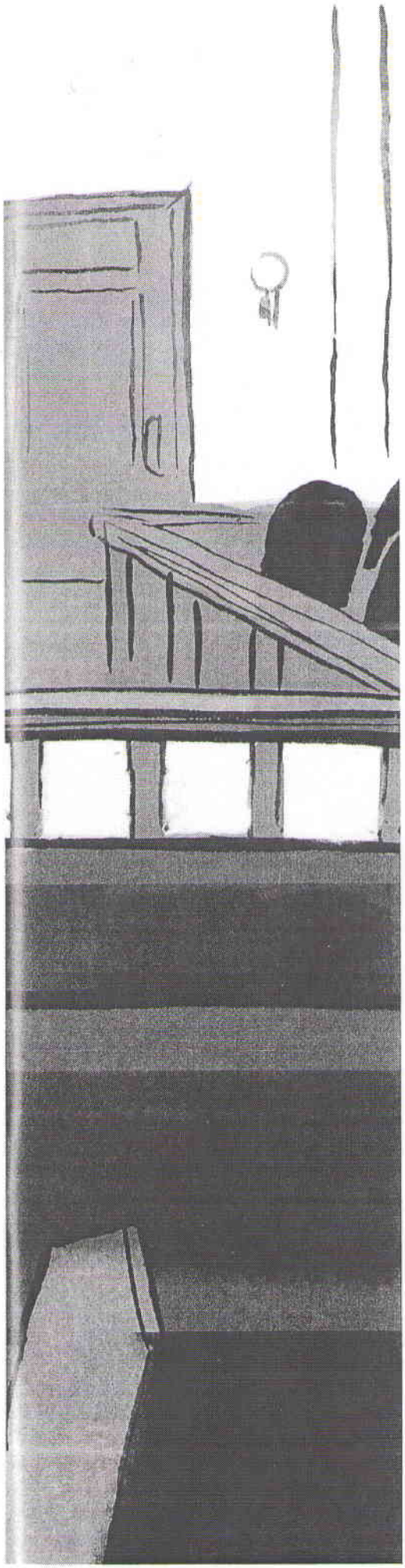

Jonathan Lisus

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 mode for the resolution of disputes. Rule 20 does not represent court reform, or the reform of the adversary system, in disguise.[1]

Fifteen years later, on January 23, 2014, in *Hryniak v. Mauldin*, 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.[2]

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,

contested discovery plans, fast-rising hourly rates and gatekeepers who view a trial as a failure of justice? How will litigation history judge the decision – as a requiem for the vanishing trial or as a catalyst for modern trial procedure?

In the immediate aftermath of the Supreme Court's ruling, the trial bench and bar held its breath. Plaintiff's counsel braced for an onslaught of tactical summary judgment motions. Trial judges warily eyed the court's preference for motions judges to case manage and seize themselves of actions that survived Rule 20. An associate in our office, on his triumphal return from Central East, reported moving counsel's effort to salvage what he could after his motion was dismissed by alerting the judge to the Supreme Court's expectation that he would seize himself of the action and case manage it to trial. "That's obiter," the motion's judge observed dryly without looking up from the endorsement he was writing on the back of the motion record traversing the case to the next assignment court.

> "t will be a long time before Rule 20 makes nother appearance in the Supreme 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 wrongfully deprived of the trial narrative as many predicted? (I'll readily admit I was one of them.) The last six months have been interesting ones as *Hryniak* has been absorbed by courts across the country and at all levels, provincial and federal.

It seems to have touched a nerve in positive and unexpected ways.

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 Perell 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 appellant 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 appellant did not request an adjournment at the time; and
>
> 2) The Supreme Court of Canada in *Hryniak v. Mauldin* ... has approved a "culture shift" requiring judges to manage the process in line with the principle of proportionality in the application of Rule 20.[3]

Although one might read *King Lofts* as a departure from the pre-*Hryniak* approach, I do not think it was. On balance, the cases decided in the Court of Appeal reflect the same sensible approach to reviewing cases that cannot survive the good hard look.

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, 2014, decision of Associate Chief Justice Smith of the Supreme Court of Nova Scotia in *Garner v. Bank of Nova Scotia*. The case was not a summary judgment case. It was a classic situation of an employment case nearing trial, mired 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 judgement motion, in my view, they are applicable to all civil cases in Canada.[4]

Just two weeks before, on January 29, in *Attorney General of Canada v. Pictou Landing Band Council*, Justice Stratas 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. Mauldin* ...[5]

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 *Hryniak v. Mauldin* ... 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.[6]

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 *Hryniak* in a messy displacement application for certification. In dealing with contentious procedural wrangling, the board said:

> [T]he Board's ruling herein is in keeping with the emerging doctrine of proportionality in the Canadian justice system: see ... *Hryniak v. Mauldin* ... [T]he legal environment should afford "timely and affordable access to the civil justice system" with "proportional procedures tailored to the needs of the particular case."[7]

In *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, Justice Brown was guided by *Hryniak* 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.[8]

Hryniak 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.

Hryniak 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 *Hryniak* 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 *Hryniak* Addendum,"[9] 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 *Hryniak* 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 dockets, 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

take a good look at our approach and ask a simple question: *Do I want to try my cases, or do I not?* If we do consider ourselves trial counsel, we must be prepared to push judges, using *Hryniak* to get cases to trial. We must also be prepared to address the economics of trials.

We must be prepared to make a real contribution to the preservation of the trial. We must embrace the fact that, if we do not try cases, we are not complete as counsel. We should not be deterred from trying them by the economics. There is an inherent value in the trial process, responsibly conducted. And we must be prepared to conduct trials on the basis of alternative fee arrangements. This is an important issue for the future of the trial and one which the entire civil trial bar should embrace. There is no better way to educate young counsel about the importance of pleadings, productions, affidavits of documents and examinations for discovery (and all those refusals that seemed such a good idea at the time) than living with all those steps as they play out in the fullness of a trial.

Hryniak gives us the opportunity to persuade the bench to allow us to do just that: directed trials of issues, hybrid trials with evidence in chief by affidavit,[10] stop-clock trials and bifurcated proceedings.

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 RSJs, 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, be it 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

1. George D. Finlayson, "Address to CBAO Civil Litigation/Insurance Sections End of Term Dinner – Subject: Summary Judgment Motions and Appeals", online: Court of Appeal for Ontario, Archives <http://www.ontariocourts.ca/coa/en/ps/speeches/address.htm>.
2. 2014 SCC 7 at para 1 [*Hryniak*].
3. 2014 ONCA 215 at para 14 [*King Lofts*].
4. 2014 NSSC 63 at para 34.
5. 2014 FCA 21 at para 10 [emphasis in original].
6. 2014 YKSM 2 at para 21 (CanLII).
7. 2014 CanLII 10764 at para 18 (ON LRB).
8. 2014 ONSC 1173.
9. Online: Whaley Estate Litigation, <http://whaleyestatelitigation.com/resources/WEL_Brown_J_re_Hryniak_Institute.pdf> at 1.
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.

Name: Gordon Capern
Firm: *Paliare Roland Rosenberg Rothstein LLP*
Date: April 8, 2014
Playlist:
This is part of a larger playlist called "La Savane," named after a beautiful place owned by a good friend to many of us at TAS.
1. All 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 session 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*