

# SUMMARY JUDGMENT IN FAMILY LAW PROCEEDINGS

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FOR USE BY THE LAW SOCIETY OF SASKATCHEWAN

# ACCESS TO JUSTICE

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- Increasingly a problem
- Former Supreme Court Justice Thomas A. Cromwell addressed issues in a paper entitled *Civil & Family Justice: A Roadmap for Change*
- A greater number of individuals experience legal problems each year
- The poor and marginalized are more likely to experience issues requiring adjudication
- Nearly 50% of Canadians attempt to resolve matters without legal assistance
- Anecdotal, number of self-represented litigants in family proceedings has increased dramatically

# ACCESS TO JUSTICE

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- Two major recommendations from Justice Cromwell's committee were:
  - (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

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- Introduced in 2013
- Shift in judicial perspective found in the foundational rules

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.

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.
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# SUMMARY JUDGMENT UNDER THE RULES

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- Previously only had Rule 188
- Rules 7-2 to 7-5 now contain summary judgment rules
- Allow the Court to summarily determine issues where the case can be decided justly and fairly without a trial

# SUMMARY JUDGMENT UNDER THE RULES

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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.**



# SUMMARY JUDGMENT UNDER THE RULES

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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.

# SUMMARY JUDGMENT UNDER THE RULES

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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.

# SUMMARY JUDGMENT UNDER THE RULES

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(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.**

# SUMMARY JUDGMENT UNDER THE RULES

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- 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.

# THE SUPREME COURT WEIGHS IN

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## *Hryniak v Mauldin, 2014 SCC 7*

[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.



# THE SUPREME COURT WEIGHS IN

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- 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.

# RECENT QB PRACTICE DIRECTIVE

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- New Practice Directive
- Attend at a scheduling conference first before summary judgment application heard

# TCHOZEWSKI V LAMONTAGNE, 2017 SKQB 71

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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)

# TCHOZEWSKI V LAMONTAGNE, 2017 SKQB 71

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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)”

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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George v Merasty, 2020 SKCA 9

- Mobility application – Regina to Manitoba
- Summary judgment available for family law matters
- Mobility applications can be determined summarily but it is a “delicate business”
- Trial had already been scheduled

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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McCorriston v Hunter, 2019 SKCA 106

- Issues of parenting and child support. Key issue: whether summary judgment available.
- Appropriate to consider issues on summary judgment motion.
- Courts should be cautious as to making final orders on the basis of affidavit evidence, particularly in family law matters (where there is often conflicting affidavits)
- Key issue – Why there was a breakdown between father and the children

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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Moore v Moore, 2020 SKQB 81

- Summary judgment – family property
- Affidavits were controverted, but over a minor amount of property (\$13,000)
- Wife's evidence preferred – husband had a history of failing to follow court orders
- Application granted

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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*Leonhardt v. Shlahetka*, 2019 SKQB 64

- Summary judgment application addressed issue of whether parties were in a spousal relationship
- One of the parties was incapacitated and was assisted by a property guardian
- Court indicated that summary judgment process is unduly complicated
- Onus is initially on applicant to show no genuine issue for trial on affidavit evidence. The burden then shifts to the respondent to show that there is a genuine issue for trial
- Although applicant on its materials showed that there was no genuine issue for trial, the respondent in its material demonstrated that there was a genuine issue for trial
- After determining that there was a genuine issue for trial, the Court went on to determine whether it could avoid the trial by use of its new fact finding powers. It indicated that it could not given the conflicting evidence and limitation period issue.

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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*Elder v Elder*, 2018 SKQB 263

- Summary judgment application: child and spousal support obligations from date of application to present
- Husband had been laid off from prior employment, had significant unpaid tax debts, new position with evidence of current earnings. Had not filed corporate and personal tax returns for several years because his accountant required his payments to be brought current
- Parties could not afford a trial with legal counsel
- Summary judgment unsuccessful – documentary evidence of husband's earnings insufficient (tax returns and corporate financial statements)

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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*Hurton v Lafayette Estate*, 2018 SKQB 99

- Summary judgment application to equally divide the equity in the family home
- Court indicated that family home is to be addressed with the balance of the family property
- Other family property issues were not ready for adjudication. Summary judgment application was premature

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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Major v Major, 2016 SKQB 368

- Mother applied for summary judgment for child support and division of family property
- Family property issues could not be determined summarily – valuation was still at issue
- Child support, both prospective and retroactive, could be determined because the matter at issue was a legal matter – whether child support could be granted given that the child had ceased to be a child

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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

- Summary judgment application brought by Ministry to dismiss grandparents' custody application
- A permanent order for adoption had already been made
- Order could not be varied
- Given that this was a legal issue (not factual), summary judgment was appropriate

# SASKATCHEWAN SUMMARY JUDGMENT FAMILY LAW CASES

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*Madraga v Gatin*, 2016 SKQB 299

- There had been a prior judicial decision dividing the proceeds of the family home
- Two years later, the husband commenced an action to relitigate the division of the family home
- Action struck as an abuse of process, but Court commented that summary judgment would not have been available because of the controverted evidence filed by the parties

# SUMMARY OF SASKATCHEWAN SUMMARY JUDGMENT CASES

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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*, 2020 SKQB 81.

# CONCLUSION

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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. 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.

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