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# Ontario Court of Appeal signals partial summary judgment may become a rarity in Ontario

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Authors: Jennifer Dolman, Lindsay Rauccio, Lauren Harper

## In this Update

- In *Butera v Chown, Cairns LLP* (*Butera*) the Ontario Court of Appeal overturned an award for partial summary judgment
- The Court cautioned parties and judges about the potential problems associated with partial summary judgment motions
- The Court's reasons confirm that a party considering a partial summary judgment should proceed with extreme caution
- Judges at Civil Practice Court may take a more direct role in refusing to schedule motions for partial summary judgment

The Ontario Court of Appeal recently released a decision cautioning that partial summary judgment may become a rarity in Ontario. In *Butera v Chown, Cairns LLP*, 2017 ONCA 783, the Ontario Court of Appeal overturned an award for partial summary judgment, finding that there was a genuine issue for trial, and that granting partial summary judgment in this case would create, rather than solve, a host of problems.

## The summary judgment culture shift

In *Hryniak v Mauldin*, 2014 SCC 7 (*Hryniak*) (which Osler commented on previously), the Supreme Court of Canada called for a "culture shift" in using summary judgment motions as a tool to improve access to justice and fairly resolve actions in a manner that is proportionate, timely, and affordable.

Writing for a unanimous court, Justice Karakatsanis established that there will be no genuine issue for trial when the motions judge is able to reach a fair and just determination on the merits of a motion for summary judgment. This is the case when a summary judgment:

- allows the judge to make findings of fact;
- allows the judge to apply the law to the facts; and
- is a proportionate, more expeditious and less expensive means to achieve a just result.

Justice Karakatsanis directed that the "standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute."

Where there is a genuine issue for trial, the motions judge must consider whether it would be in the "interests of justice" to use their enhanced fact-finding powers to avoid a trial. The use of enhanced fact-finding powers will generally not be against the interest of justice if it will lead to a fair and just result, and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

On the topic of motions for partial summary judgment, Justice Karakatsanis balanced the risks of inefficiencies, duplicative proceedings, and inconsistent findings of fact against the potential to resolve an important claim against a key party.

## Partial summary judgment motions may undermine Hryniak's stated objectives

Since *Hryniak*, the proverbial floodgates opened, and Civil Practice Court (CPC) was established in Toronto to deal with the increased volume of summary judgment motions. The judge presiding over CPC acts as a "gatekeeper" and must approve the scheduling of any summary judgment motion.

The Ontario Court of Appeal has recently had occasion to consider the appropriateness of motions for summary judgment that will determine some of the issues, but will not dispose of the action as a whole. Most recently, in *Butera v. Chown, Cairns LLP* (*Butera*), the Ontario Court of Appeal cautioned parties and judges about the limits and problems associated with partial summary judgment motions. This case builds on previous jurisprudence of the Court of Appeal in the context of partial summary judgment motions, including *Baywood Homes Partnership v. Haditaghi*, 2014 ONCA 450 and *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922.

In *Butera*, the appellants, a Mitsubishi dealer and its principal, brought an action against their former solicitors. The respondents had acted for the appellants against various Mitsubishi entities in a law suit claiming $5 million in damages for breach of contract, misrepresentation, breach of collateral warranty, negligence, and breach of the *Arthur Wishart Act*, that was dismissed by Hambly J. on the basis of a successful limitation period defence. Osler previously wrote on the underlying action here. After their appeal failed, the appellants brought an action against the respondents for solicitors' negligence and lost opportunity damages. Initially, the respondents brought a motion for full summary judgment, but ultimately decided to proceed with partial summary judgment to dismiss that portion of the appellants' damages claim relating to misrepresentation. The judgment was granted with the result that the remaining claims would have proceeded to trial.

The Ontario Court of Appeal allowed the appeal, finding that there was a genuine issue for trial with respect to the misrepresentation claims. While this determination on its own was sufficient to overturn the award, the Court also found that the motion judge committed an extricable error in principle in failing to consider whether partial summary judgment was appropriate in the context of the litigation as a whole.

Justice Pepall, writing for the Court, explained that partial summary judgment motions tend to defeat the stated objectives of proportionality, timeliness and affordability underlying *Hryniak*. In particular, the Court highlighted four problems with partial summary judgment:

**1. Delay:** A partial summary judgment motion will, at best, resolve one element of the action and at worst, only increase fees and delay, particularly if the motion is appealed.

**2. Expense:** Motions for partial summary judgment may be very expensive. Justice Pepall

noted that, "[t]he provision for a presumptive cost award for an unsuccessful summary judgment motion that existed under the former summary judgment rule has been repealed, thereby removing a disincentive for bringing partial summary judgment motions."

**3. Wasted judicial resources:** Judges who are already overburdened with summary judgment motions post-*Hryniak* are hearing partial summary judgment motions and writing comprehensive reasons on issues that do not dispose of the action.

**4. Inconsistent findings:** The record at the partial summary judgment will not be as expansive as the record at trial, thereby increasing the danger of inconsistent findings.

Justice Pepall noted that a partial summary judgment motion should be considered a "rare procedure" that is reserved for issues that can be easily bifurcated from the main action and that can be dealt with expeditiously and in a cost-effective manner. The Court reasoned that this approach is entirely consistent with the Supreme Court's comments in *Hryniak* and the direction that the *Rules of Civil Procedure* be construed to secure the most just, expeditious and least costly determination of a proceeding.

## Future implications

*Butera* confirms that a party considering a partial summary judgment should proceed with extreme caution. The four factors listed above (delay, expense, inefficient use of judicial resources and the risk of inconsistent findings) should be given careful consideration when assessing whether such a motion is advisable in the context of the action as a whole. For example, an issue of contractual interpretation, the outcome of which will be dispositive of the action, may still be appropriate for a partial summary judgment motion, but regard should be had for the potential for appeal, especially if the issue is novel. Furthermore, in light of *Butera*, one should expect judges at CPC to take a more active role in vetting out motions that are deemed to be inappropriate for summary judgment, and in fact some matters are already being ordered to trial at CPC.