Hryniak *fallout*

Is summary judgment appropriate for class actions?

BY JULIUS MELNITZER
For Law Times

In *Hryniak v. Mauldin*, the Supreme Court of Canada both liberalized and revitalized Canadian courts' approach to summary judgment. But most of the extensive commentary so far on the case's implications has focused on traditional litigation.

To be sure, there have been a few class actions resolved by summary judgment in Canada both before and after *Hryniak*, including the Ontario Court of Appeal's 2012 decision in *Fairview Donut Inc. v. The TDL Group Corp.* and the Alberta Court of Appeal's 2014 decision in *Windsor v. Canadian Pacific Railway Ltd.*

"As many class actions are decided on questions of law or on records that are largely documentary, the procedure is likely appropriate in many more cases than we've seen so far," says Rebecca Jones of Lenczner Slaght Royce Smith Griffin LLP in Toronto.

"I expect that we'll see more summary judgment motions going forward."

The most recent application of the summary judgment procedure to class actions came in the January 2015 decision of Justice Edward Belobaba of the Ontario Superior Court of Justice in *Sankar v. Bell Mobility*.

The class action concerned prepaid cellphone services and the expiry of unused top-up payments. As the plaintiffs hadn't pleaded promissory estoppel or misrepresentation, which required proof of individual reliance that would have made their action inappropriate for certification, the court certified the action, in Belobaba's words, "as a straight-forward contractual and statutory interpretation case."

The core common issues were whether Bell Mobility Inc. had breached its contract with class members by seizing unused prepaid credits before it was contractually entitled to do so and whether the expiry and forfeiture of the credits was contrary to provincial gift-card regulations.

After noting it was a "textbook" case of a class action suitable for summary judgment because it involved a pure question of contractual interpretation that the court could determine on the documentary record, Belobaba found against the plaintiffs on both issues and dismissed the claim.

"*Hryniak* has now been around for some time," says Jones.

"More people are thinking about it in the context of class actions and more judges seem willing to do it."

Jones cites *Ramdath v. George Brown College*, a case in which the appeal court upheld a judgment in favour of George Brown College students who had been misled as to the benefits of the school's international business management program.

"The evidence in that case went in entirely through readins and affidavits, and it may well be that it could have been decided on summary judgment at first instance," says Jones. "Although it did proceed as a common issues trial, it was not that different from a summary judgment proceeding."

According to Jones, the objectives of summary judgment overlap with the Class Proceedings Act's enunciated goal of promoting access to justice.

"The things that make a case amenable to certification can also make it amenable to summary judgment," says Jones.

"And both invoke the courts' concern about efficiency and access to justice."

But Jonathan Ptak of Koskie Minsky LLP in Toronto has his doubts.

"The jury's still out because the themes and emphasis in *Hryniak* focus on using summary judgments when it is proportional and effective to do so," he says.

"In class actions — at least in large ones — proportionality is not as relevant as it might be in individual cases."

Still, Ptak adds, judges must ultimately answer the same question whether they're dealing with individual cases or collective ones.

"It all comes down to whether the facts and issues are simple and straightforward and narrow," he says.

"If the court embarks on a summary judgment procedure where these conditions are not present, the judge will be swamped with a mountain of evidence on a paper record that may well include conflicting expert reports. And what will the motions judges do with that if they don't have the machinery of a trial with which to do it?"

There are also issues related to the timing of a summary judgment motion.

"If you choose to do it with the certification motion, it can expand the inquiry because it takes you into a full-blown consideration of the merits," says Ptak.

'The things that make a case amenable to certification can also make it amenable to summary judgment,' says Rebecca Jones.

"That, in turn, raises delay issues, particularly regarding the certification motion."

As Ptak sees it, backing up a case early on with a cumbersome summary judgment motion can also affect access to justice.

"It substantially affects the flow of proceeds by making things more expensive and introducing cost consequences at an early stage," he says.

In attempting to discern *Hryniak*'s impact on class actions, it's instructive to look at the statistics regarding summary judgment motions generally in the wake of the landmark ruling.

Gord McGuire of Adair Barristers LLP in Toronto has discovered that 145 rulings emanated from summary judgment procedures in the 12 months following *Hryniak*. That was 21 fewer than during the 12 months preceding the decision.

To be sure, these numbers don't speak to the summary judgment motions pending, reserved or decided without reasons and perhaps by endorsement.

But what may be more revealing are the statistics related to the outcomes of summary judgment motions. According to the statistics, Ontario judges granted 55 per cent of summary judgment motions, partially allowed nine per cent, and dismissed 36 per cent in the year preceding *Hryniak*. In the 12 months thereafter, judges granted 54 per cent, partially allowed 10 per cent, and dismissed 36 per cent.

These numbers lend themselves to at least three interpretations: the first is that the Supreme Court's endorsement of the procedure and the test it enunciated for its application, which gave judges very broad scope in interpreting the Rules of Civil Procedure, has done virtually nothing in promoting successful outcomes on such motions; the second is that the *Hryniak* test, when put into practice, is no broader than the previous standard for granting summary judgment; the third arises because the statistics don't measure the breadth of the issues raised on the various motions. It suggests that because the broader test has encouraged lawyers to seek summary judgment in a wider range of cases, the expanded scope of the applications may be limiting their success.

But whatever the correct interpretation and working on the assumption that class actions are for the most part more complex than individual cases, it appears lawyers may be reluctant to embrace the summary judgment procedure in collective lawsuits more wholeheartedly than they have in traditional litigation. LT