CASE COMMENT

ACCESSIBLE, PROPORTIONATE, TIMELY AND AFFORDABLE – THE SUPREME COURT OF CANADA'S CHALLENGE TO BENCH AND BAR IN HRYNIAK v. MAULDIN

1. Introduction

In *Hryniak v. Mauldin*[1] and its companion case *Bruno Appliance and Furniture Inc. v. Hryniak*,[2] the Supreme Court of Canada has posed a challenge to bench and bar: execute a shift in culture away from the bias favouring trials and toward non-trial procedures that favour a system of justice that is accessible, proportionate, timely and affordable.[3]

The message, boiled down: more cases should be determined by way of summary judgment.

It is difficult to be optimistic that such a shift will occur and that more cases will be decided summarily. Summary judgment has not had a robust history in Ontario.[4] The bias toward trials over more expeditious methods of dispute resolution was identified before the first version of Rule 20 was introduced into Ontario, as was the need to adopt a norm "that everyone has a right of access to the courts, but not necessarily to a trial".[5] Furthermore, we found that the most recent revisions to Ontario's Rule 20 in 2010 made no difference whatever to the rate at which summary judgment was granted,[6] even though the new summary judgment rule was specifically designed to increase the relative number of summary determinations.[7]

1. *Hryniak v. Mauldin*, 2014 SCC 7, 366 D.L.R. (4th) 641, 27 C.L.R. (4th) 1 (S.C.C.) ("*Hryniak*").
2. *Bruno Appliance and Furniture Inc. v. Hryniak*, 2014 SCC 8, 366 D.L.R. (4th) 671, 27 C.L.R. (4th) 65 (S.C.C.) ("*Bruno*").
3. *Hryniak*, *supra* note 1 at para. 28.
4. P. Wells, A. Boudreau and A. Forristal, "A New Departure and a Fresh Approach: The Ontario Court of Appeal decision in *Combined Air*" (2012), 39 Adv. Q. 477.
5. W.A. Bogart, "Summary Judgment: A Comparative and Critical Analysis" (1981), 19 Osgoode Hall L.J. 552 at p. 598.
6. P. Wells and A. Boudreau, "It Was Déjà Vu All Over Again" (2013), 42 Adv. Q. 86.
7. Honourable Coulter A. Osborne, Q.C., *Civil Justice Reform Project:*

2. The Principles in the Supreme Court Decisions

(1) Overview

If the profession and the courts are able to make the necessary shift in culture to focus on access to fair adjudication processes for claims instead of access to a trial, the decision of the Supreme Court in *Hryniak* will truly mark a "new departure and a fresh approach" to the role and purpose of summary judgment in the civil litigation process. With its customizable and more limited procedure, the Court identifies summary judgment as a significant – and under-used – alternative to the conventional trial for adjudicating disputes. Thus, summary judgment is re-cast as an important tool to increase access to justice for ordinary litigants who are unable to afford to take their case all the way to trial.[8]

To make justice accessible to ordinary Canadians, the Court recognizes that a cultural shift is required in our approach to litigation.[9] In particular, we must move away from the idea that more procedure is generally "better". The Supreme Court suggested that the Ontario Court of Appeal's test for determining whether summary judgment is appropriate was too focussed on procedure and "evidentiary perfection": "the Ontario Court of Appeal placed too high a premium on the 'full appreciation' of evidence that can be gained at a conventional trial".[10] Indeed, the Court found that the "Cadillac" of procedures – the old-fashioned trial – may actually work an injustice in cases where the full forensic machinery of this process is not required to fairly resolve the matter and is therefore disproportionate to the nature of the dispute and the interests involved. There are times when "a Chevrolet, a serviceable, no frills vehicle, will do just fine".[11]

While trials will continue to have their place, the Supreme Court recognizes that the classic trial process is now out of reach for the average litigant:[12] they are too expensive and take too long.[13]

Summary of Findings and Recommendations (Ontario: Ministry of the Attorney General, 2007) ("Osborne Report").

8. *Hryniak*, *supra* note 1 at paras. 1-3.
9. *Ibid.* at para. 2.
10. *Ibid.* at para. 4.
11. *Ontario v. Rothmans Inc.*, 2011 ONSC 2504, 5 C.P.C. (7th) 112, 2011 CarswellOnt 2916 (Ont. S.C.J.), leave to appeal refused 2011 ONSC 3685, 2011 CarswellOnt 5363, [2011] O.J. No. 2811 (Ont. Div. Ct.), at para. 159 (S.C.J.).
12. *Hryniak*, *supra* note 1 at para. 1.
13. *Ibid.*

Without alternative procedures to adjudicate disputes, ordinary litigants may not be able to access justice.

The Court notes that barriers to accessing justice have negative effects beyond the individual litigant. When individuals do not have the means to act upon or defend their rights, the rule of law becomes threatened.[14] Furthermore, when cases are not adjudicated within the context of the public justice system, the development of the common law is stunted because it is denied opportunities to consider these matters and, through their determination, to grow and develop.[15]

The foundation of the Supreme Court's decision is rule 1.04, including subrule 1.1, the rule relating to proportionality:[16] "a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial."[17] Following the 2010 rule change and the decision in *Hryniak* the Supreme Court's message is clear: we must work toward a shift in legal culture in which we come to see summary judgment as the appropriate procedure to resolve a greater number of disputes. In effect, it is no longer to be regarded as an extraordinary process used only to cull out clearly unmeritorious cases.

In addition to reducing the barriers to use of summary judgment, the Court makes a number of practical, procedural suggestions designed to maximize the (as yet) unrealized potential of this procedure.

(2) Values Underlying Access to Justice

The Supreme Court has clearly sounded a wake-up call to Canada's judges and lawyers. The increasing cost and complexity of litigation operates as a significant barrier to accessing the justice system for ordinary citizens.[18] It is fundamental that whatever procedure is selected to adjudicate a claim, it must be fair and just.[19] However, a "fair and just" adjudication is one that is also accessible – proportionate, timely and affordable.[20] This makes logical sense: all

14. *Ibid.*
15. *Ibid.*
16. R.R.O. 1990, Reg. 194. This subrule was added by the same regulation that modified the summary judgment rule.
17. *Hryniak*, *supra* note 1 at para. 4.
18. *Ibid.* at para. 24.
19. *Ibid.* at para. 23.
20. *Ibid.* at para. 28.

the procedure in the world will not produce fair and just adjudications, or any adjudications at all, if the procedure offered is disproportionate to the matters at issue, results in protracted adjudications or is too expensive for the average person to reasonably access. The Court in *Hryniak* makes it clear that there can be no fairness and justice absent accessibility.

To the contrary, sometimes more process and perfect procedure actually works against the goal of increasing access to justice. Ordinary litigants, who cannot afford to take their case to trial, may look for alternatives outside the justice system or simply "give up" on justice.[21] As discussed above, this threatens the rule of law and stunts the development of the common law.[22] Where a conventional trial is the only option available, some of these litigants will simply not have their disputes adjudicated fairly and justly. In this way, undue procedure (that is disproportionate to the matters to be adjudicated) prevents fair and just resolutions.[23]

We must accept that non-trial processes can also be fair and just, and that these processes are "no less legitimate" than the conventional trial.[24] The necessary culture shift required for this appreciation requires those involved in the justice system to modify their approach to litigation. Judges must "actively manage" the legal process in line with the principle of proportionality.[25] Counsel must act in a way that "facilitates rather than frustrates access to justice".[26] The Court acknowledges that there are still times when "slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative".[27] However, following *Hryniak*, all those involved in the civil litigation process must actively consider whether the procedures selected to adjudicate a particular dispute are *necessary* to a fair process that results in a just adjudication.[28]

(3) The Role of Summary Judgment Generally

The Supreme Court in *Hryniak* tells us that summary judgment is a tool that can improve access to justice because, in general, it provides a cheaper, faster alternative to a full trial.[29]

21. *Ibid.* at para. 25.
22. *Ibid.* at para. 26.
23. *Ibid.* at para. 24.
24. *Ibid.* at paras. 27-28.
25. *Ibid.* at para. 32.
26. *Ibid.*
27. *Ibid.* at para. 33.
28. *Ibid.*
29. *Ibid.* at para. 34.

The Court notes that the place and purpose of the summary judgment motion has evolved. As we noted in our first paper,[30] summary judgment in its earliest form provided a narrow mechanism for weeding out clearly unmeritorious claims in certain defined "categories of cases".[31] With the changes to the *Rules of Civil Procedure* in 1985, the availability of summary judgment was broadened in order to apply to a wider variety of claims and litigants.[32]

Although these changes to the summary judgment rule were initially interpreted broadly and the new rule was applied enthusiastically following amendment, over time appellate courts effectively narrowed the rule's application so that, once again, the rule was confined to a narrow purpose: weeding out claims that had no chance of success at an early stage.[33] We referred to this expanding and contracting process in our earlier paper as "interpretive erosion".[34] It is a phenomenon that we observed following both the 1985 and 2010 rule changes, both of which sought to broaden the availability of summary judgment.

The Court emphasizes that the 2010 rule change is the latest step in the evolution of the summary judgment rule away from its original limited application to "a legitimate alternative means for adjudicating and resolving disputes".[35] The 2010 rule changes were meant to broaden, yet again, the summary judgment rule and to increase the number of summary judgment motions brought in the civil litigation system in order to make this system more accessible and affordable.[36] In other words, one purpose of the 2010 amendment to Rule 20 was to increase access to justice.[37]

As part of these reforms, motion judges were given new powers in the 2010 rule change, permitting them to weigh evidence, evaluate credibility, draw reasonable inferences from the evidence and to hear oral evidence. These powers were meant to increase the number of cases where there is "no genuine issue requiring a trial", permitting a greater number of matters to be determined summarily.[38] The Court held that these new powers, together with the new formulation of the summary judgment test collectively "demonstrate that trial is not the

30. *Supra* note 4.
31. *Hryniak*, *supra* note 1 at paras. 36-37.
32. *Ibid.* at para. 38.
33. *Ibid.*
34. *Supra* note 4.
35. *Hryniak*, *supra* note 1 at paras. 36 and 45.
36. *Ibid.* at para. 39.
37. *Ibid.* at para. 36.
38. *Ibid.* at para. 44.

default procedure".[39] However, unless judges and lawyers accept this proposition, it is unlikely that the necessary culture shift will take place.

Summary judgment is the preferred process for adjudication whenever a judge can reach a fair and just determination on the merits of the motion. Specifically, no trial is required whenever a motion judge is able to find facts and apply the law to those facts and summary judgment provides a more expeditious and less expensive means to achieve a just result. Moreover, there is no "type" of case that is appropriate or inappropriate for summary judgment – the old "categories of cases" approach is gone.[40]

The Supreme Court's directions on the proper use of the new fact-finding tools will also require a shift in thinking. The new powers are presumptively available to a motion judge: they may be exercised *unless* it is in the interests of justice for them to be exercised only at trial.[41] Again, appropriate use of the tools must follow an assessment of the nature of the matters in issue in order to select a proportionate procedure. Proportionality will be assessed by comparing the relative efficiencies of proceeding via summary judgment compared to a full trial.[42] For instance a motion judge may consider the cost and speed of both procedures, what evidence is available under both processes and the court's opportunity to evaluate that evidence, the nature of the issues, the nature and strength of the evidence and the consequences of the proposed motion in the context of the entire litigation.[43]

Procedure must not dictate how the substance of a case is considered: the proper focus is whether a trial *is necessary*, and not whether the evidence at trial will be superior to the evidence available at a summary judgment motion. This latter consideration sets the bar "too high" as, inevitably, the evidentiary processes available at trial will be more fulsome than those on a summary judgment motion.[44]

In keeping with this guidance, the power to hear oral evidence should be exercised when it will allow the judge to reach a fair and just adjudication and exercise of this power is proportionate to the scope of the action.[45] Again, the focus is not on the length or nature of the

39. *Ibid.* at para. 43.
40. *Ibid.* at para. 47.
41. *Ibid.* at para. 45.
42. *Ibid.* at para. 58.
43. *Ibid.* at paras. 58-60.
44. *Ibid.* at para. 56.
45. *Ibid.* at para. 63.

oral evidence, but whether the exercise of the power will promote fairness in the context of the motion, and the litigation.

Accordingly, the Court suggests the following procedure should be followed by a motion judge hearing a summary judgment motion:

1. Determine if there is a genuine issue requiring a trial based only on the evidence before the motion judge, without using the expanded tools; and,
2. If the judge determines a trial is required, the judge should next consider if a trial can be avoided if the tools are used.

(4) Judicial Tools for Managing the Risks of Summary Judgment Motions

After explaining the nature and purpose of summary judgment, the Court outlines three practical mechanisms that are to be incorporated into the summary judgment process to improve its management.

(a) Early Judicial Involvement in Summary Judgment Motions

The Court suggests that, before a summary judgment motion is heard, a motion for directions can be brought to control the size of the motion record in order to manage the time and cost of the summary judgment motion.[46] Such a motion should be brought to the judge seized of the summary judgment motion to ensure that the knowledge the judge gains about the case on this preliminary motion does not simply "go to waste".[47]

The Court notes that not every summary judgment motion will require a preliminary motion for directions. However, failure to bring such a motion in circumstances where directions would be of benefit to the parties, for example, when the record will be complex or voluminous, can be addressed later with costs.[48] An early motion for directions also provides an opportunity for the responding party to challenge the motion if the responding party believes the motion should not be heard because it does not sufficiently advance the litigation or serve the principles of proportionality, timeliness and affordability.[49]

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46. *Ibid.* at paras. 69-70.
47. *Ibid.* at para. 71.
48. *Ibid.*
49. *Ibid.* at para. 72.

(b) Judge to Remain Seized

The Court recognizes that failed summary judgment motions can add "sometimes astronomically" to costs and delay.[50] In recognition of this fact, the Court suggests two ways the motion judge remain involved in the case in order to use the knowledge she has learned in hearing the motion.

First, the judge can, relying on rule 20.05 and the court's inherent jurisdiction, make a number of specific trial-management orders that will guide the litigation as it continues.[51] The types of orders that may be appropriate vary and range from ordering timetables to specifying how evidence of certain witnesses should be presented at trial. In particular, the Court suggests that motion judges look to the procedures under the summary trial process as a model for such orders.[52] For example, it may be appropriate to order that the affidavits already filed on the summary judgment motion be used at trial in place of direct examinations.

Second, unless there are "compelling reasons to the contrary", the judge hearing the summary judgment motion should seize herself of the matter as the trial judge.[53] The Court observes that this saves a different judge from "getting up to speed" on the matter each time it goes to court and may have a "calming effect" on the conduct of litigious parties and counsel.[54] This was a suggestion we made in our most recent paper.[55] To the extent that judicial scheduling practices prevent this from happening, those scheduling practices should be changed to facilitate this access to justice initiative.[56]

(c) Deference to the Exercise of Summary Judgment Powers on Appeal

Absent very compelling reasons, certain decisions of the motion judge sitting on a summary judgment motion should not be lightly overturned on appeal. When the motion judge exercises the powers under the new summary judgment rule and determines there is a genuine issue requiring a trial, this is a question of mixed fact and law that attracts deference.[57] Similarly, determining whether to use new

50. *Ibid.* at para. 74.
51. *Ibid.* at para. 76.
52. *Ibid.* at para. 77.
53. *Ibid.* at para. 78.
54. *Ibid.*
55. *Supra* note 6.
56. *Hryniak*, *supra* note 1 at para. 79.
57. *Ibid.* at para. 81.

fact-finding powers is discretionary and therefore should not be disturbed unless it is so clearly wrong that it has resulted in an injustice.[58] Where a motion judge incorrectly applies a principle of law or makes an error of law, these errors will still be reviewed on the less deferential correctness standard.[59]

3. Since We Are Already Shifting Cultures, Why Stop at Summary Judgment?

While having a summary judgment rule that makes summary judgment a commonly used alternative to a conventional trial represents a significant advance, the fact remains that there are other procedural areas that could be explored to increase access to justice. We believe that for a "shift in culture" to actually occur, we must embrace procedural changes that go well beyond changes to summary judgment.

(1) Applications

In his 1981 paper on summary judgment, Professor Bogart also considered the application procedure (then known as an originating notice of motion) as another form of obtaining summary disposition of certain disputes.[60] In Ontario applications are governed by rule 14.05. There are a number of enumerated issues that can be brought by way of application, including a catch-all in rule 14.05(3)(h) "in respect of any matter where it is unlikely that there will be any material facts in dispute". Although the balance of the matters in rule 14.05(3) (such as (d) determination of rights under a deed, will, contract or other instrument) are not subject to this limitation, there are cases that have held that where the credibility of deponents must be assessed in order to resolve material facts in dispute, it is beyond the proper role of a judge to determine such issues on an application.[61] The reasoning in *Hryniak* and *Bruno*, it is submitted, has effectively overturned these cases.

Indeed, before the two Supreme Court decisions, the Federal Court of Appeal held that it was permissible to bring a trade-mark infringement proceeding as an application with reasoning that

58. *Ibid.* at para. 83.
59. *Ibid.* at para. 84.
60. *Supra* note 5 at p. 564.
61. *Sandhu-Malwa Holdings Inc. v. Auto-Pak Ltd.*, 2011 ONSC 7363, 2011 CarswellOnt 15566 (Ont. S.C.J.), at paras. 39-43; *Newcastle Recycling Ltd. v. Clarington (Municipality)* (2005), 16 M.P.L.R. (4th) 157, 204 O.A.C. 389, 2005 CarswellOnt 7237 (Ont. C.A.), at para. 11.

foreshadowed the basis of those two decisions: "In my view, the purpose of the [*Trade-marks Act*] in general, and the 'Legal Proceedings' section in particular, is best met by an interpretation that promotes access to the courts that is as expeditious and proportionate as possible. To facilitate expeditious and proportionate access to justice, section 53.2 of the Act should be interpreted as permitting proceedings to be brought either by application or by action. This would allow access in an appropriate case to the more summary application process. Nothing in the wording of the Act precludes this interpretation."[62]

The court also has some control over the application process and has the means to simplify the process of getting testimony concerning facts that require more than affidavits and cross-examination transcripts. In *St Andrew Goldfields*[63] a dispute over liability for payment of a royalty that had been improperly described in a purchase agreement was dealt with in this way. The application was commenced in November, a seven-day trial of the issues was held in January and February of the following year, and a decision was delivered by July of that year, eight months after the application started. It would have been very difficult to bring a case to trial in an action in that amount of time.

(2) Trials

As made clear by the Supreme Court, trials will continue to have their place in the litigation process.[64] Indeed, sometimes the Chevrolet just won't do. But why should these "slow and expensive" procedures remain immune from changes that would seek to increase access to justice? We believe that a serious study should be undertaken to determine how trial procedure can also be reformed to result in more expeditious and less expensive determinations. As noted by Justice Brown, "civil trials are capable of adapting (and indeed must adapt) to new ways of adjudicating cases".[65] However, we also believe that a serious look at old ways of conducting trials should be included in this study. Are "modern"

62. *BBM Canada v. Research in Motion Ltd.*, 2011 FCA 151, 93 C.P.R. (4th) 1, [2013] 1 F.C.R. 117 (F.C.A.), at para. 28.
63. *St Andrew Goldfields Ltd. v. Newmont Canada Ltd.*, 2009 CarswellOnt 4582, [2009] O.J. No. 3266 (Ont. S.C.J.), affirmed 2011 ONCA 377, 282 O.A.C. 106, 2011 CarswellOnt 3148 (Ont. C.A.). See the discussion of the procedural background in Appendix A.
64. *Hryniak*, *supra* note 1 at para. 33.
65. *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001, 354 D.L.R. (4th) 121, 30 C.P.C. (7th) 252 (Ont. S.C.J. [Commercial List]), at para. 35.

trials taking longer, as many senior counsel believe, and if so, why is this the case?

The number of cases going to trial in Ontario has sharply declined.[66] The Report of the Task Force on Advocacy found that there was a 42% decrease in civil trials between 1998/99 to 2002/03.[67] The significant expense and protracted nature of trial procedure is no doubt one of the reasons for this decline. In addition to these factors, the bench and bar have noted that another reason for the "vanishing trial" may be the (junior) bar's seeming unfamiliarity with the trial process and consequent reluctance to take cases to trial.[68]

We would argue that the lack of cases going to trial (when a trial is actually necessary) also has a negative effect on access to justice. Avoiding trial when trial is necessary may result in poorer outcomes for clients. A case that makes it to trial where counsel does not have trial experience may lead to inflated litigation costs, further discouraging taking cases to trial. Accordingly, the lack of an efficient trial process in which claims can be determined (and counsel can get experience with trial procedure) can have a negative effect on case outcomes and, ultimately, access to justice. As stated by The Advocates' Society: "If a client's lawyer does not have experience conducting trials, then that lawyer may be trial-phobic and may encourage sub-optimal outcomes in order to avoid going to trial. Additionally, if through lack of experience the lawyer does not know how to conduct the entire litigation process through to trial efficiently, then the client may be denied the opportunity to achieve an optimal outcome by means of a trial, since the costs will be artificially increased. In fact, the over-represented client may be under-represented in terms of outcome."[69]

"Trial phobia" may be heightened in particularly document-intense cases. Such cases exist because of the large numbers of electronic documents that are now created and stored by most

66. It is interesting that our bias toward trials has persisted, even as fewer and fewer cases ever reach trial.

67. The Advocates' Society, *Report of The Advocates' Society Task Force on Advocacy*, available at: http://www.advocates.ca/assets/files/pdf/publications/task-force-on-advocacy.pdf, at p. 6. The drop during this period cannot be blamed on the priority given to trying criminal cases within a reasonable time as required by s. 11(*b*) of the *Canadian Charter of Rights and Freedoms*. The landmark Supreme Court of Canada decision, *R. v. Askov*, [1990] 2 S.C.R. 1199, 74 D.L.R. (4th) 355, 59 C.C.C. (3d) 449 (S.C.C.), had already been in place for at least eight years before the start of the period in question.

68. *George Weston Ltd.*, *supra* note 65 at para. 31.

69. Advocates' Society, *supra* note 67 at pp. 9-10.

corporations and individuals. These documents are then put through the e-discovery process and are stored in software that allows all the material to be accessed electronically. In one notable case this process resulted in a 295-day trial spread over five years with about 2,800 exhibits being marked.[70] Who wouldn't be scared?

Of course, the cost and complexity of trials is not a new concern.[71] In keeping with *Hyrniak*, one possible solution is for greater judicial involvement in the scheduling and management of trials. For example, orders can be made requiring a "hybrid trial"[72] and giving directions for the management of the case going forward. "The Trial" need not be a single, uncustomizeable procedure. Creative procedures to present evidence and argument can go "a long way towards addressing the concerns of litigants about the costs involved in going to trial".[73] For instance:[74]

> [36] . . . The 2010 amendments to the *Rules of Civil Procedure* made available to judges and counsel alike a big box of LEGO-like building blocks with which they can construct a wide variety of modes of trial: witnesses testifying by *viva voce* evidence; witnesses testifying, in whole or in part, by affidavit; using pre-hearing affidavits and cross-examinations as examinations for discovery; using pre-hearing affidavits as part of the trial evidence-in-chief of a witness and pre-hearing transcripts as part of the trial cross-examination of a witness; placing time limits on examinations at trial; using written opening statements; pre-trial hot-tubbing by experts; and, filing an agreed statement of facts . . .

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70. *GasTOPS Ltd. v. Forsyth*, 2009 CarswellOnt 5773, [2009] O.J. No. 3969 (Ont. S.C.J.), affirmed 2012 ONCA 134, 99 C.C.E.L. (3d) 62, 2012 C.L.L.C. 210-021 (Ont. C.A.); costs decisions at *GasTOPS Ltd. v. Forsyth*, 2010 ONSC 7068, 2010 CarswellOnt 10494 (Ont. S.C.J.). We should also note that some of the length of this trial is attributable to the fact that the defendant had made the case far more difficult by attempting to destroy and hide incriminating documents, which came out part way through the trial.
71. For example, Lord Esher in *Ungar v. Sugg* (1892), 9 R.P.C. 113 (C.A.): "It used to be said that there was something catching in a horse case: that it made the witnesses perjure themselves as a matter of course. It seems to me that there is something catching in a patent case, which is that it makes everybody argue, and ask questions to an interminable extent – a patent case with no more difficult question to try than any other case instead of lasting six hours is invariably made to last at least six days, if not twelve. I am sure there ought to be some remedy for it".
72. For an example of a hybrid trial process and other case management directions, see *Wood v. Arius3D Corp.*, 2012 ONSC 5596, 2012 CarswellOnt 12238 (Ont. S.C.J. [Commercial List]), at para. 8.
73. *1318214 Ontario Ltd. v. Sobeys Capital Inc.*, 2012 ONSC 2784, 40 C.P.C. (7th) 331, 2012 CarswellOnt 5904 (Ont. S.C.J. [Commercial List]), at para. 23.
74. *George Weston Ltd.*, *supra* note 65 at paras. 36-37.

> [37] Under our *Rules* the "conventional trial" no longer exists as a norm; the *Rules* have made the civil trial modular in nature, with counsel and the judge able to fashion trials tailor-made to the circumstances of each a particular case. Our Court must use these trial building blocks to offer litigants creative, cost-attractive trial options . . .

As we become more familiar with these procedures the process of adjudicating actions may become more of a continuum, with summary judgment motions on a purely written record at one end, and a conventional trial where "viva voce evidence reigns supreme",[75] at the other. Part of the restructuring of the civil trial may include some method of triaging cases at an earlier stage to identify truly complex cases in need of greater judicial intervention. Such cases could be diverted into a stream where such active case management might reduce the time devoted to trying the case.

(3) Limiting the Expenditure of Judicial Resources on Non-Legal Matters

Sometimes the primary issue animating a legal dispute is not actually a legal issue. The most obvious example might be found in estates cases and family matters where the underlying problem for "adjudication" is some family dysfunction that plays out as a legal dispute.

We suggest that the possibility of having mandatory triage at an early stage by a social worker be studied. In some cases a referral of the litigants to an appropriate professional may address the real problem, and eliminate the legal dispute which is merely a proxy for the real problem. In other cases the parties may not be willing or able to address the underlying issue, and the court will still have to decide who gets the heirloom vase or the month of July at the family cottage.

4. Can We Make the Shift?

Given the history of backsliding to old ways after initial pledges that "this time is different" it seems a fair question.[76] As the Supreme Court makes clear, we really haven't much choice. Ordinary legal proceedings are beyond the reach of ordinary Canadians. As the Supreme Court observes this undermines the rule of law and stunts the development of the common law. These issues have been growing for many years, and as a profession we may not have appreciated their

75. *Ibid.* at para. 35.

76. There is a joke that sums up the problem: Q. How many psychiatrists does it take to change a light bulb? A. Only one, so long as the bulb wants to change.

extent. The Supreme Court's decisions make it clear that the *status quo* is not acceptable. The obvious next question is what litigators will do if hardly anyone can afford litigation. Both civic interest and self-interest ought to motivate bench and bar to find ways to restore litigation as a realistic means of resolving disputes.

The culture shift toward accessible justice must start with summary judgment. We suggest, and hope, that it will not end there.

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