

Litigation - Canada

Court of Appeal on judicial use of enhanced summary judgment powers

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Introduction

The Ontario Court of Appeal has released a decision which signals that judges ought to exercise their expanded summary judgment powers under Ontario's Rules of Civil Procedure where highly conflicting evidence in the written record makes a credibility assessment impossible.⁽¹⁾ *Trotter v Trotter*⁽²⁾ was decided 10 months after the Supreme Court's decision in *Hryniak v Mauldin*,⁽³⁾ which was hailed as expanding the availability of summary judgment and improving access to justice. However, the court in *Trotter* noted that even though *Hryniak* expanded the availability of summary judgment, in this case the justifications that the motion judge gave for granting summary judgment did not even satisfy the lower threshold from *Hryniak*. Although motion judges were vested with enhanced powers to assess conflicting evidence after the amendment of the rules in 2010, they must also engage in a credibility analysis in the face of vastly different factual assertions, and if that cannot be done on the written record alone, "that should be a sign that oral evidence or a trial is required".⁽⁴⁾

Background

Trotter revolved around Rule 20.04 of the rules, which was amended in 2010 to expand the availability of summary trial. Whereas the test used to be whether there was "a genuine issue for trial", the appropriate question now is whether there is a "genuine issue requiring trial". By virtue of Rule 20.04 (2.1), motion judges now have the power to weigh the evidence, evaluate the credibility of a deponent and draw any reasonable inferences from the evidence to determine whether there is a genuine issue requiring a trial. The caveat is that these powers cannot be exercised where it is in the "interests of justice" for such powers to be exercised only at a trial. In addition, Rule 20.04(2.2) now gives motion judges the power to consider oral evidence by "mini-trial".⁽⁵⁾

Facts

The parties in *Trotter* were family members embroiled in a bitter dispute over their mother's estate. In two related actions, the appellants (two of the deceased's children) challenged the validity of the deceased's wills and a series of land transfers before death on the basis of undue influence. Two significantly different factual assertions were put forward by the opposing parties. The appellants' evidence portrayed a pattern of isolation, domination and influence that the respondent had exerted over his mother, including detailed descriptions of explosive anger and temper. On the other hand, the respondent's position was that he had cared for and looked after the deceased, supporting her financially and investing time, resources and energy into improving her properties, and that he left university to do so while the other siblings moved away. As such, the respondent argued that the unequal treatment of the children under the wills was expected, as the appellants were estranged from their mother and did not provide care for the deceased. The respondent brought a successful motion for summary judgment, thereby dismissing the claim of undue influence.

Motion judge's decision

On the summary judgment motion, only written evidence – including affidavits, cross-examination transcripts and documentary exhibits – was filed. The motion judge heard no oral evidence. Based on the written record, the respondent successfully argued that a trial was not required.

The motion judge granted summary judgment, finding that the undue influence arguments amounted to "bald allegations" and that there was no evidence of coercion for the *inter vivos* transfers. On the basis of the written record, the motion judge determined that the deceased was an independent person who had made her own plans for her will, and that there was no evidence that the respondent

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had pressured her or that she had been affected by any influence from the respondent.

Hryniak

After the summary judgment motion was heard in *Trotter*, but before the Ontario Court of Appeal decision was released, the Supreme Court released its decision in *Hryniak*,⁽⁶⁾ where it considered the amended rules to summary judgment in Ontario. *Hryniak* provides a two-step framework:

- The motion judge is to determine whether there is a genuine issue "requiring trial".
- If there is no genuine issue requiring trial, the judge must determine whether a trial can be avoided using the expanded powers without offending the interests of justice.⁽⁷⁾

The Supreme Court went on to hold that the new rules establish that a trial is no longer the default, as demonstrated by the expanded summary judgment powers. With these new powers, a motion judge has a greater ability to dispose of cases through weighing evidence, evaluating credibility and drawing inferences at the summary judgment stage.⁽⁸⁾ The focus on access to justice and the ability of a summary judgment motion both to advance and to hinder access to justice feature prominently in the Supreme Court's decision, a theme which was carried through to *Trotter*.⁽⁹⁾

Ontario Court of Appeal decision

The principal question that the Ontario Court of Appeal considered was whether the motion judge used the correct approach to summary judgment under Rules 20.04(2.1) and (2.2) in a case that involved highly contested facts.

The court in *Trotter* emphasised the caveat provided in *Hryniak* that although there are benefits to disposing of a case at the summary judgment stage, there is a risk that the evidence will be improperly analysed. A case should be dismissed only through a fair process that ensures a just adjudication of the dispute.⁽¹⁰⁾ In this case the judge improperly analysed the evidence by:

- unfairly labelling the appellants' arguments as "bald allegations";
- insufficiently analysing the credibility and undue influence issues; and
- improperly analysing a key piece of evidence.

The appellants' arguments as to undue influence could not be described as "bald allegations" for two reasons. First, it was incumbent on the judge to consider the evidence regarding the respondent's temper, the deceased's fear of him and his attempts at manipulation.

The court went on to criticise the motion judge for failing to appreciate the circumstantial evidence that the deceased did not want to prefer the respondent over her other children. Similarly, the motion judge's findings on undue influence did not address the deceased's vulnerability and the allegations of the respondent's dominance and control. These problems were compounded by legal errors in the motion judge's consideration of undue influence.⁽¹¹⁾ Applying *Hryniak*, the court found that the motion judge never moved to the second step of the test for summary judgment, failing to weigh the evidence, evaluate it or make findings of credibility.⁽¹²⁾

Comment

Although the court listed examples of the types of analysis that the motion judge in *Trotter* was required to undertake, summary judgment will not require the same procedures in every case. Since *Trotter* was a will challenge case involving allegations of undue influence, credibility was an important issue. For that reason, the motion judge was required to provide some findings on credibility. It may have been open to the motion judge to evaluate the cross-examination as nothing more than witness badgering and mere suspicion, as she did in this case,⁽¹³⁾ but her failure to consider oral evidence or conduct a proper credibility analysis left the court in a position where it could not let the decision stand.⁽¹⁴⁾ In other cases, where credibility is not as crucial an issue, the requirements may be different. However, despite the court's criticism of the motion judge's decision, the court did recognise that summary judgment may have been appropriate had the motion judge used the expanded powers to hear oral evidence.⁽¹⁵⁾ *Trotter* is a signal that in appropriate cases, judges ought to – and indeed must – make use of their expanded powers under the rules, including the use of mini-trials, in order to make necessary credibility findings to support their ultimate decision on the motion.

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Endnotes

(1) RRO 1990, Reg 194.

(2) 2014 ONCA 841.

(3) 2014 SCC 7 [*Hryniak*].

(4) *Trotter*, *supra* note 2 at para 55.

(5) Rules, *supra* note 1, r 20.04.

- (6) *Hryniak*, *supra* note 3.
- (7) *Ibid* at para 66.
- (8) Rules, *supra* note 1, r 20.04 (2.1).
- (9) *Trotter*, *supra* note 2 at para 48.
- (10) *Ibid* at para 49, citing *Hryniak*, *supra* note 3 at para 28.
- (11) *Ibid* at paras 58-64.
- (12) *Ibid* at paras 73-74.
- (13) *Trotter v Trotter*, 2013 ONSC 1182 at para 123.
- (14) *Trotter*, *supra* note 2 at para 55.
- (15) *Ibid* at para 80.

Jon Pinkus, student, assisted with the preparation of this update.

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