Fifteen years ago, the late Justice George Finlayson was invited to deliver the keynote address at the CBAO’s Civil Litigation/Insurance Sections End of Term Dinner. The Speakers Committee wanted his thoughts on the election of judges or judicial activism, but he had something he wanted to get off his chest: "ambitious" summary judgment (or "Rule 20") motions, which were getting some counsel into trouble in his court.

After a careful review of the Rule 20 case law, he paused, pursed his lips and cautioned the audience to keep their Rule 20 motions "simple." Impulses to "enlarge the scope of the rule to include torts ... such as negligence" were to be suppressed; "ambitious" motions "founder ... in our court." Counsel would do well to remember that Rule 20 descends from Rule 33, the Specially Endorsed Writ. Rule 20's highest and best use was in straightforward "breach of contract suits, actions for the recovery of loans, mortgage and other debt enforcement proceedings, and ... generally cases for the recovery of land or property or money."

Justice Finlayson summed up:

Under the Rules of Civil Procedure, the plenary trial remains the model for the resolution of disputes. Rule 20 does not represent court reform, or the reform of the adversary system, in disguise.

Fifteen years later, on January 23, 2014, in Hryniak v. Muddin, Justice Karakatsanis for a unanimous Supreme Court of Canada deemed "too high" the "premium" the Court of Appeal for Ontario placed on the "conventional trial" - an unrealistic "alternative for most litigants" - and anointed Rule 20 an instrument of court reform.

According to the court:

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.

At some point between that End of Term Dinner in 1999 and January 2014, a combination of court gridlock and a runaway hourly rate pushed the plenary trial beyond the grasp of ordinary Canadians. Along the way, Canada slid to 11th place in the World Justice Project Rule of Law Index, a fact that rightfully displeased the high court.

And Justice Finlayson’s beloved "plenary trial" was the immediate casualty. How and why did this happen? And what does all this mean for the next generation of End of Term Dinner audiences?

The Hryniak record is notable for its massive size and credibility issues. At bottom, it was a case in which the defendant defrauded the plaintiffs of the funds they invested with him. Justice Finlayson would have found it "ambitious." The Court of Appeal held that summary judgment was not appropriate on this record but declined to set aside the motions judge’s decision, given the effort expended adjudicating the issue. Now, summary judgment is available where it is "just and efficient" - no more, no less - regardless of the size and nature of the record.

Hryniak of course is not the first time that the bench and the bar have wrung their hands about summary judgment. Before this most recent demand for a paradigm shift there were the 1985 amendments, the Civil Justice Review and the 2010 amendments.

This has not been a waste of resources. We should fuss about such things, because the basis upon which a litigant will be deprived of a trial is an important issue. There are parallels between the Rule 20 court, as a justice gatekeeper, and other resource-constrained, mission-critical features of a civil society such as health care and education.

The Rule 20 court is the emergency room of the justice system. Both assess cases that have no real screening mechanism before they arrive (the courts have yet to recalibrate Rule 21, which governs the determination of an issue before trial). Both take a good, hard look at the presenting complaint and make a judgment whether to discharge or admit for more prolonged and expensive treatment. As summary judgment is to law what the emergency room is to medicine, arbitration is to the justice system what private schools are to public education: an alternative for the well-heeled who pay handsomely for the privilege of opting out and selecting their judge, the return of results on time, and ready telephone and e-mail access to the decision maker.

So where do we stand since Justice Karakatsanis mandated a culture shift in the delivery of civil justice? Has the plenary trial been rendered a chimera, a lion-headed, goat-bodied, serpent-tailed creature of litigation mythology? Is the plenary trial still the mode for the resolution of disputes? Or has it been driven to extinction by e-discovery,
it will be a long time before Rule 20 makes another appearance in the Supreme Court...

...endorsement he was writing on the back of the motion record traversing the case to the next assignment court.

I will assume that the reader is by now familiar with the road map written by the court in Hryniak. This is not an exposition of the difference between "no genuine issue for trial" and "just and efficient." It will be a long time before Rule 20 makes another appearance in the Supreme Court, and the exact parameters of "just and efficient" will be hashed out in motions courts across the province and in our Court of Appeal.

Six months into the Hryniak culture shift, where do things stand? Has the gridlock of the trial list simply shifted to motions court? Is the Court of Appeal flooded with litigants wrongly deprived of the trial narrative as many predicted? (I'll readily admit I was one of them.) The last six months have been interesting. As Hryniak has been absorbed by courts across the country and at all levels, provincial and federal.

It seems that the culture shift has had a positive effect. If one takes a close look at the summary judgment appeals in the Court of Appeal for Ontario post-Hryniak (at last count, there were seven), it is difficult to discern any fundamental change in the appellate review of summary judgments. Reading these decisions leads to the conclusion that the catastrophic consequences predicted have failed to materialize - Hryniak has not caused a sea change in the court's approach.

King Lofts Toronto Ltd. v. Emmons is perhaps the most aggressive application of the Hryniak imperative. The Court of Appeal for Ontario considered a solicitor's negligence case in which Justice Perras granted summary judgment. The twist was that he granted judgment to the responding party who had not asked for it. In rejecting the request to allow the appeal judgment for solicitor's negligence against the law firm, the court crisply noted:

In oral argument, the appellants added a new ground of appeal that the motion judge erred in granting judgment in favour of a party who had not given advance notice of a claim for summary judgment. There are two points in response to this:
1) The appellants did not request an adjournment at the time, and
2) The Supreme Court of Canada in Hryniak v. Makklin... has approved a "cultural shift" requiring judges to manage the process in line with the principle of proportionality in the application of Rule 20.

Interestingly, a review of activity across the country reveals that the far more interesting and significant impact of Hryniak has been on the litigation process outside the Rule 20 envelope. And, on balance, the Rule has been applied in a way that, with the right kind of creative, trial-focused lawyering, ensures the survival of the conventional trial.

Very quickly after its release, Hryniak was picked up by trial and appellate judges across the country as an invitation to take a hard look at procedure and its relationship to a speedy disposition. The Supreme Court's decision has lent significant scope for counsel to bring cases to trial in a quicker, more efficient and focused way than has any other access to justice initiative. Hryniak gives creative and trial-focused counsel and judges the tools to streamline trial-worthy cases into the most direct route to judgment. It also gives judges the moral authority to press the case for trial.

A good starting point is the February 14, 2018, decision of Associate Chief Justice Smith of the Supreme Court of Nova Scotia in Carew v. Bank of Nova Scotia. The case was not a summary judgment case. It was a classic situation of an employment case nearing trial, mixed in procedural jockeying about production and discovery. In cutting through, Smith A.C.J. said:

I referred counsel to the recent Supreme Court of Canada decision in Hryniak... In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. While these comments were made in the context of a summary judgment motion, in my view, they are applicable to all civil cases in Canada.

Just two weeks before, on January 29, in Attorney General of Canada v. Pictou Landing Band Council, Justice Stratus in the Federal Court of Appeal invoked Hryniak to modify the rules governing intervention by, among other things, adding an additional Hryniak consideration: Is the proposed intervention inconsistent with the imperatives in Rule 3, namely securing "the just, most expeditious and least expensive determination of every proceeding on its merits?"... Considerations such as these should now pervade the interpretation and application of procedural rules. Hryniak v. Makklin...

The day after its release, Hryniak was applied by the Yukon Small Claims Court in Hedmann v. Attorney General of Canada, in which Luther T.C.J. commented:
I would like to bring to the parties' attention a Supreme Court of Canada decision, which ironically was just released yesterday, called Hryniv v. Mouldin... That case specifically examines the Ontario rules for civil procedure, and Rule 20... It also sets an overall tone for a balance between procedure and access struck by our justice system and must come to reflect modern reality and recognize that new models of adjudication can be fair and just. On March 6, 2014, the Ontario Labour Relations Board, in United Brotherhood of Carpenters & Joiners of America, Local 27 v. Donia Aluminum & Roofing Ltd., invoked Hryniv in a messy displacement application for certification. In dealing with contentious procedural wrangling, the board said: The Board's ruling herein is in keeping with the emerging doctrine of proportionality in the Canadian justice system: see ... Hryniv v. Mouldin... The legal environment should afford "timely and affordable access to the civil justice system" with "proportional procedures tailored to the needs of the particular case." In GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc., Justice Brown was guided by Hryniv in the disposition of a contested motion about a receiver's sale of property with these words: Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigation given the nature and complexity of the litigation. Hryniv has struck a chord with trial and appellate judges across the country. They, like litigants, are frustrated by gridlock in the "conventional" trial system. It has conferred on them an enhanced degree of procedural autonomy and discretion to manage cases to judgment -- even in the context of the conventional trial -- by weighing their procedural and substantive proportions.

I disagree that too high a premium can be placed on the conventional trial and its narrative. No doubt there are cases -- many, in fact -- in which the trial narrative is not needed and the point can be adequately made on a paper record. But there are many in which it can not. Hryniv need not herald the demise of the conventional trial. But the trial bar would be foolish to ignore the message it carries. That message is that the bench is losing confidence in the ability of counsel and the system to deliver justice to litigants through the plenary trial. It is incumbent on the trial bar to embrace this message and employ Hryniv as a tool to revive it, or some substantial part of it. The discretion the Supreme Court conferred on the modern advocate and superior court judges affords us the opportunity to rebuild the confidence lost in the conventional trial. In a February 2014 paper titled "Utrum Regulae Sint Impedimenta Vel Non? Part II: The Hryniv Addendum," Justice Brown made the case for why the civil trial is worth saving. He invited counsel to "engage in a sober reality check" before reading Hryniv as an invitation to substitute Rule 20 for the civil trial.

He cautioned that in a world of finite judicial resources, the more summary judgment and ancillary scheduling motions on the docket, the longer the wait for their disposition. He pointed out that, as a result of the efforts of the Toronto Region Civil Review Working Group led by R.S.J. Morawetz, civil trials generally, and particularly long ones, are much more available and encourage the bar to take advantage of that momentum. It bears remembering that when all is said and done with the motion, reserve and appeal, summary judgment is often neither quicker nor cheaper than a directed trial.

We need to uncouple ourselves from conventional thinking about trials and, as importantly, conventional trial economics. We need to...
I accept that there are serious issues with bifurcated liability and damages trials, but there are many cases in which this approach serves the litigation realities well, provided production can be made on both issues. A finding of liability one way or the other very often leads to a negotiated damages resolution. And there is great scope to apply *Hryniak* to craft an expedited procedure to determine damages with a liability finding in hand. More often than not, a liability finding will promote sensible resolution discussions.

Trial counsel – those committed to preserving the civil trial, which we have as a privilege, not a constitutional right like our colleagues at the criminal bar – need to get serious about the problems in our approach that led to the Supreme Court’s loss of confidence in the value of the conventional civil trial.

The decision is ours. We either adapt our practices and approach – and apply *Hryniak* – and the manner in which it has been embraced across the country, as a springboard to persuade JPs, local administrative judges and the gatekeepers in Rule 20 courtrooms that the trial process can and does work – or we resign ourselves to a glorified motions practice. The justice system, like any other core value in a civil society, is its education or medicine, has to evolve. We expect our caregivers to practise universal “modern medicine” in a resource-constrained environment. We should demand no less of ourselves.

Notes
2. 2014 SCC 7 at para 1 [Hryniak]
4. 2014 NSCC 1 at para 34.
5. 2011 ONCA 21 at para 6 (templates in original).
6. 2014 YKSC 2 at para 21 [Card 10].
7. 2011 Card H 10 at para 38 [ON LTB].
8. 2010 ONCA 1173.
10. I am not a fan of this for many cases, as I think the most revealing part of a case is often the examination in chief. Evidence in chief scripted by lawyers is in many respects an artificial exercise, but that's a topic for another day.

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**Name:** Gordon Capern  
**Firm:** Fulbright & Jaworski LLP  
**Date:** April 8, 2014

**Playlist:**
1. The Wine - The National
2. Amsterdam - Coldplay
3. Anthems for a 17 Year Old Girl - Broken Social Scene
4. Skinny Love - Bon Iver
5. Feels Like Home - Randy Newman
6. Gimme Shelter - Rolling Stones
7. Gimme Sympathy (acoustic, iTunes version) - Metric
8. High and Dry - Radiohead

**Name:** Maureen Littlejohn  
**Firm:** Davies Ward Phillips & Vineberg LLP  
**Date:** March 22, 2014

**Playlist:**
1. Pompeii - Bastille
2. The Modern Leper - Frightened Rabbit
3. Nowhere With You - Joel Plaskett
4. Second Hand News - Fleetwood Mac
5. Fat Bottomed Girls - Queen
6. It's Tricky - Run DMC
7. Ballroom Blitz - Sweet
8. Here Comes the Hotstepper - Ini Kamoze
9. Float On - Modest Mouse
10. Pensacola - Manchester Orchestra

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