



Canada Announces Free Trade Agreement with the Republic of Korea

by Aaron Grossman

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There is a prospect for faster, less expensive and more accessible justice for Ontario businesses and residents by virtue of a decision recently issued by the Supreme Court of Canada.

The decision provides for summary judgment to be granted in a wider variety of cases than was previously available. Bringing a summary judgment motion can allow a party in an action to have a judgment rendered more expeditiously than in the trial process. The Court's primary rationale for expanding the availability of summary judgment was to increase access to justice and lower the cost of litigation for Ontarians.

A summary judgment hearing is normally conducted on the basis of affidavit evidence and transcripts from the cross-examinations of the witnesses who swore the affidavits. Previously, live witnesses were generally not permitted and the summary judgment motions judges decided the case on the basis of a paper record, without seeing or hearing the witnesses live.

Amendments to the summary judgment rules were made in 2010 to allow for some live witnesses to be called on discrete issues. In addition, summary judgment motions judges were provided new fact-finding tools that were previously not available to help them decide such motions -- the ability to weigh the evidence, to evaluate the credibility of a witness and to draw reasonable inferences from the evidence, even though they never saw or heard the witnesses in person. It was these amendments that were recently interpreted by the Supreme Court of Canada.

In a case called *Hryniak v. Mauldin*¹, Robert Hryniak "lost" several million dollars provided to him by investors that was earmarked for investment in an offshore bank. The plaintiffs were investors who alleged that Hryniak was liable for civil fraud. Rather than go to trial, the plaintiffs brought a summary judgment motion asking the court to decide, on the basis of a paper record, without live witnesses, that the fraud had been perpetrated. They succeeded on the motion, with the Supreme Court of Canada endorsing the motion court's judgment.

Writing for a unanimous Supreme Court, Madam Justice Andromache Karakatsanis set out the foundation for the Court's decision as follows:

"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 an 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.

¹ 2014 SCC 7.

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

“Summary judgment motions provide one such opportunity. ...”

This opening set the tone for the remainder of the decision, in which the Supreme Court concluded as follows:

- Historically, summary judgment has evolved from weeding out *clearly* unmeritorious claims or defenses to granting judgment in situations where the dispute can be resolved *fairly and justly*.
- Summary judgment motions can be an effective and efficient dispute resolution tool in *appropriate* cases.
- Judges generally *must* utilize their new fact-finding powers if doing so will assist in granting summary judgment, unless doing so would be against the interest of justice. Again, these powers include hearing evidence from live witnesses, weighing the evidence, making findings of credibility and drawing reasonable inferences from the evidence.
- The trial is no longer the default dispute-resolution mechanism, as most litigants never get to trial nor do they expect to do so.
- Summary judgment is a key tool in promoting access to justice and reducing the cost and delay associated with court based litigation in Canada. A key to the effective use of the rule is proportionality -- tailoring the procedures used to the importance and size of the case.
- In order to grant summary judgment, the motions judge must have confidence that the summary judgment procedure will justly resolve the merits of the case. In addition, summary judgment must be “a proportionate, more expeditious and less expensive means to achieve a just result.” The concept of proportionality in litigation is that orders made and procedures used in a given case should be proportionate to the relative importance of that case.
- If judgment is not granted on a summary judgment motion, the costs expended should not be thrown away. Motions judges have been mandated to keep the case through to trial, even if they dismiss the motion for summary judgment, so that the institutional knowledge gained by the judge is not lost. Motions judges are now expected to assume a case management role over these matters, which includes making orders to expedite and focus the remaining steps in the action and making orders that narrow the true issues to be decided.

The Supreme Court of Canada’s conclusions differed significantly from the Ontario Court of Appeal’s previous interpretation and application of the 2010 amendments to the summary judgment rule. The Court of Appeal had held that summary judgment was only available when a judge could “fully appreciate” the evidence as if the judge were hearing the evidence at a trial. This interpretation of the amendments to the rule had tilted the balance in favor of trials as the preferred method of dispute resolution and was seen by many as emasculating the very purpose of the amendments, which was to make summary judgment more available. The Supreme Court disagreed with the Court of Appeal’s interpretation and application of the amendments, recognizing that in the modern day, a trial is often neither realistic nor desirable.

Analysis and Future of Summary Judgment – Easier for the Right Types of Disputes

Based on the Court’s comments regarding proportionality, efficiency of the legal system, and the desire for enhanced access to justice, cases involving relatively small amounts of money in dispute between the parties appear to be ripe for summary judgment. In addition, cases with simple legal or factual issues are good candidates for summary judgment, even where some oral testimony is required or there is a key credibility issue. However, oral evidence and credibility disputes will have to be discrete and manageable in order for summary judgment to be an effective alternative method of dispute resolution.

It will be interesting to see how the legal community and the courts respond to the Supreme Court's guidance, which has the potential for a "cultural shift" in how cases are decided in Ontario. It remains to be seen as to whether the decision will have the desired effect of increasing access to justice and decreasing delay and costs. ■