Summary Judgment Proceedings in Saskatchewan Family Law Proceedings

By Sean Sinclair[1]

Saskatchewan's summary judgment rules were intended to create efficiencies and promote greater access to justice. The hope was that litigants would have access to a just and final outcome without the expense and time commitment of a trial. Unfortunately, we have yet to see summary judgment process achieve its intended goals, in part because of a judicial reluctance to allow summary determinations where there are factual disputes. In this paper, I will be walking through some access to justice issues, the development of the "New Rules", the language of the New Rules and the case law implementing those rules.

Access to Justice Issues

We have a crisis of access to justice in Canada in family law proceedings. This issue is well-chronicled in several prominent publications. One of the most notable papers is *Access to Civil & Family Justice: A Roadmap for Change*, prepared by the Action Committee on Access to Justice Matters, headed by former Supreme Court Justice Thomas A. Cromwell. Some of the notable findings of the Committee included:

(a) "The civil and family justice system is too complex, too slow and too expensive. It is too often incapable of producing just outcomes that are proportional to the problems brought to it or reflective of the needs of the people it is meant to serve."

(b) Approximately 12 million Canadians experience legal problems each year and 40% of marriages end in divorce.

(c) The poor and marginalized are more likely to experience legal issues requiring adjudication.

(d) Having unresolved legal issues adversely affects individuals' mental health and finances.

[1] Sean Sinclair is a partner at Robertson Stromberg LLP. Joree Nelson of the same firm assisted with some of the research related to Saskatchewan summary judgment decisions.

(e) Nearly 50% of Canadians attempt to resolve legal issues without legal assistance, which is also true for family law matters.

(f) "Statistics indicate that individuals who receive legal assistance are between 17% and 1,380% more likely to receive better results than those who do not."

Two of the recommendations from the Committee are particularly germane to this discussion:

(a) "Our current formal procedures seem to grow ever more complicated and disproportionate to the needs of the litigants and the matters involved. Everyday legal problems need everyday solutions that are timely, fair and cost-effective. Procedures must be simple and proportional for the entire system to be sustainable. To improve the system, we need a new way of thinking that concentrates on simplicity, coherence, proportionality and sustainability at every stage of the process."

(b) "Our final guiding principle calls for a shift in focus from process to outcomes. We must be sure our process is just. But we must not just focus on process. We should not be preoccupied with fair processes for their own sake, but with achieving fair and just results for those who use the system. Of course fair process is important. But at the end of the day, what people want most is a safe, healthy and productive life for themselves, their children and their loved ones."

The "New Rules" of Court

In 2020, it is likely dubious to still refer to the Queen's Bench Rules as being the "New Rules", given that they were implemented in 2013. Nonetheless, because of the experience and the stubbornness of the writer, the Rules will still be referred to herein as the "New Rules".

The New Rules were meant to mark a shift in judicial perspective. While the Cromwell report was not published when the New Rules were implemented, the issues around access to justice were well known.

Many of the ideals of the Cromwell report are found within the text of the Rules, particularly the Foundational Rules. For instance:

(a) "1-3(1) The purpose of these rules is to provide a means by which claims can be justly resolved in or by a court process in a timely and cost effective way."

(b) "1-3(4) Resolving a claim justly in a timely and cost effective way includes, so far as is practicable, conducting the proceeding in ways that are proportionate to:

(a) the amount involved in the proceeding;

(b) the importance of the issues in dispute; and

(c) the complexity of the proceeding."

Some of the other foundational rules express similar goals of promoting efficiency and cost-effective resolution of legal issues.

One of the key changes from the prior Rules of Court was the adoption of a summary judgment application. Previously, the Rules of Court had a process for the adjudication of legal issues where the facts were not controverted (Rule 188). Generally, litigants needed to enter into an Agreed Statement of Facts in order to access Rule 188.

The new summary judgment rules though were different. They would allow judges to assess the affidavit evidence and determine whether a trial was truly necessary to achieve a just and fair result. It would provide parties a means to bring an end to a judicial proceeding without the time and expense of a trial.

The summary judgment rules are found in Part VII. For this paper, I will highlight the following provisions from the summary judgment rules:

7-2 A party may apply, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in

the pleadings at any time after the defendant has filed a statement of defence but before the time and place for trial have been set.

7-3(1) A response to an application for summary judgment must not rely solely on the allegations or denials in the respondent's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

(2) The Court may draw an adverse inference from the failure of a party to cross-examine on an affidavit or to file responding or rebuttal evidence.

(3) An affidavit for use on an application for summary judgment may be made on information and belief as provided in rule 13-30, but, on the hearing of the application, the Court may draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

7-4(1) On an application for summary judgment, each party shall serve on each of the other parties to the application a brief consisting of a concise argument stating the facts and law relied on by the party.

(2) The applicant's brief must be served at least 10 days before the hearing.

(3) The respondent's brief must be served at least 5 days before the hearing.

(4) If the applicant wishes to reply to any new matters raised in the respondent's brief, the applicant may serve a reply brief at least 3 days before the hearing.

(5) Each party's brief must be filed in accordance with rule 13-23.1, with proof of service, in the Court office where the application is to be heard.

7-5(1) The Court may grant summary judgment if:

> (a) the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment.

(2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:

(a) shall consider the evidence submitted by the parties; and

(b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:

(i) weighing the evidence;

(ii) evaluating the credibility of a deponent;

(iii) drawing any reasonable inference from the evidence.

(3) For the purposes of exercising any of the powers set out in subrule (2), a judge may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(4) If the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.

(5) If the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

(6) If the Court is satisfied there are one or more genuine issues requiring a trial, the Court may nevertheless grant summary judgment with respect to any matters or issues the Court decides can and should be decided without further evidence.

(7) If an application for summary judgment is dismissed, either in whole or in part, a judge may order the action, or the issues in the action not disposed of by summary judgment, to proceed to trial in the ordinary way.

(8) If an application for summary judgment is dismissed, the applicant may not make a further application pursuant to rule 7-2 without leave of the Court.

The summary judgment rules are a fundamental shift from the way that the Court previously operated. Traditionally, weighing evidence, determining credibility and making final decisions required a trial with full opportunity of cross-examination. The summary judgment rules permit the Court to make credibility assessments on affidavits and determine a case based on the written materials alone.

In short, the summary judgment process has the potential to avoid the necessity of a settlement pre-trial conference and trial. Given that it can frequently take four to six months to book a pre-trial conference and the same or longer for a trial, there is the potential that litigants can reduce a legal dispute by eight to twelve months by use of a summary judgment application. There is also the reduced cost associated with avoiding a full day pre-trial and (in many cases) a three to five-day trial.

Some key takeaways from the Rules include:

(a) An applicant must establish its evidence that there is no genuine issue requiring a trial.

(b) A respondent to a summary judgment application must meet that challenge, by his or her own evidence, why there is a genuine issue requiring a trial. This is sometimes referred to as putting the respondent's "best foot forward".

(c) An affidavit can be based on hearsay, but the hearsay will be given less weight.

(d) A judge can make determinations of credibility based on the written material, as well as any cross-examination on affidavit.

Supreme Court Guidance

The Supreme Court of Canada weighed in on similar summary judgment procedures in Ontario in *Hryniak v Mauldin*, 2014 SCC 7. At the outset of the decision, the Supreme Court highlighted the issues of access to justice:

> [1] 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.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from 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.
>
> [3] Summary judgment motions provide one such opportunity. Following the *Civil Justice Reform Project: Summary of Findings and Recommendations* (2007) (the Osborne Report), Ontario amended the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Ontario *Rules* or Rules) to increase access to justice. This appeal, and its companion, *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8, [2014] 1 S.C.R. 126, address the proper interpretation of the amended Rule 20 (summary judgment motion).
>
> [4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. **In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary 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.**
>
> [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.
>
> [Emphasis added]

Some other principles emerging from *Hryniak* include:

(a) Summary judgment motions should not be regarded as exceptional;

(b) The test for a judge should not be whether better evidence could be adduced at trial, as a trial is an illusion for many litigants;

(c) In the event that a summary judgment motion is unsuccessful, the judge should tailor the balance of the legal proceeding to ensure that efficiencies can be created. To the extent possible, the judge hearing the summary judgment motion should seize him or herself with the case to streamline resolution of the proceeding;

(d) Summary judgment must be granted unless there is a genuine issue requiring a trial.

New Summary Judgment Practice Directive

Worth noting, the Saskatchewan Court of Queen's Bench adopted a new practice directive regarding summary judgment applications. As of November 1, 2019, litigants are to set down summary judgment applications during a regular chambers sitting. The initial appearance in chambers is intended to assist with setting aside sufficient time to hear the matter, managing the application (including setting deadlines) and determining any preliminary issues. The judge is able to make a summary determination during that hearing, but most often would not do so. It could be questioned whether creating more steps with pre-hearing appearances will assist with the ultimate goal of efficient and cost-effective resolution of legal disputes.

Summary Judgment Test

Before delving into the family law specific cases, it is worth reviewing the leading Saskatchewan case on summary judgment applications, *Tchozewski v Lamontagne*, 2017 SKQB 71. The oft quoted part of *Tchozewski* is this test as to when summary judgment should be granted:

> "1. The court must first decide if there appears to be a genuine issue requiring a trial within the meaning of Rule 7-5(1)(a)), based solely on the evidence before the court, and without using the powers provided by Rule 7-5(2)(b) to weigh the evidence, evaluate credibility and draw inferences. (*Hryniak*, para. 66)
>
> 2. There will be no genuine issue requiring a trial if the judge is able to reach a fair and just determination on the merits based on the affidavit and other evidence. That will be so if the summary judgment process:
>
> (a) allows the judge to make the necessary findings of fact;
>
> (b) allows the judge to apply the law to the facts; and
>
> (c) is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. (*Hryniak*, para. 49)
>
> 3. The issue is not whether the summary judgment process is as thorough or the evidence is as complete as at trial. It is whether the judge is confident he or she can find the facts and apply the relevant legal principles so as to fairly resolve the dispute. If the judge has that confidence, proceeding to trial is generally not proportionate, timely or cost effective. A process that does not give the judge confidence in his or her conclusions, on the other hand, is never proportionate. (*Hryniak*, paras. 50 and 57)
>
> 4. If there appears to be a genuine issue requiring a trial, the court should next determine if a trial can be avoided by using Rule 7-5(2)(b) powers to weigh evidence, evaluate credibility and draw

inferences, and whether it is in the interests of justice that those powers be exercised only at trial. (*Hryniak*, para. 56)

5. In deciding whether there is a genuine issue requiring trial, and whether it is in the interests of justice to use the powers provided by Rule 7-5(2)(b) to avoid a trial, the court must consider the nature of the evidence and issues. It must also consider proportionality in the context of the litigation as a whole. The relevant factors may include, but are not limited to:

(a) the complexity of the claim;

(b) the amount at issue;

(c) the importance of the issues;

(d) the relative cost and speed of a summary judgment application, as compared to trial;

(e) whether better evidence will be available at trial than on the application, and the nature and extent of the conflict in the evidence, including:

(i) whether there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination;

(ii) whether credibility determinations are at the heart of the issues to be determined; and

(iii) whether credibility determinations are made more difficult by the shortage of reliable documentary yardsticks.

(f) whether the court is able to fairly evaluate the evidence, including the extent to which it would assist the court to have evidence presented by way of a trial narrative, to hear and observe witnesses and to have the assistance of counsel in reviewing the facts and the law within the conventional trial process;

(g) whether summary judgment would resolve all claims against all parties, or whether a trial will be necessary in any event, raising, among other things, the possibility of duplicative proceedings or inconsistent findings of fact; and

(h) whether the application could dispose of an important claim against a key party, thereby reducing cost and delay. (Rule 1-3, *Hryniak*, *supra*, paras. 58, 60 and 66, and *Pervez*, para. 48)

6. The court also has the discretion to permit a party to present oral evidence pursuant to Rule 7-5(3) if it would allow the court to reach a fair and just adjudication on the merits and is the proportionate course of action. (*Hryniak,* para. 63)"

As can be seen from the foregoing, the basic assessment for a judge is to determine whether they can determine the case fairly and make the necessary findings of fact based on the materials submitted. Where the Court can make those factual determinations and determine the case fairly without the need for a trial, it should do so to avoid further cost for the parties.

Saskatchewan Family Law Case Law

There is a developing body of case law considering the application of summary judgment in family law proceedings. What follows is a brief synopsis of several of those decisions:

George v Merasty, 2020 SKCA 9 [*Merasty*]

This case is a bit of an oddity on two fronts. First, the case deals with a successful application for summary judgment on a mobility issue, and second, the Chambers judge heard the summary judgment application although a trial had already been set. As a result, the judgment was decided about ten days before the date the trial was scheduled to begin (para 42).

Ms. Merasty applied and was granted, by way of a summary judgment application, an order permitting her to move the children from Regina where they had been raised, to Manitoba where her fiancé lived. On appeal, Mr. George argued that this was not an appropriate case for summary judgment. Additionally, he submitted

that the Chambers judge did not properly consider and apply the maximum contact principle, failed to adequately consider the best interests of the children, and improperly considered parental conduct (para 31).

The Court of Appeal upheld the Chambers judge's decision that the mobility application could be decided by way of summary judgment.

In reaching their decision the Court of Appeal cited the recent case of *McCorriston v Hunter*, 2019 SKCA 106 (Sask CA) [*McCorriston*], for the position that there is no reason in principle why the summary judgment procedure should not be available to resolve family law disputes (para 34).

Although the Court of Appeal upheld the chambers judge's decision, the Court suggested that such applications should be brought with a great deal of caution. The Court stated:

> [41] … I completely agree with Mr. George that employing summary judgment in the mobility context is a delicate business. This is so for two main reasons. First, the potential impact of a mobility decision on the lives of the children and the relationship between the children and the non-moving parent is dramatic. Second, affidavit evidence can all too easily obscure the truth or reveal only parts of it. As Leurer J.A. observed in *McCorriston* at paragraph 25 "[a]n affidavit is the ultimate form of leading a witness". All of this means that, in order to properly respect and account for the best interests of the children in a mobility case, judges will need to take considerable care to ensure the material issues in the proceeding can be fairly resolved without oral testimony.

The Court of Appeal also discussed some of the procedural issues associated with the mechanics of the overlay between family law and Part 7 of the *Rules* at para 36.

<u>*McCorriston v Hunter*</u>, 2019 SKCA 106 [*McCorriston*]

In *McCorriston*, the Court of Appeal reviewed the Chambers judge's decision in *H.D.H. v. J.B.M.* (2018), 2018 SKQB 335. In the decision, the Chambers judge granted Ms. Hunter's application for summary judgment. Mr. McCorriston appealed the decision. The issue before the Court of Appeal was whether a summary judgment is available to resolve issues of parenting and child support,

and whether the judge erred by granting a judgment with respect to the aforementioned issues.

The Court of Appeal held that although it was appropriate for the Chambers judge to have entertained the summary judgment application, the Chambers judge erred in principle in determining that no genuine issue for trial existed with respect to parenting, and subsequently, child support.

In formulating his decision, the Chambers judge first addressed the availability of summary judgment, before concluding that "there is sufficiently clear and uncontroverted relevant evidence that the court may proceed with a determination of the issues before it" (at para 16).

The Court of Appeal warned that trial courts need to be cautious when making final orders on the basis of affidavit evidence, particularly in a family law context (para 25). The court further instructed:

> [26] In every case, a judge considering a request for summary judgment will need to determine if the material issues at stake can be fairly resolved without hearing the parties testify. In making this assessment, judges will need to sort out the nature of the disagreements, if any, and whether the summary judgment procedure allows for material disagreements to be fairly resolved. Judges will also need to consider whether the efficiencies associated with summary judgment are more perceived than real. I will give two examples.
>
> [27] Summary judgment may be inappropriate where there are only a few witnesses and the time to prepare affidavits and conduct cross-examinations on them will be as arduous and time-consuming as simply setting the matter down for a short trial. Summary judgment also may be inappropriate where there are conflicting affidavits and the judge considers that cross-examination on the affidavits, or the hearing of oral evidence pursuant to Rule 7-5(3), will be an unsatisfactory method for resolving material conflicts. All of this is case specific. Fundamentally, the use of the summary judgment procedure in a family law context, as in any other, must be measured against the principles of timeliness and proportionality,

> keeping in mind that, before summary judgment can be granted, the court must have confidence that a fair and just result will be achieved.

Ultimately, the Court of Appeal concluded that the Chambers judge erred in his conclusion that there was no genuine issue for trial, as significant facts were in dispute (para 34). The key issue in dispute, according to the Court of Appeal was the cause of the breakdown of the relationship between Mr. McCorriston and the children. Unsurprisingly, the affidavit evidence was highly contradictory (para 38).

Therefore, the Court of Appeal found that the Chambers judge had erred through his failure to analyze the controverted evidence. The Chambers judge was required to *either* resolve the conflicting evidence or determine that the evidence was irrelevant to the determination of the parenting issue (para 39-41). The court summarized this error as a failure to appreciate that, in a summary judgment context, the issue of process is inextricably tied to the issue of substance (para 43).

Moore v Moore, 2020 SKQB 81 [*Moore*]

The wife brought a summary judgment application respecting the division of family property. Both parties agreed that the matter should be resolved by way of summary judgment.

The primary matter in dispute regarding family property was whether the husband had "absconded" with certain missing chattels. The judge evaluated the affidavit evidence and the husband's history of not following court orders to determine that it was more likely than not that he received the household items in dispute (valued at $13,000). Justice Smith indicated that the husband had "no particular affinity for the truth."

Accordingly, summary judgment was granted regarding family property.

Leonhardt v. Shlahetka, 2019 SKQB 64 [*Leonhardt*]

The primary issue in *Leonhardt* was whether Rule 7-5 of *The Queen's Bench Rules*, given the somewhat unusual circumstances, permitted a summary adjudication to dismiss Ms. Leonhardt's claim. Ms. Leonhardt, the petitioner sought a division of family property on the grounds that she and Mr. Shlahetka were in a spousal relationship (they were both in their 80s at the time of the application; it does not

explicitly spell it out but Mr. Shlahetka appears to be incapacitated). The property guardians took the opposite position.

Notably, the court in *Leonhardt* provided a critique of the development of the caselaw for determining the merits of a summary judgment, referring the process as “unduly complicated” (para 22).

The court first found that the applicants (the property guardians) had shown there was no genuine issue requiring trial based on their affidavit evidence. The court then turned to the second step of the analysis as mandated by *Lameman,* and asked given the shifting burden of proof, has Ms. Leonhardt shown that “there is a genuine issue requiring trial?” In making this assessment the court provided:

> [54] Although lack of cohabitation renders a relationship non-spousal, mere cohabitation does not prove a spousal relationship. Arguably, then, for Ms. Leonhardt to show that there is a genuine issue requiring a trial she must establish whether the Molodowich indicia, other than "shelter," present genuine issues requiring a trial. For several reasons, I find that genuine issues require trial.
>
> …
>
> [57] In summary, I find that Ms. Leonhardt has done what Lameman requires her to do: she has refuted and countered the moving party's evidence and has shown that genuine issues require a trial.

In light of the determination that Ms. Leonhardt had established that there was a genuine issue for trial, the court asked whether *a trial, could a trial be "avoided" by the court's use of the new powers under Rule 7-5(2)(b)?*

The court went on to note that much of the evidence was conflicting, and that the court was unable to make definitive findings of credibility, which the court characterized as “a matter better reserved for trial” (para 62). A limitation period issue also remained at large. As such, the application for summary judgment was dismissed.

Elder v Elder, 2018 SKQB 263

The husband in this case sought summary judgment relating to his child and spousal support obligations from the date of application to present date. His evidence was that he had been laid off from his previous employment; he had significant unpaid tax debts with CRA related to the operation of his former company; he had a new position for which he provided evidence of his current earnings. He had not filed corporate and personal income tax returns for several years, as his accountant required his unpaid bills to be brought current (which the husband indicated that he could not afford). The wife's income was known, although there were issues regarding whether income should be imputed to her.

The application for summary judgment was unsuccessful. The chambers judge emphasized the lack of filed income tax returns.

Hurton v Lafayette Estate, 2018 SKQB 99

In this case, Hurton, the surviving common-law husband of Lafayette, applied pursuant to the summary judgment provisions, for an order that the family home, that was solely registered in Lafayette's name be vested in Hurton's name upon Hurton paying Lafayette's estate one half of the equity and assuming the existing mortgage on the family home.

Counsel for Hurton argued that in dealing with a family property application, the court must deal with the family home separately from other family property. The court disagreed and held that the law is settled that the value of the family home must be included in the totality of the family property for the purposes of an application pursuant to s. 30(1) of the FPA (para 15). The court explained that the application for summary judgment was premature and that Hurton is required to disclose all his property so that a court can make a determination of his share of family property (para 16). The court further added that once all disclosure of Hurton's assets have been provided to counsel for Lafayette's estate, a summary judgment may resolve the outstanding issues between the parties.

Major v Major, 2016 SKQB 368 [*Major*]

In *Major*, the mother applied for a summary judgment for child support and the distribution of family property. The court held that it was able to determine the matter of retroactive child support on a summary basis and ordered the father to

pay retroactive child support. The primary determination in that case was legal – the child was under 18 years-old when the petition was commenced, but no longer a child when the motion for summary judgment was made. Thus, the question was whether, pursuant to *D.B.S. v. S.R.G.*, 2006 SCC 37, the mother was able to pursue retroactive support given that the child had ceased to be a child. Justice Wilson determined that child support could still be granted, as the child met the definition of "child" under the *Divorce Act* when the action was commenced.

The court was not able to grant a summary judgement on the division of family property due to the difference in opinion regarding the value of the goods.

L. (G.) v Saskatchewan, 2017 SKQB 48

In this case, the Ministry applied for a summary judgment dismissing the grandparents' custody application with respect to two of the children. As a permanent order had been made regarding the two children, the order could not be varied once the children had been placed in a home for adoption. Accordingly, there was no genuine issue for trial and the Ministry was granted summary judgment. Again, the issue was largely a legal (not factual) determination – whether the grandparents could seek custody when a permanent order for adoption had already been made.

Madraga v Gatin, 2016 SKQB 299

This case addressed a dispute over the proceeds of the sale of the family home. The matter previously came before the court and the property was sold, with the proceeds being distributed to the former spouses, pursuant to a court order.

Two years later, the husband again commenced an action claiming the wife had made withdrawals and misrepresentations from the mortgage and he had suffered a monetary loss. The court held that this was simply an attempt by the husband to relitigate the issue and allowed the application to strike.

The court added, that if the action had not been struck, the matter would not have been allowed to proceed summarily. This was due to the fact that the husband's affidavit evidence was denied by the wife, and the husband relied solely on his own assertions. As such a trial would be required to adjudicate between the parties (para 28).

Thus, the matter was again an issue of legal interpretation, as opposed to a factual dispute.

Summary of Saskatchewan Family Law Cases

The Court of Queen's Bench and Court of Appeal have found:

(a) It was inappropriate to grant summary judgment in a custody dispute where there was significant conflict in the evidence: *McCorriston*;
(b) While a mobility summary judgment decision can be rendered on affidavit evidence, great caution should be used in deciding to do so: *George v Merasty*;
(c) The determination of whether parties were "spouses" under *The Family Property Act* could not be determined summarily: *Leonhardt*;
(d) The issue of ongoing child and spousal support, where there was incomplete documentary evidence, could not be determined summarily: *Elder*;
(e) Family property issues, if there is conflict in the evidence, could not be determined summarily: *Hurton v Lafeyette Estate*, *Major*;
(f) Where the matter at issue is a legal determination with few factual disputes, the matter can be resolved summarily: *Major*, *Madraga v Gatin*, *L.(G.) v Saskatchewan*;
(g) Summary judgment could be granted on a family property matter where the matter at issue was very small and the prior judicial history of the file showed that a party had a propensity for not telling the truth: *Moore v Moore*.

There is little evidence that the Court has utilized its new "fact-finding" powers under Rule 7-5(2). Further, the reported decisions do not indicate that judges determining summary judgment applications have: (a) seized themselves with any further steps in the litigation; or (b) reduced the complexity or issues for trial under Rule 7-6.

Conclusion

In general, it can be said that the Court has rarely found a family law case appropriate for summary disposition if there are any facts in dispute. Primarily, rule 7-2 has been successfully used to resolve legal interpretation issues, as

opposed to any factual disputes[2]. The default is, thus, to bring matters to a pre-trial conference and trial, unless the facts are uncontroverted.

As a result, the goals of the "New Rules" and the call to action by the Action Committee on Access to Justice Matters have not yet been realized. We are, unfortunately, continuing to focus on the procedural safeguards of a trial, rather than focussing on fair and just outcomes for families through quicker and less expensive summary judgment applications.

[2] Query whether Rule 7-2 is necessary for this purpose, given that Rule 7-1 allows determinations on points of law.