# Summary Judgments at the Court of Appeal for Saskatchewan

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# Major Themes

1. Standards of review
2. Evidentiary issues
3. Signals to the bar

# Summary Judgments

- The standard of review is framed by the issue itself.
- Rule 7-5(1):

  (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** …

# 1. Standards of Review

How will the Court will determine if there is a “genuine issue” requiring a trial?

- The actual approach to summary judgments hasn’t changed much since Barrington-Foote J (as he then was) set out the “framework” in *Tchozewski v Lamontagne*, 2014 SKQB 71:

  [31] The central question posed on a Rule 7-2 application, accordingly, is whether summary judgment will achieve what Karakatsanis J. calls … the “principal goal”, and Popescul C.J.Q.B. calls “the overarching consideration” (at para. 49, *Pervez*): that is, a fair process that results in a just adjudication of the dispute before the court. The answer to this question calls for an analysis of the affidavit and other evidence presented and the issues raised by the application, in the context of the litigation as a whole. …

# 1. Standards of Review

- The *Lamontagne* framework:
  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 …
  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 …
  3. The issue is not whether the summary judgment process is as thorough or the evidence 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…
  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** …
  5. In deciding whether there is a genuine issue requiring a 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 the proportionality in the context of the litigation as a whole. …
  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.

# 1. Standards of Review

- Built into the *Lamontagne* framework is considerable discretion and imprecise standards
- *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87:

> [81] … absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. **When the motion judge exercises her new fact-finding powers** under Rule 20.04(2.1) and **determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law. Where there is no extricable error in principle, findings of mixed fact and law should not be overturned absent palpable and overriding error**. …
>
> [82] Similarly, the question of whether it is in the "interest of justice" for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) depends on the relative evidence available at the summary judgment motion and at trial, the nature, size, complexity and cost of the dispute and other contextual factors. **Such a decision is also a question of mixed fact and law which attracts deference**.

# 1. Standards of Review

- The SKCA frames its standard of review in the same way.
- *Kyrylchuk v Kyrylchuk Estate*, 2020 SKCA 62:
  - [19] Rule 7-5(1)(a) of *The Queen's Bench Rules* provides that a judge may grant summary judgment if he or she is satisfied that there is no genuine issue requiring a trial. **The standard of review applicable to decisions made about whether to proceed under Rule 7-5 is deferential in nature**.

# 1. Standards of Review

- So that's straightforward enough: The SKCA is generally deferential under Rule 7-5, and the SKCA's approach hasn't changed since *Hryniak*.

# 1. Standards of Review

*Hawryliw v Smith*, 2021 SKCA 53

- Claim by home purchaser against seller for breach of contract, negligent and fraudulent misrepresentations, all flowing from defects in the home.
  - Defendants applied for summary judgment to dismiss all claims.
- At QB: Claims in contract and negligent misrepresentation against vendor summarily dismissed
  - Directed (pursuant to Rule 7-5(6)) that the fraudulent misrepresentation claim proceed to trial, because she could not resolve (on the basis of the affidavit evidence before her) whether certain defects were latent or patent.
- Deference in action:
  - [28] … it is **implicit** in the Chamber's judge's reasons that, after considering all of this evidence, she found herself unable to make a finding with regard to the type of defect. On the evidence before her, she was not comfortable making a finding that it was patent or latent. …
  - [29] The onus rested on [Applicant] to establish there was no genuine issue for trial. … Bearing in mind the standard of review, I can find no error … in the determination that there was a genuine issue for trial in relation to fraudulent misrepresentation by concealment.

# 2. Evidentiary Questions

- Most of the SKCA's most interesting jurisprudence on summary judgments arises out of the powers in Rule 7-5(2):

> (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.

# 2. Evidentiary Questions

- Others come out of Rule 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.

# *Deren v SaskPower*, 2017 SKCA 104

- Don't get caught "flat footed"
  - In other words: Respondent has evidentiary onus to show that there is a genuine issue requiring a trial: Rule 7-3.
- In practical terms:
  - [93] When a party applying for summary judgment has adduced evidence sufficient to make out its claims or defences *prima facie*, the responding party, whether … will run the risk of losing on the application if it does not adduce evidence that puts the applying party's evidence, and thereby its success on its claims or defences, into question: … In this way, the responding party bears the evidentiary burden of showing one or more of its defences or claims has "a real chance of success"

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# The “Shifting Burden”

- What para 93 of *Deren* means gets into the nuances of burdens of proof, onuses, and the quality of evidence before the Court.
- Enter *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43 [*Yorkton*]
  - Not a summary judgment case
    - A thorough explanation of the practical applications of, and proper approach to, evidence (especially affidavits)

# *Yorkton*

- City applied for a preservation order after learning that the respondent liquidated its assets.
  - The issue was therefore whether the respondent's dealings with its assets made it "likely" that judgment enforcement will be wholly or partially ineffective.
    - All parties agreed that the City bore the burden of proof

# *Yorkton* (Cont'd)

- Respondent tendered evidence that it had "insurance coverage," but that "the insurer does not and will not cover every professional fee and disbursement"
  - The Chambers Judge found: "but for [the Respondent's] evidence of insurance, it was obvious Mi-Sask would be unable to satisfy a judgment in favour of the City."
  - But, Chambers Judge concluded that the City failed to adduce evidence related to the extent of the Respondent's insurance coverage, and so failed to satisfy its burden. Application dismissed.

# *Yorkton* (Cont'd)

- Barrington-Foote JA allowed the appeal, and granted the preservation order.
- The high points relevant to summary judgments:
  1. Evidentiary, Persuasive, and Tactical Burdens:
     - **Evidentiary burden**: the party bearing it must be able to **point to** evidence on the record that is sufficient to **raise** the issue (para 31)
     - **Persuasive burden**: the party bearing it in respect of an issue must prove the issue (i.e. point to enough evidence to satisfy the Court) on the civil standard of proof (para 33)
       - In civil proceedings, "the question of who bears the persuasive burden is generally of no moment … It is only if the judge cannot reach a conclusion because the evidence is so evenly balanced that the persuasive burden becomes relevant" (para 34)
     - **Tactical burden**: a "common sense" obligation to adduce evidence on a point once the opposing side has satisfied its evidentiary burden (para 41).

# *Yorkton* (Cont'd)

2. Quality of evidence vs. the standard of proof:
   - **Standard of proof**: balance of probabilities.
   - **Quality of evidence**: the quality of evidence needed to satisfy the Court that an issue has been proved to the standard of proof will depend on the nature of the claim and of the evidence *capable* of being adduced by a particular party: para 51.

     Para 53: "A defendant will frequently have exclusive or, at a minimum, far better access to the financial and other information relevant to an application for a preservation order. **That would weigh in favour of a less stringent approach when determining whether the evidence is sufficiently clear and persuasive to make the plaintiff's case**. From the defendant's perspective, this could be characterized as a resulting tactical burden on the defendant to lead better evidence, such as evidence to the extent and confirmation of insurance coverage…"

# *Yorkton* (Cont'd)

3. Appellate review of Affidavit evidence: expressly rejects any standard of "reasonableness" (as in *Valley Beef Producers Co-operative Ltd. v Farm Credit Corporation*, 2002 SKCA 100) in the appellate review of affidavit evidence.

   The standard of reviewing the lower court's assessment of the evidence is the same as that for evidence adduced through *viva voce* testimony: **palpable and overriding error**: para 25.

# 2. Evidentiary Issues (Cont'd)

- More (and related issues from Rule 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.

Rule 6-14 allows for cross-examination on affidavits by Order of the Court.

# Cross-examination on affidavits

- So when does the Court of Appeal suggest applications to cross-examine should be granted?
  - *Ter Keurs Bros. Inc. v Last Mountain Valley (Rural Municipality)*, 2019 SKCA 10
    - **It's probably an error to not grant an application to cross-examine**: "because a party responding to a summary judgment is obliged to 'put its best foot forward', these considerations, generally speaking, weigh in favour of permitting cross-examination" (para 30).
- But, the decision is discretionary, and so attracts the standard of review in *Rimmer v Adshead*, 2002 SKCA 12

# Cross-examination on affidavits

- What guides the proper exercise of the Court's discretion on an application to cross-examine on an affidavit in a summary judgment application? (*Ter Keurs*, paras 29-33)
  - Rule 7-2(1): the obligation for the respondent to put in evidence and not rely on the pleadings;
  - Rule 7-2(2): the adverse inference available if a party does not cross-examine on an affidavit;
  - Rule 1-3(4): the goal of proportionality, embedded in the Rules and aimed at achieving timely and cost effective dispute resolution;
  - Other factors that weigh in favour: 1. Testing conflicts in evidence; 2. Exploring specific issues; 3. The possibility that evidence from cross-examinations may assist the parties in deciding whether to proceed by summary judgment.
  - **Factors that weigh against**: 1. Where the aim of cross-examination is to thwart dispute resolution or cause delay; 2. Where cross-examination is a fishing expedition.

# 3. Judicial signals

- Recent decisions on summary judgment are necessarily framed in the context of the "new" approach to dispute resolution that the Supreme Court endorsed in *Hryniak*, and which Saskatchewan has followed.
- *Hryniak*, in its own terms, was not just the interpretation of procedural rules.
  - It was "A Necessary Culture Shift" driven by concerns over access to justice, undue processes, protracted trials, and their accompanying high costs and delays (para 24).

# 3. Judicial Signals

- *Law Society of Saskatchewan v Abrametz*, 2020 SKCA 81, (app for leave to appeal to SCC granted)
  - The Court relied on the "culture shift" described in *Hryniak* (and the new approach to trial delays in *Jordan*) to conclude that the Law Society erred by not staying proceedings against Mr. Abrametz for delay amounting to an abuse of process: paras 8-10
  - What does this signal?
    - The aspirational language in *Hryniak* should be taken seriously.
    - *Hryniak* doesn't need to (and arguably should not) be limited to the summary judgment context

# Other leading cases

- There's plenty more to be said about the Court of Appeal's approach to evidence generally, standards of review, and how they treat applications for summary judgment.
- Other leading cases worth reviewing for your next summary judgment application:
  - *Holmes v Jastek Master Builder 2004 Inc.*, 2019 SKCA 132: exercising powers under Rule 7-5(2);
  - *Viczko v Choquette*, 2016 SKCA 52: the first SKCA decision to accept Barrington-Foote J's description of how to apply Saskatchewan's summary judgment rules in *Tchozewski v Lamontagne*, 2014 SKQB 71;
  - *George v Merasty*, 2020 SKCA 9: Chief Justice Richards explained how to modify summary judgment rules for family law disputes.

# Questions

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