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• CLASS ACTIONS AND SUMMARY JUDGMENT •

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Since the Supreme Court's 2014 decision in *Hryniak v. Mauldin*,[1] counsel have increasingly sought to use summary judgment to resolve class actions. This article sets out a taxonomy of cases where this approach has been successful and unsuccessful. We analyze a cross-section of class action summary judgment decisions and highlight the common features that have worked and those that have faltered. We conclude by discussing the implications of embracing innovative and hybrid procedures to resolve class actions.

While our analysis focuses on developments in Ontario, we suggest that these developments may provide assistance to litigants in other Canadian common law jurisdictions, where summary dismissals of class actions are becoming more common.[2]

I. SUMMARY JUDGMENT MOTIONS IN CLASS PROCEEDINGS

Historically, few class actions, once certified, have proceeded to a determination on the merits. In a 2014 study, the authors found that only 18 common issues trials had ever been conducted in Ontario.[3]

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Yet summary judgment may be shifting the frequency of merits-based adjudication in the class action context.[4] A summary judgment motion may resolve a case more quickly, minimizing costs in the process. Since the introduction of the new Rules in 2010, summary judgment motions have been brought in numerous Ontario class actions. The advantages and flexibility of summary judgment may account for the rise of these motions under the new Rules.

Summary judgment motions in class proceedings span a spectrum of complexity and involve a range of legal issues: summary judgment has been invoked to resolve discrete threshold questions (such as limitations defences) and to resolve all of the common issues in complex cases with voluminous records. Below, we examine judgments released since *Hryniak* (and a few released before it) to find patterns in the case law.

A. The Successes

Generally, summary judgment has been granted in the class action context in three situations:

1. where a threshold issue may determine the class action;
2. where the certified common issues are defined by contract interpretation; and
3. where a narrow legal issue can resolve the common issues.

Cases in all three categories commonly feature either an undisputed factual record or are contingent on a legal question that is not based on complex findings of fact or credibility (such as the interpretation of a statute).

1. Threshold Questions

Class actions that can be decided on the basis of a threshold question are well-suited for summary adjudication. The quintessential example is the application of a limitation period. Limitations period defences pose a narrow question: was the action commenced out of time? When questions of discoverability arise, however, limitations issues may be more complicated.[5]

A limitations defence can be determined easily through a summary procedure if it is undisputed when the class discovered its claim (necessitating no significant factual findings) and the plaintiff cannot rebut the presumed date of discovery. This was the case in *Fehr v. Sun Life*, in which the Court dismissed several of the class-wide claims because they were out of time. These claims were based on misrepresentations in an insurance policy. The law presumes that an insured person has read and accepted an insurance contract on delivery.[6] Given this legal presumption, it was clear when the plaintiff class discovered its claim.[7]

However, where complicated factual findings are required to determine discoverability, summary judgment may not be appropriate.[8] In *Fanshawe College v AU Optronics*,[9] the plaintiff commenced a conspiracy and price-fixing class action against Taiwanese vendors of electronics, alleging civil conspiracy and breach of the *Competition Act*. The defendants moved for summary judgment, arguing that the claims were time-barred. The Court held that there were discoverability issues that required a trial.[10] The plaintiff's affidavit evidence on when it came to know of the claim was not sufficiently tested on cross-examination to allow the Court to rule on the affidavit's veracity.[11] Moreover, the date on which the limitation period began to run was in dispute and there was insufficient evidence as to when the plaintiff ought to have discovered the action.[12]

Another threshold issue is a Court's jurisdiction over a proposed class action. While a jurisdiction motion is distinct from a summary judgment motion, a successful jurisdiction motion has the same effect as a successful pre-certification summary judgment motion. Both resolve the class action without a trial.[13]

2. *Contract Cases*

Class actions centered on simple issues of contractual interpretation may also be amenable to summary judgment because these cases may not require complex findings of fact or credibility.

Cases where the factual matrix of the contract is not significantly in issue are well-suited for determination by summary judgment. The decision in *Sankar v. Bell Mobility Inc.* centered primarily on issues of contractual and legislative interpretation (the latter discussed below), a documentary record enabling interpretation of the factual matrix of the contract without *viva voce* evidence or conflicting witnesses, and clear contractual language that rendered other evidence irrelevant.[14] The plaintiff alleged that Bell's practice of seizing unused pre-paid credits on the stated expiry date of the credits (as opposed to after the expiry date) breached its contract with purchasers. The parties brought cross-summary judgment motions to determine the contractual and statutory interpretation issues, the two core common issues.[15] To interpret the contract, Justice Belobaba reviewed uncontested documentary evidence (such as brand brochures and pamphlets at cell phone retailers).[16] There was "no ambiguity in the contractual language at issue"[17], which allowed the contract to be interpreted by way of summary judgment without resorting to further evidence.[18]

Even where surrounding circumstances are at issue, such as the reasonable expectations of the contracting parties, summary judgment may be appropriate if the factual matrix can be effectively decided on an "objective" documentary record.[19] In *O'Neill v. General Motors of Canada*,[20] GM retirees sued the company for breach of contrct following a reduction to their health and life insurance benefits. The parties and Justice Belobaba agreed to resolve the matter through summary judgment.[21] Justice Belobaba's decision in favour of the retirees was partly premised on his determinations of the class members' reasonable expectations, which he found were evidenced in the employer's handbooks from the 1960s and 1970s.[22] Based on this uncontested documentary record, it was reasonable for the employees to expect that their health care and life insurance post-retirement benefits would remain unchanged for the rest of their lives.[23]

Finally, many franchise class actions have been resolved through summary judgment.[24] Franchise

claims, a subset of contract cases, often focus on the interpretation of a franchise agreement. Even in *Fairview Donut Inc. v. The TDL Group Corp.*,[25] a franchise case that featured multiple experts and a "huge record," Justice Strathy resolved all of the common issues by way of summary judgment. The conflicts in the evidence were "irrelevant" to the main issues and there was no need for multiple findings of fact or credibility.[26]

3. Narrow Legal Issues on the Merits

Several class actions have also been decided by summary judgment where the resolution of a narrow legal issue disposed of the common issues. Unlike in cases featuring a threshold question, the narrow legal issues in these cases go to and *resolve* the common issues on the merits.

A controlling question of statutory interpretation is one such example. The second question in the *Sankar* case was whether Bell's forfeiture of the pre-paid credits violated the *Gift Card Regulation*. By applying principles of statutory interpretation, Justice Belobaba determined that the regulation did not apply to the vast majority of pre-paid credits.[27] As a result, he was able to summarily decide this issue in favour of Bell. The Court of Appeal rendered a similar decision in *Keatley Surveying v. Teranet*, where the only dispositive question was the interpretation of one provision of the *Copyright Act*.[28]

One recent decision indicates, though, that other legal issues may also be amenable to summary judgment. In *Wise v. Abbott Laboratories, Ltd.*, Justice Perell heard a summary judgment motion in a complex pharmaceutical class action.[29] The plaintiff alleged negligent design, failure to warn, negligent marketing, unjust enrichment, and waiver of tort. Despite a record of over 11,000 pages and competing expert evidence, Justice Perell held that the class action was amenable to summary judgment. The controlling issue – general causation – was dispositive of the entire action. Justice Perell held that while "there is a genuine issue about causation," he used his enhanced fact-finding powers under Rules 20.04(2.1) and (2.2) to conclude that there was no causation.[30] Because causation was a "constituent element" of all of the plaintiff's claims, he dismissed the class action.[31] Justice Perell's decision in this case also highlights a willingness of the Court to flex its enhanced summary judgment muscles in an effort to enhance access to justice and conserve judicial resources, twin goals of the *Class Proceedings Act*.

B. Where a trial is needed

Some cases are not suitable for summary judgment — particularly where many findings of fact must be made in light of multiple competing versions of evidence. Class actions alleging complex torts, which require complicated legal assessments based on competing evidence, have generally been denied summary judgment. Similarly, where multiple assessments of credibility must be made in respect of evidence from various witnesses, *viva voce* evidence may be required and summary judgment may be inappropriate.[32] In civil cases generally, judges have at times (though not always) struggled to weigh competing expert evidence on motions for summary judgment.[33]

Aggregate damages assessments may also require a trial or separate hearing for two reasons. First, aggregate damages are typically addressed in a separate hearing because the aggregate damages provisions of the *CPA* apply "only once liability has been established."[34] Second, aggregate damages assessments may require complicated and conflicting expert evidence to decide the appropriate method for quantifying aggregate damages.[35] In the only two decisions where aggregate damages have been awarded in Ontario, neither hearing proceeded by way of summary judgment.[36]

Generally, the following circumstances have contributed to the dismissal of summary judgment motions in the class action context:

1. where the Court is required to make complicated factual findings, especially if credibility is at issue;
2. where the common issues are of central importance to the legal system; and
3. where timing considerations would make a trial more proportionate, efficient, and just.

1. Complicated Factual Findings and Credibility

In cases decided prior to *Hryniak*, Courts had held that allegations of fraud, unconscionability, and misrepresentation were too complex to be decided summarily. However, the former "full appreciation of the evidence" test was used to determine these motions.[37] These cases exemplify the type of complex cases requiring significant factual findings and credibility determinations to be made on a contested record which judges still may find unsuitable for summary judgment.[38]

For example, in *Cannon v. Funds for Canada Foundation*,[39] the class action sought compensation for a complicated tax scheme that promised but failed to deliver large tax deductions for charitable contributions. Justice Strathy held that resolving the common issues would have required the Court to balance "the evidence of multiple witnesses" to determine whether the contracts at issue were vitiated or unenforceable due to fraud, unconscionability, public policy, or rescission under the *Consumer Protection Act, 2002*. Moreover, the allegations of fraud alone were serious enough to warrant a trial.[40]

2. Issues of Central Importance to the Legal System

Prior to *Hryniak*, the Court of Appeal held that summary judgment was an inappropriate procedure to resolve "unsettled matters of law" in the absence of an "undisputed factual record."[41] In *Allen v. Aspen Group Resources Corporation*,[42] for example, Justice Strathy dismissed a summary judgment motion that sought to establish that a law firm owed a novel duty of care.[43]

Post-*Hryniak*, there is at least one case suggesting that issues of central importance to the legal system should still not be resolved summarily. In *Mayotte v. Ontario*, a class of private issuers of motor vehicle licenses and registrations brought an action against Ontario for breach of contract and unjust enrichment.[44] The plaintiffs alleged that they were unfairly compensated under the private issuer scheme and that Ontario had acted in bad faith.[45] Justice Perell declined full or partial summary judgment and made no findings of fact. The Court saw the issues in the case as numerous, novel, and profound: the "class action raise[s] a profound rule of law question at the intersection of private and public law. At issue is the Court's regulation of a contract between citizens in the private sector and the state that is the public sector."[46] Justice Perell held that a full hearing was necessary to deliver justice and fairness to the litigants in light of the important issues before the Court.[47]

However, more recently, Courts have shown a willingness to use the summary judgement procedure to decide class actions involving novel legal issues that may not be fundamental to the legal system. For example, in two tort class actions asserting novel duties of care, the Courts determined liability on summary judgment motions.[48]

3. Timing

It may be improvident to move for summary judgment when the common issues trial is imminent. A summary judgment motion that pre-empts an approaching trial may not be seen as cost-effective or proportionate to the efforts already expended by counsel.

This consideration weighed heavily on the Court in *Mayotte*. When the summary judgment motion was heard, the trial was scheduled to commence two months after the release of the summary judgment reasons. Justice Perell held that it was in the "interests of justice" to wait for trial to determine the issues of public importance, especially in light of the difficult evidentiary hurdles of proving bad faith.[49] The case proceeded to trial soon after and was decided less than a year after Justice Perell's decision.[50]

II. CONCLUSIONS

As summary judgment becomes more common in class actions, counsel should assess the issues raised and determine whether they resemble those cases that have been found to be amenable to summary judgment.

However, *Hryniak* does not merely call for the increased use of the summary judgment procedure; the Supreme Court called for a "culture shift." The decision was a call to the bar and bench to recognize new models of adjudication as fair and just: "[s]ummary judgment motions provide *one* such opportunity" for this culture shift.[51]

Class actions provide the perfect context for innovation. Class actions are case managed by a judge that can "make any order [he or she] considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination."[52] For example, in a recent class action summary judgment decision, Justice Belobaba ordered a mini-trial under Rule 20.04(2.2) to allow for oral evidence on a key issue.[53] Counsel may work together, with the guidance of a case management judge, to use novel methods of adjudication such as hybrid trials in circumstances where summary judgment may not be warranted.

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1 [2014] S.C.J. No. 7, 2014 SCC 7 [*Hryniak*].

2 See e.g. *McDonald v. Brookfield Asset Management Inc.*, [2016] A.J. No. 1263, 2016 ABCA 375; *Lee v. Transamerica Life Canada*, [2016] B.C.J. No. 220, 2016 BCSC 191 (although in B.C., the summary trial process is typically relied on); *Sandoff v. Loblaw Companies Limited*, [2015] S.J. No. 589, 2015 SKQB 345.

3 Jon Foreman & Genevieve Meisenheimer, "The Evolution of the Class Action Trial in Ontario" (2014) 4:2 West. J. of Legal Stud. 1 at 5. See also *Leslie v Agnico-Eagle Mines*, [2016] O.J. No. 766, 2016 ONSC 532 at para. 18, n 22.

4 See e.g. Monique Jilesen & Julia Brown, "Fight or Flight: Summary Judgment of Settlement in Class Action" (2015) 9 Class Action Defence Quarterly 29; Neil Finkelstein, et al., "Summary Judgment Prior to Certification in Class Actions: How Microsoft and Hryniak Have Changed the Landscape" (2015), 44 Adv. Q. 229.

5 *Limitations Act, 2002,* S.O. 2002, s. 5(2); *Fehr v. Sun Life Assurance Company of Canada,* [2015] O.J. No. 5891, 2015 ONSC 6931, at para. 383.

6 *Ibid* at para. 394.

7 *Ibid* at paras. 404-435.

8 See also *The Ontario Flue-Cured Tobacco Growers' Marketing Board v. Rothmans, Benson & Hedges, Inc.*, [2014] O.J. No. 3135, 2014 ONSC 3469; aff'd [2016] O.J. No. 3567, 2016 ONSC 3939.

9 [2015] O.J. No. 1579, 2015 ONSC 2046; aff'd [2016] O.J. No. 4297, 2016 ONCA 621 [*Fanshawe*].

10 *Ibid* at paras. 62, 94-95. The Court also held that the *Competition Act* claim was subject to discoverability in the same sense as the common law claims.

11 *Ibid* at paras. 52-53, 61-62.

12 *Ibid* at paras. 95.

13 In *Airia Brands Inc. v. Air Canada*, [2015] O.J. No. 4451, 2015 ONSC 5332, the Court stayed the claims of absent foreign class members for lack of jurisdiction. Though this decision was overturned on appeal ([2017] O.J. No. 5347, 2017 ONCA 792, leave to appeal to the Supreme Court of Canada has been filed), it nonetheless shows that a jurisdictional challenge can resolve a class action without a trial.

14 [2015] O.J. No. 665, 2015 ONSC 632, aff'd [2016] O.J. No. 1706, 2016 ONCA 242, aff'd on reconsideration [2017] O.J. No. 1818, 2017 ONCA 295, leave to appeal denied [*Sankar*].

15 *Ibid* at para. 2.

16 *Ibid* at para. 21.

17 *Ibid* at para. 25.

[18] *Ibid* at para. 27. See also *Magill v. Expedia Inc.*, [2014] O.J. No. 1553, 2014 ONSC 2073 [*Expedia*].

[19] *O'Neill v. General Motors of Canada*, [2013] O.J. No. 3239, 2013 ONSC 4654 at para. 78 [*GMCL*]; *Ibid* at para. 24.

[20] *Ibid.*

[21] *Ibid* at para. 22.

[22] *Ibid* at para. 30-36.

[23] *Ibid* at para. 36. Justice Belobaba came to a different conclusion regarding the sub-class of executive retirees. See *ibid* at paras. 97-102.

[24] See *Zwaniga v. Johnvince Foods Distribution*, [2012] O.J. No. 4345, 2012 ONSC 5234, aff'd [2013] O.J. No. 1916, 2013 ONCA 271; *1250264 Ontario Inc. v. Pet Valu Canada*, [2014] O.J. No. 5152, 2014 ONSC 6056; *Dean v. Mister Transmission (International) Limited*, [2011] O.J. No. 414, 2011 ONSC 553, aff'd [2011] O.J. No. 4759, 2011 ONCA 670.

[25] [2012] O.J. No. 834, 2012 ONSC 1252, aff'd [2012] O.J. No. 5775, 2012 ONCA 867, leave to appeal denied [*Fairview*].

[26] *Ibid* at para. 670.

[27] *Sankar*, *supra* note 14 at paras. 42-43.

[28] *Keatley Surveying Ltd. v. Teranet Inc.*, [2017] O.J. No. 5023, 2017 ONCA 748. See also *Wright v. United Parcel Service Canada Ltd.*, [2011] O.J. No. 3936, 2011 ONSC 5044; *Krajewski v. TNow Entertainment Group, Inc.*, [2013] O.J. No. 5624, 2013 ONSC 7502; *Wood v. CTS of Canada Co.*, [2017] O.J. No. 4956, 2017 ONSC 5695.

[29] *Wise v Abbott Laboratories, Limited*, [2016] O.J. No. 1600, 2016 ONSC 7275. See Neil Finkelstein, Brandon Kain & Byron Shaw "A Wise Development? The Growing Trend Towards Summary Judgment in Class Actions" (2017) 47 Adv. Q. 164.

[30] *Wise v Abbott Laboratories, Limited*, [2016] O.J. No. 1600, 2016 ONSC 7275, at para. 347.

[31] *Ibid* at para. 14.

[32] See *Baywood Homes Partnership v. Haditaghi*, [2014] O.J. No. 2745, 2014 ONCA 450 at paras. 44-45.

[33] See *Maracle v Mascarin*, [2016] O.J. No. 557, 2016 ONSC 537 at para. 40; *Frame, et al. v Watt, et al.*, [2016] O.J. No. 459, 2016 ONSC 718 at paras. 33, 46, 49.

[34] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] S.C.J. No. 57, 2013 SCC 57 at para. 132. In *Ramdath v. George Brown College*, the damages assessment trial ([2014] O.J. No. 3031, 2014 ONSC 3066 and [2014] O.J. No. 3682, 2014 ONSC 4215, var'd [2015] O.J. No. 6850, 2015 ONCA 921) was heard after liability was established at the common issues trial ([2012] O.J. No. 5389, 2012 ONSC 6173).

[35] *Ramdath v. George Brown College*, [2014] O.J. No. 3031, 2014 ONSC 3066 at para. 12, var'd [2015] O.J. No. 6850, 2015 ONCA 921. The parties agreed to a damages formula, but the experts debated how indirect costs could be determined in the aggregate (*ibid* at para. 25).

[36] *Ramdath v. George Brown College*, [2014] O.J. No. 3031, 2014 ONSC 3066, var'd [2015] O.J. No. 6850, 2015 ONCA 921(5-day damages trial); *Trillium Motor World Ltd. v. General Motors of Canada Limited*, [2015] O.J. No. 3602, 2015 ONSC 3824, at para. 541, var'd [2017] O.J. No. 3478, 2017 ONCA 544 (41-day liability and damages trial).

[37] *Combined Air Mechanical Services Inc. v. Flesch*, [2011] O.J. No. 5431, 2011 ONCA 764 at para. 50.

[38] See also John M. Picone & Chelsea Nimmo, "Summary Determinations in Class Proceedings" (2014) 9:4 Class Action 621.

[39] [2012] O.J. No. 168, 2012 ONSC 399, leave to appeal denied, [2012] O.J. No. 5117, 2012 ONSC 6101 [*Cannon*].

[40] *Ibid* at para. 443.

[41] *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96 at para. 71.

[42] [2012] O.J. No. 2924, 2012 ONSC 3498 [*Allen*]

[43] *Ibid* at paras. 39-40.

[44] [2015] O.J. No. 3432, 2015 ONSC 4196 [*Mayotte*].

[45] *Ibid* at para. 16.

[46] *Ibid* at paras. 5, 22.

[47] *Ibid* at para. 25.

[48] *Williams v. Toronto (City)*, [2016] O.J. No. 19, 2016 ONSC 42, aff'd [2016] O.J. No. 4718, 2016 ONCA 666; *Lavender v Miller Bernstein*, [2017] O.J. No. 3646, 2017 ONSC 3958.

[49] *Ibid* at para. 24.

[50] *Mayotte v Ontario*, [2016] O.J. No. 921, 2016 ONSC 1233.

[51] *Hryniak*, *supra* note 1 at paras. 2-3 [emphasis added].

[52] *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 12.

[53] *Brown v. Canada (Attorney General)*, [2017] O.J. No. 692, 2017 ONSC 251, at para. 45.