 and elsewhere that if, as the motion judge had found, the promissory notes were questionable because the parties "fabricated and executed documents that did not reflect the true state of affairs" and were therefore not amenable to enforcement on a motion for summary judgment, the same could well be true of the release signed by the plaintiffs (which was bound up in the same series of transactions).

- The potential for a "fuller appreciation" and the risk of inconsistent findings: As Lauwers J.A. observed, a trial judge adjudicating on the validity of the promissory notes may develop a "fuller appreciation" of the relationships and transactional context than the motion judge. That could result in a trial decision on the promissory notes that was inconsistent with the Release the motion judge concluded was valid and effective.

- A call for caution where there are real credibility concerns and the written record is relied upon: Lauwers J. appears to have concluded that in relying solely on the written record, the motion judge misapprehended the plaintiff's admissions in relation to the Release. The following words of caution, which have been frequently cited post *Baywood*, are worthy of note:

> *What happened here illustrates one of the problems that can arise with a staged summary judgment process in an action where credibility is important. Evidence by affidavit, prepared by a party's legal counsel, which may include voluminous exhibits, can obscure the affiant's authentic voice. This makes the motion judge's task of assessing credibility and reliability especially difficult in a summary judgment and mini-trial context. Great care must be taken by the motion judge to ensure that decontextualized affidavit and transcript evidence does not become the means by which substantive unfairness enters, in a way that would not likely occur in a full trial where the trial judge sees and hears it all.*[122]

➢ **Mini-trial not ordered where limited chance of disposing of limitations argument. Case an example of where fairness requires that the "trial judge sees and hears it all" per the Court of Appeal in *Baywood*:** *Farmers Oil & Gas Inc. v Ontario (Ministry of Natural Resources)*, 2015 ONSC 223, Mew J.

In *Farmers Oil & Gas Inc. v Ontario (Ministry of Natural Resources)*,[123] the plaintiff issued its claim against the Ministry of Natural Resources in 2001 seeking damages and declaratory relief in relation to alleged contraventions of the plaintiff's rights and interests with respect to certain oil leases.

The defendant Ministry brought a motion for summary judgment to have a limitation defence it had pleaded 13 years prior, determined. The viability of that defence depended on whether the matters complained of by the plaintiff involved the exercise by the Ministry of "public" or "private" duties and powers. There was some evidence in the record that the Ministry had some (private) activities which, if viewed in isolation, would not attract the application of the shorter statutory limitation period. Ultimately, Mew J. concluded that he could not confidently, as contemplated in *Hryniak,* find the necessary facts to definitively resolve the limitation issue on the record before the Court.

His Honour then considered whether it would be appropriate to deploy the Court's powers to order a mini-trial. In concluding that this was not an appropriate case, Mew J. held as follows:

[122] *Ibid* at para 44.
[123] 2015 ONSC 223, Mew J.

- Costly and limited likelihood of resolution: The use of a mini-trial in this case would not serve the interests of justice as it was a costly procedure with little chance of disposing of the limitations issue before trial.

- Facts intertwined: In the present case, the "public" and "private" qualities of the Ministry's activities were "woven into the threads of the evidence in this case, and that extricating them by any means other than a trial [was] likely to be a fruitless exercise."

- Fairness required the trial judge to hear and see all: According to Mew J., this was the sort of matter that Lauwers J.A. contemplated in *Baywood* where it was indicated that there "will be times when fairness requires that the trial judges 'sees and hears it all' before, in this case, being able to determine what really went on…".[124]

In view of the above, the Ministry's motion for summary judgment was dismissed.

It is interesting to note that Mew J. contemplated rejecting the Ministry's motion on the basis that it had been brought at such a late stage in the proceeding. Mew J.'s comments in this regard are instructive:

> *Ultimately, I talked myself out of simply dismissing the defendant's motion based solely on the basis that it had been brought too late in the life of the action. But I would suggest that there may be cases, for example where a case is close to, if not ready for trial, and there are no, or weak, excuses for the moving party not to have brought its motion sooner, where the court goes further than I have chosen on this occasion and simply declines to entertain a motion for summary judgment*.[125]

- **Mini-trial not ordered in case involving motor vehicle accidents, tavern liability and where findings in the mini-trial would not dispose of the need for a fulsome trial to: determine the liability of the other defendants, contributory negligence and the apportionment of liability:** *Jacinto v Ramjattan*, 2015 ONSC 833, Perell J.

The case of *Jacinto v Ramjattan* (2015), involved two related motor vehicle accidents. The plaintiff was injured in the second accident and sued the unlicensed and intoxicated driver of the vehicle that caused both accidents. The driver did not defend the action and was noted in default. The plaintiff also sued the owner of the vehicle, as well as a tavern that had allegedly over-served the defendant. The insurer of the vehicle driven by the defendant denied coverage to the driver and had itself added as a statutory third party.

The tavern brought a motion for summary judgment seeking to have the claim against it dismissed.[126]

[124] *Ibid* at para 96.
[125] *Ibid* at para 46.
[126] Prior to the motion, the plaintiff had agreed to dismiss the claim against the tavern. Perell J. dismissed the tavern defendant's technical argument for summary judgment that there were no valid crossclaims in the circumstances as "too cute or too rich for the administration of justice's blood." See paragraphs 19-30.

Having found that there was a genuine issue for trial, Perell J. moved on to consider whether the need for a trial could be avoided by using the powers under rules 20.04(2.1) and (2.2). In the present case, and if the credibility of the driver could be determined through oral evidence at the mini-trial, there were still numerous possible outcomes for the claim against the tavern. While some would be dispositive of the claim, a complete trial would still be required to determine the liability of the driver, the plaintiff's contributory negligence and the apportionment of liability.

Consequently, Perell J. held that there was "little or no economy" to be achieved by having a mini-trial to determine the driver's credibility. The defendant tavern's motion was dismissed.

C). Case Examples: Are Juries and the Mini-trial compatible post *Hryniak*?

In some motions, the moving party seeks partial summary judgment to determine a key issue to the litigation such as liability while leaving the remaining issues for trial. Motions for summary judgment thus conceived closely mirror the process of a bifurcated proceeding, where a trial on liability in a given case occurs before the trial on damages.

Such staged adjudication procedures certainly have their appeal. They also have their risks. As Karakatsanis J. stated in *Hryniak,* "failed or even partially successful, summary judgment motions add – sometimes astronomically – to costs and delay." And, whether you are talking summary judgment or bifurcation, it appears that for now, both processes are complicated by the presence of juries.

In Ontario, the Court of Appeal's decision in *Kovach v Kovach*[127] continues to be good law: the Court does not have jurisdiction to order bifurcation of a proceeding, absent the consent of the parties. *Hryniak* has further entrenched this precedent. In *Ryan v Heise,*[128] Hackland J. held that the culture shift in *Hryniak* militates against bifurcation in a jury case because of the potential for duplication of the evidence, possible conflict in the findings of fact between two juries and the potential for extra expense and delay.

The debate over bifurcation and juries, has post-*Hryniak*, now also firmly entered the realm of motions for summary judgement. Generally, there is agreement that summary judgment on liability can be given, despite a jury notice, if there are no genuine issues for trial and the motion can be determined based exclusively on the material put before the Court. The debate arises where there are genuine issues for trial and the motion judge is evaluating whether a mini-trial can and should be used to resolve those issues.

Below we have provided three cases that speak to the compatibility of mini-trials and juries. *Hryniak* and the culture shift are front and centre in this debate. In the first case, *Anjum v John Doe* (2015), a complicated personal injury action, the *Kovach* precedent was explicitly distinguished in the context of motions for summary judgment. A three day mini-trial was subsequently ordered to determine liability.

[127] 2010 ONCA 126.
[128] 2015 ONSC 6157, Hackland J.

In the remaining two cases, the judges declined to order mini-trials (or use any of the enhanced fact finding powers) where jury notices had been filed and ordered all matters to trial together.

- **Judge relies heavily on culture shift in ordering 3 day mini-trial on a discrete liability issue, despite a jury notice. This "alternative adjudication model" is not bifurcation under Rule 6.1 and not subject to *Kovoch*:** *Anjum v John Doe,* 2015 ONSC 5501, 2015 CarswellOnt 13454 (Sup Ct), Myers J.

Anjum v John Doe,[129] is a catastrophic injury case involving an unidentified driver. The plaintiff sued his owner insurer. The insurer denied that there was evidence that another vehicle was actually involved in the accident. The defendant insurer flagged its intention to bring a summary judgment motion. The parties agreed that the expert evidence on liability (including on whether another vehicle was involved) required *viva voce* evidence. A mini-trial was contemplated.

The plaintiff took the position that if oral evidence was to be heard, he was entitled to a full jury trial. Myers J. considered the Court of Appeal's decision in *Kovach (Litigation Guardian of) v Kovach* (2010) which dealt with Rule 6.1.01. His Honour concluded that summary judgement under Rule 20 is *not* a bifurcation of issues in a proceeding as contemplated in Rule 6.1.[130]

Myers J. went on to stress that summary judgment is a separate process available when the interests of justice are satisfied. His Honour reviewed the culture shift called for in *Hryniak* citing extensively from Karakatsanis J.'s reasoning as follows:

- that "a trial is not the default procedure";
- that "alternative models of adjudication are *no less legitimate than the conventional trial"*;[131]
- that Karakatsanis had "used an example [in *Hryniak*] involving a jury trial as an indication of a disproportionate process."[132]

The issues of case management and the Supreme Court's interpretation in *Hryniak* of the amendments to the Rules were also canvased in detail by Myers J. who reasoned that: "[t]he amendments to Rules 20 and 50.13, along with the advent of the CPC in Toronto (and complementary processes elsewhere), are

[129] *Anjum,* supra note 109.
[130] At para 8 of the decision, Myers J. further reasoned as follows: *"In my view, summary judgment under Rule 20 is not a bifurcation of issues in a proceeding contemplated under Rule 6.1. There will not be two trials – one for liability and one for damages. If the court decides that there is no serious issue requiring a trial under Rule 20.04, then the parties never get to a full trial. Summary judgment is an alternative process that is provided by the Rules. Instead, there will be a motion at which a judge will decide if a summary disposition of the issue of liability is appropriate, fair, and just. If there is no liability, then the action will be over and there will be no trial at all. If liability is found summarily, then the case will go to trial on damages. If the judge is not prepared to resolve the matter summarily, then she will decide how to deal with the issues under Rule 20.05. Rule 6.1 considerations may well factor into that decision."*
[131] *Ibid* at para 35.
[132] *Ibid* at para 12.

steps that allow the judiciary, court administrators, and the bar to take up the gauntlet and begin the journey to implement the culture shift."[133]

In the present case, liability was a discrete issue and was factually and legally separate from the issue of damages. Beyond a host of other case management directions, Myers J. ordered that: (1) the defendants' motion for summary judgment on liability be heard over three days; (2) that evidence in chief of the experts would be mainly through affidavit evidence and through their reports, with 15 minutes of direct oral examination as a "warm up"; (3) that cross-examination of each expert was limited to three hours; and (4) that the plaintiff could give oral evidence on the cause of the accident and would be subject to cross-examination not to exceed 3 hours.

This decision was released in September 2015. It is not known whether it has been appealed.

- **Judge considers *Hryniak* in jury case and exercises discretion not to order mini-trial that would "effectively usurp the role of the jury":** *Mitusev v General Motors Corp,* 2014 ONSC 2342, M.J. Edwards J.

In *Mitsuv v General Motors Corp*,[134] the plaintiff sustained a catastrophic injury when his seat malfunctioned thereby causing him to lose control of his vehicle. The plaintiff filed a jury notice and commenced claims against a number of parties including, the manufacturer of the seats in the van.

The defendant manufacturer brought a motion for summary judgment to dismiss the claim against it. M.L. Edwards J. dismissed that motion on the basis of a deficient evidentiary record; much of the evidence sought to be relied upon by this defendant was inadmissible. In deciding the motion, Edwards J. reviewed the impact of the *Hryniak* decision and considered whether summary judgment could be granted in view of the jury notice. His Honour cited cases indicating that a jury notice does not preclude the court from granting summary judgment. However, Edwards J. declined to use the expanded fact finding powers, including a mini-trial, given the jury notice. His Honour reasoned as follows:

> *On a motion for summary judgement, while it is clear that the motion judge is required to determine whether there is no genuine issue for trial – even in the fact of a Jury Notice, where the motion judge is unable from the evidence filed to make findings of fact, and to thereafter apply the law, it seems to me that it would be the exceptional case that the motion judge would exercise the expanded fact finding allowed by Rule 20.04(2.1) and (2.2) to effectively usurp the fact finding role of the jury.*[135]

[133] *Ibid* at para 39.
[134] 2014 ONSC 2342, M.J. Edwards J.
[135] *Ibid* at para 91.

- **Judge declines to order mini-trial in jury case with interrelated liability issues –to do so would be contrary to the interests of justice:** *Yusuf (Litigation guardian of) v Cooley,* 2014 ONSC 6501, 2015 ONSC 3244 (upheld by Div Ct).

Yusuf (Litigation guardian of) v Cooley,[136] is a catastrophic injury case involving a minor. The defendant that allegedly waived the plaintiff to cross the street brought a motion for summary judgment to have the claim against him dismissed.

This case is summarized in more detail on page 23. Among other reasons for declining to order a mini-trial, Lederer J. relied on the fact that a jury notice had been filed and reasoned as follows:

> [27] *It is generally understood that, within the boundaries set by the legislation, there is a right to have the facts and damages decided and set by a jury. It may be that, where there is no issue requiring a trial, it will be found that there is no need for a jury, but it cannot be that a mini-trial is to be used to have a factual issue, integral to the understanding of the case as a whole decided by a judge with the remainder of the findings of fact being left to a jury. To my mind, such a hybrid procedure would be contrary to the interests of justice.*

Lederer J.'s decision generally was upheld by the Divisional Court: *Yusuf (Litigation guardian of) v Cooley,* 2015 ONSC 3244; although the compatibility of juries and the mini-trial was not addressed by the Court.

It is worth noting that Myers J. explicitly distinguished *Yusuf* in ordering the three day mini-trial on liability in *Anjum.* In particular, Myer J. held Lederer J. to be saying that on the particular facts in *Yusuf* the issue could not be decided summarily because it required context or there would be duplication in the evidence presented in the mini-trial and the trial. [137] The presence of a jury notice was not taken to be an absolute bar.

(5) CONCLUSION

The *Hryniak* decision occasioned a review by the Supreme Court on the health of our civil justice system. With many proceedings bogged down by expense and delay, it is clear that access to justice has been undermined and change is necessary.

In the nearly two years since *Hryniak* was released there has been change – both within the confines of summary judgment motions and more broadly. It remains, however, far too early to tell whether the change that has occurred and that has yet to come will strike the appropriate balance between timely, affordable justice and the fair and just resolution of disputes. And, it seems that the jury will be out for some time on whether the conventional trial will be dethroned. Will the summary judgment framework in Ontario become the significant alternative model of adjudication contemplated in *Hryniak?* Will the culture shift continue to permeate other aspects of our civil justice system?

[136] *Yusuf,* supra note 116.
[137] *Anjum*, supra note 109 at para 20.

(6) LIST OF RATIOS FROM PAPER (a litigators shortcut*)**

CASE EXAMPLES: THE CULTURE SHIFT WITHIN THE CONTEXT OF SUMMARY JUDGEMENT

- ***Hryniak* greatly expands the use of the summary judgment process in Ontario. Summary judgment is appropriate for cases of all shapes and sizes – there is no "hierarchy of suitability":** *Density Group Limited v HK Hotels LLC,* 2014 ONCA 605; *Sweda Farms Ltd v Egg Farmers of Ontario,* 2014 ONSC 1200, Corbett J; and *Danos v BMW Group Financial Services Canada,* 2014 ONSC 2060, Goldstein J.

  See pages 4.

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- **Pick your analogy – post *Hryniak* it is even more important for parties to take summary judgment seriously. Judges will assume parties have obtained and played their trump cards. And, according to one judge, the trump suit is not lawyers' affidavits:** *Sweda Farms Ltd v Egg Farmers of Ontario,* (2014) ONSC 1200, Corbett J., aff'd 2014 ONCA 878, 2014; and other cases, as cited.

  See pages 5.

- **The Court of Appeal has twice relied on the culture shift in *Hryniak* in finding that summary judgment can be granted to a responding party where not cross-motion was brought:** *King Lofts Toronto I Ltd v Emmons,* 2013 ONSC 6113, Perell J., aff'd 2014 ONCA 215; and *Kassburg v Sun Life Assurance Co of Canada*, 2014 ONCA 911, K van Rensburg J.A.

  See page 7.

- **Summary judgment motions brought pre-discovery can have teeth post *Hryniak.* Counsel will be held to their tactical choices. And, part of "leading trump" is utilizing the investigation opportunities within the motion process:** *Thyssenkrupp Elevator (Canada) Ltdv Amos* 2014 ONSC 3910, Myers J.

  See page 8.

- **Two recent cases indicate that the Divisional Court is attuned to the direction in *Hryniak* for judges to seize themselves of a matter following a failed motion. And, an example of a case in which judge held there was no economy to be gained by being seized of a particular case:** *Forestall v Carroll* 20152015 ONSC 5883 (Div Ct); *Maria-Anthony v Selliah* 2015 2015 ONSC 295 (Div Ct), Corbett J; and *Huang v Mai* 2014 ONSC 1156, Myers J.

See page 9.

CASE EXAMPLES: *HRYNIAK* AND THE CIVIL JUSTICE SYSTEM - THE CULTURE SHIFT LANDSLIDE

- **Judge ordered that witnesses residing internationally could participate at trial by video conference – the principle of proportionality in *Hryniak* supported it**: *Chandra v CBC,* 2015 ONSC 5385, Mew J.

See page 10.

- **Judge finds that culture shift in *Hryniak* makes efficiency a key consideration in trial planning. Plaintiffs were successful in a contested motion to limit trial time to 10 days, per prior agreement between the parties:** *Bosworth v Coleman,* 2014 ONSC 4832. Myers J.

See page 11.

- **Culture shift was a key consideration by master in motion to consolidate two actions:** *Glasjam Investments Ltd v/ Freedman,* 2014 ONSC 3878, Master MacLeod.

See page 12.

- **Trial by ambush and other tactics that add cost and time are the antithesis of the culture shift called for in *Hryniak:*** *Bosworth v Colemen,* 2014 ONSC 6135, Myres J.*; Unimac – United Management Corp v Cobra,* 2015 ONSC 5167, Master Wiebe.

See page 12.

- **Judge did not convert an application into an action, citing the proportionality required in H*ryniak***: *Blackberry Ltd v Marnineau-Mes,* 2014 ONSC 1790, McEwen J.

See page 13.

- **Culture shift was central in judge's decision to order costs against a successful party in a motion to dismiss an action where leisurely answers to undertakings rendered the motion unnecessary**: *Pinto v Kaur,* 2015 ONSC 2015*,* Myers J.

See page 13.

- **Judge denied leave pursuant to Rule 48.04 for defendant to bring motion to compel a defence medical after action had been set down. The principle of proportionality and *Hryniak* were front and center in the decision:** *Vadivelu v Sundaram*, 2015 ONSC 331, Perell J.

  See page 14.

- **Judge declined to use enhanced powers and held that in <u>simplified actions</u> the culture shift in *Hryniak* required consideration of the likelihood of a one-day trial:** *Wiseman v Carleton Place Oil,* 2014 ONSC 1987, Pedlar J.

  See page 15.

- **The forensic machinery of a trial was not required to decide the matters in issue. Judge relied on the principles of *Hryniak* in applying the test for whether an application should be converted into a trial:** *T Films SA v Cinemavault Releasing International Inc,* 2015 ONSC 6608, Penny J.

  See page 15.

- **Culture shift tipped the balance in judge's decision to deny defendant's motion to adjourn trial for 90 days to permit further disclosure and discovery. There is no entitlement to perfect disclosure.** *Letang v Hertz Canada Ltd,* 2015 ONSC 72, Myers J.

  See page 16.

MINI-TRIALS POST *HRYNIAK*

<u>Case Examples: When Have Judges Ordered Mini-Trials?</u>

- **Judge ordered mini-trial to obtain *viva voce* evidence on the issues of consent and ownership. Summary judgment granted to third party insurer to dismiss claim against it:** *Brown v Williamson*, 2015 ONSC 4231, Firestone J.

  See page 18.

- **Judge ordered 1-2 day mini-trial to determine whether driver had consent to operate vehicle in motion described as a "contest between two insurers":** *Pinto v Kaur,* 2014 ONSC 5329, Myers J.

  See page 19.

- **Leave to Divisional Court granted in motion brought to determine whether daughter had consent to operate vehicle. Motion judge mishandled the discovery evidence and the option of a mini-trial:** *Forestall v Carroll,* 2015 ONSC 5883 (Div Ct), Corbett J.

  See page 19.

- **Mini-trial used to obtain oral evidence from two witnesses. Plaintiff obtained summary judgment in contractual dispute after judge determined applicable limitations act and rejected estoppel defence:** *Toronto Standard Condominium Corp No 1487 v Market Lofts Inc.*, 2015 ONSC 1067, Perell J.

  See page 20.

- **A mini-trial was ordered to determine whether there was a juristic reason for a payment made to a common-law spouse under the unjust enrichment analysis:** *Solarblue LLC v Aus*, 2014 ONSC 3482, McDermot J.

  See page 21.

- **1.5 day mini-trial ordered in construction dispute to resolve narrow factual issue that would determine whether the plaintiff's claim could proceed as a Construction Lien action:** *Boyd v Ashgrove Lane Properties Ltd*, 2014 ONSC 3037, Thompson J.

  See page 21.

- **Mini-trial ordered in employment action to permit further affidavits and oral cross-examinations to determine reasonable notice and mitigation:** *Howard v Benson Group,* 2015 ONSC 2638, MacKenzie J.

  See page 22.

- **3-day mini-trial ordered to determine liability in a catastrophic personal injury file where there was expert evidence and one lay witness**: *Anjum v John Doe,* 2015 ONSC 5501, Myers J.

  See page 22.

Case Examples: When is a mini-trial *not* in the interests of justice?

- **Mini-trial not appropriate in waiver case where conflicting evidence on plaintiff's understanding of waiver, discrepancies in evidence and where out-of-province witnesses for mini-trial on waiver the same as those for trial on liability:** *Clarke v Alaska Canopy Adventures LLC*, 2014 ONSC 6816, Firestone J.

  See page 23.

- **Judge did not order mini-trial in an mva case where the liability of one defendant could not be severed from the "fabric of the case as a whole" and where jury notice filed:** *Yusuf (Litigation guardian of) v Cooley,* 2014 ONSC 6501, 2015 ONSC 3244, Lederer J. (upheld by Div Ct).

  See page 23.

- **Mini-trial not ordered in complex employment case where witness credibility at issue and there was the potential for overlapping adjudication:** *Lavergne v Dominion Citrus Ltd*, 2014 ONSC 1836, Brown J.

  See page 24.

- **Ontario Court of Appeal held that a motion judge erred in failing to consider the use of a staged summary judgment process in the context of the "litigation as a whole", particularly where credibility was at issue:** *Baywood Homes Partnership v Haditaghi*, 2014 ONCA 450, Lauwers J.A. writing for the Court.

  See page 25.

- **Mini-trial not ordered where limited chance of disposing of limitations argument. Case an example of where fairness requires that the "trial judge sees and hears it all" per the Court of Appeal in *Baywood*:** *Farmers Oil & Gas Inc. v Ontario (Ministry of Natural Resources)*, 2015 ONSC 223, Mew J.

  See page 26.

- **Mini trial not ordered in case involving motor vehicle accidents, tavern liability and where findings in the mini-trial would not dispose of the need for a fulsome trial to: determine the liability of the other defendants, contributory negligence and the apportionment of liability:** *Jacinto v Ramjattan*, 2015 ONSC 833, Perell J.

  See page 27.

Case Examples: Are Juries and the Mini-trial compatible post *Hryniak*?

- **Judge relies heavily on culture shift in ordering 3 day mini-trial on a discrete liability issue, despite a jury notice. This "alternative adjudication model" is not bifurcation under Rule 6.1 and not subject to *Kovoch*:** *Anjum v John Doe,* 2015 ONSC 5501, 2015 CarswellOnt 13454 (Sup. Ct), Myers J.

  See page 29.

- **Judge considers *Hryniak* in jury case and exercises discretion not to order mini-trial that would "effectively usurp the role of the jury":** *Mitusev v General Motors Corp.* 2014 ONSC 2342, M.J. Edwards J.

  See page 30.

- **Judge declines to order mini-trial in jury case with interrelated liability issues –to do so would be contrary to the interests of justice:** *Yusuf (Litigation guardian of) v Cooley,* 2014 ONSC 6501, 2015 ONSC 3244 (upheld by Div Ct).

  See page 31.