

Effecting a Culture Shift—An Empirical Review of Ontario's Summary Judgment Reforms

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Abstract

Lawyers and policymakers in Canada frequently discuss the need for reforms to increase access to civil justice, but concrete efforts to improve the efficiency and cost-effectiveness of our justice system are few and far between. Unfortunately, even when reforms are implemented, measures are rarely put in place to assess whether the reforms were effective. Ontario’s Civil Justice Reform Project inspired a package of amendments to Rules of Civil Procedure in 2010 but, aside from anecdotal reports, little is known about whether they achieved their desired effects. This paper presents an empirical analysis of all reported summary judgment decisions in Ontario between 2004 and 2015, in order to explore whether amendments to the summary judgment rules actually improved the efficiency and affordability of the civil justice system as was intended.

By reviewing trends in the number and outcomes of summary judgment motions throughout the study period, we can conclude that the amendments to Ontario’s summary judgment rules have made strides towards their intended goal. Since the reforms, we observe an increase in the number of summary judgment motions determined, an increase in the number of summary judgment motions granted, and, broadly, an increase in the proportion of successful summary judgment motions. The data analyzed in this study suggest that the “culture shift” promoted by the Supreme Court of Canada following the implementation of the new rule is in fact underway.

Cover Page Footnote

I am grateful to Professor Albert Yoon at the University of Toronto for his thoughtful guidance in the preparation of this article; Peter Wells of McMillan LLP for providing the data collected for his paper on summary judgment reforms with Adrienne Boudreau, “It Was Déjà Vu All Over Again;” and Stephen Ross & Nathaniel Dillon-Smith for providing their conference paper “A Real ‘Culture Shift’ Post-Hryniak?” Finally, I would like to thank Jonathan Morris-Pocock who, in addition to being a supportive husband, developed a software program to automate a great deal of the data collection and data entry required for this project.

Effecting a Culture Shift—An Empirical Review of Ontario’s Summary Judgment Reforms

BROOKE MACKENZIE*

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Au Canada, les avocats et les décideurs politiques évoquent fréquemment la nécessité d’adopter des réformes en vue d’accroître l’accès à la justice civile, mais rares sont les efforts déployés pour améliorer l’efficacité et la rentabilité du système de justice. Malheureusement, même lorsque de telles réformes sont mises en œuvre, leur efficacité fait rarement l’objet d’évaluations. Certes, le Projet de réforme du système de justice civile de l’Ontario a inspiré l’adoption en 2010 d’un ensemble de modifications aux *Règles de procédure civile*, mais, en dehors de quelques rapports anecdotiques, il est difficile de savoir si elles ont eu l’effet escompté. Le présent article présente une analyse empirique de toutes les décisions rendues dans le cadre de jugements sommaires en Ontario entre 2004 et 2015, afin de déterminer si les modifications apportées aux règles régissant les jugements sommaires ont réellement amélioré l’efficacité et l’abordabilité du système de justice civile conformément à leur objectif.

À la lumière des tendances concernant le nombre et l’issue des requêtes en jugement sommaire au cours de la période d’étude, nous pouvons conclure que les modifications apportées aux règles ontariennes sur le jugement sommaire ont permis de réaliser de grands progrès vers l’objectif visé. En effet, depuis l’adoption des réformes, le nombre d’affaires tranchées par jugement sommaire a augmenté, le nombre de requêtes en jugement sommaire accordées a progressé et, globalement, la proportion des requêtes en jugement sommaire qui sont accueillies s’est accrue. Les données analysées dans la présente étude montrent que le « virage culturel » encouragé par la Cour suprême du Canada à la suite de l’adoption des nouvelles règles a bel et bien eu lieu.

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CANADIANS HAVE BEEN CONCERNED with the inefficiencies of the justice system for decades. In 2010, numerous amendments were made to the Ontario *Rules of Civil Procedure* in the latest significant effort to improve the efficiency and effectiveness of the civil justice system. Among these amendments were changes to Rule 20—the rule respecting summary judgment—which were designed to make it easier for Ontarians to achieve a final disposition of their dispute without the necessity of a lengthy and expensive trial. No measure was put in place, however, to see whether the goals of this reform were achieved.

This article explores the question of whether the changes to Ontario's summary judgment rule in 2010 actually achieved their intended effects. To do so, it conducts a detailed empirical analysis of all reported summary judgment decisions between 2004 and 2015—the six years prior to and following the implementation of the new Rule 20 on January 1, 2010. By reviewing trends in the number of summary judgment motions determined over this period, and the outcomes of such motions, I seek to determine how the 2010 reforms to summary judgment procedure affect litigants' and judges' behaviour, and assess if any lessons learned through the latest slate of reforms can be applied to further improve the efficiency of civil dispute resolution moving forward.

The data collected and analyzed in this study provide quantitative support for the notion that the intended 'culture shift' is in fact underway, moving the emphasis in civil dispute resolution away from the conventional trial. Since the reforms, there has been an increase in the number of summary judgment motions determined, an increase in the number of summary judgment motions granted, and, broadly, an increase in the proportion of successful summary judgment motions.

Part I of this article provides the necessary background on Rule 20's previous iterations and their judicial interpretation, as well as proposals for its reform, the specific amendments made in 2010, and courts' interpretation of the amended Rule 20 following its implementation. These interpretations include two key appellate decisions: *Combined Air Mechanical Services v Flesch*, a decision of the Ontario Court of Appeal from December, 2011; and *Hryniak v Mauldin*,

a unanimous decision of the Supreme Court of Canada in January, 2014. Part II reviews this study's goals and methodology. Part III examines the results of the analysis of the number and outcome of summary judgment motions in Ontario from 2004–2015. Part V discusses conclusions drawn from the analysis, lessons that may be learned from the Rule 20 amendments and applied to future civil justice reform, and possible areas for future study to continue to assess and improve summary judgment procedures in Canada.

I. BACKGROUND: RULES, REFORM PROPOSALS, AMENDMENTS, AND JUDICIAL RESPONSE

A. RULE 20: THE HISTORY OF SUMMARY JUDGMENT IN ONTARIO

Prior to the introduction of the *Rules of Civil Procedure*¹ in 1985, the former *Rules of Practice and Procedure*² provided for the possibility of summary judgment “where the court is satisfied that the defendant has not a good defence to the action or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action.”³ Notably, this rule only permitted plaintiffs to bring motions for summary judgment, and was confined to cases asserting particular claims, such as for a debt or liquidated demand.⁴ The test for granting summary judgment was strict; the Court of Appeal had held that this power should be exercised only in “a case which is so clear that there is no reason for doubt as to what the judgment of the Court should be if the matter proceeded to trial.”⁵

Litigants' ability to obtain summary judgment was thus quite limited prior to 1985. The introduction of the *Rules of Civil Procedure* and Rule 20, however, made summary judgment available to both plaintiffs and defendants, in the context of any action, at any time following the exchange of pleadings.⁶ The text of Rule 20 suggested that the new provision was to be interpreted more broadly; Rule 20.04 provided that the court *shall* grant summary judgment where it “is satisfied that there is no genuine issue for trial with respect to a claim or defence.”⁷

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1. RRO 1990, Reg 194 [*Rules*].
 2. RRO 1980, Reg 540 [*Rules of Practice*].
 3. *Ibid*, r 58(2).
 4. John W Morden, “An Overview of the Rules of Civil Procedure of Ontario” (1984) 5:3 Adv Q 257 at 273; see also *Rules of Practice*, *supra* note 2, r 33 & 58.
 5. *Arnoldson y Serpa v Confederation Life Assn* (1974), 3 OR (2d) 721 at para 6, 46 DLR (3d) 641 (CA). See also Robert J van Kessel, *Dispositions Without Trial*, 2nd ed (Markham, Ont: LexisNexis Canada, 2007) at 156-61.
 6. *Rules*, *supra* note 1, r 20.01. See also Kenneth J Kelertas, “The Evolution of Summary Judgment in Ontario” (1999) 21:3 Adv Q 265 at 268-69.
 7. *Rules*, *supra* note 1, r 20.04.

Rule 20 was initially interpreted in an expansive manner. In *Irving Ungerman Ltd v Galanis*, the Court of Appeal helpfully explained the intended role of summary judgment as follows:

A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. *There can, however, be proceedings in which, because they do not involve a genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice.* In such proceedings the successful party has been both unnecessarily delayed in the obtaining of substantive justice and been obliged to incur added expense. *Rule 20 exists as a mechanism for avoiding these failures of procedural justice.*⁸

Although early decisions seemed to suggest that motions judges had some leeway in evaluating the evidence put before them to determine if a genuine issue for trial existed on a motion for summary judgment,⁹ two subsequent decisions of the Court of Appeal reined in the standard.

In *Aguonie v Galion Solid Waste Material Inc.*,¹⁰ the motions judge had granted summary judgment to a defendant on the basis that the plaintiff filed her claim after the limitation period had elapsed. The Court of Appeal reversed this decision, finding that the motions judge had "exceeded his role."¹¹ Writing for the Court, Justice Borins held:

In ruling on a motion for summary judgment, the court will *never* assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact.¹²

In *Dawson v Rexcraft Storage and Warehouse Inc.*,¹³ the Court of Appeal elaborated on its holding in *Aguonie*, stating: "it is necessary that motions

8. *Irving Ungerman Ltd v Galanis* (1991), 4 OR (3d) 545, at para 20, 83 DLR (4th) 734 (CA) [*Ungerman*][emphasis added].

9. See Teresa Walsh & Lauren Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?" in Todd L Archibald & Randall Scott Echlin, eds, *Annual Review of Civil Litigation 2013* (Toronto: Carswell Thomson Reuters, 2013) 422 at 426, citing *Vaughan v Warner Communications, Inc.* (1986), 56 OR (2d) 242, 10 CPR (3d) 492 (HCJ). See also, *supra* note 6, which explains the evolution of the "no genuine issue for trial" standard in detail, and from which I have drawn for this summary".

10. (1998), 38 OR (3d) 161 (CA), 77 ACWS (3d) 520, rev'g (1997) 33 OR (3d) 615 (Gen Div) [*Aguonie*].

11. *Ibid* at 168 & 169.

12. *Ibid* at 173 [emphasis added].

13. (1998), 164 DLR (4th) 257, 111 OAC 201 [*Dawson*].

judges not lose sight of their narrow role, not assume the role of a trial judge, and, before granting summary judgment, be satisfied that it is clear that a trial is unnecessary.”¹⁴

Courts were particularly concerned about a motions judge’s limits in assessing credibility. In *Masciangelo v Spensieri*, Justice Doherty firmly concluded that “[a]rguments which involve the central facts of the case and turn on judgments as to credibility should not be resolved on a Rule 20 motion.”¹⁵ In arriving at this conclusion, he observed:

Where the outcome of a law suit hinges on the assessment of credibility, a trial in which evidence is called and the competing stories are told and challenged before the trier of fact has traditionally been viewed as the ideal forum...not only because the trier of fact has the advantage of hearing and seeing the witnesses, but also because the parties are given their day in court during which they have the opportunity to present their entire case, face their judge, and tell their story.¹⁶

It is particularly interesting to note Justice Doherty’s emphasis on litigants’ *perceptions* of the quality of justice they received (*i.e.*, their ability to have their day in court), rather than a motions judge’s ability to assess credibility effectively on a written record.

B. THE OSBORNE REPORT

Although summary judgment was available to litigants following the 1985 *Rules*, the Court of Appeal’s interpretation of “no genuine issue for trial” granted limited scope to motions judges. As Professor Janet Walker has explained, “[a]lthough this interpretation remained in place for some time, by 2006 it had become clear that it was not serving the civil justice system well.”¹⁷ In June 2006, Michael Bryant, then Ontario’s Attorney General, asked Coulter Osborne, the former Associate Chief Justice of Ontario, to lead the Civil Justice Reform Project (CJRP). As part of this mandate, Justice Osborne was asked to “deliver recommendations for action to make the civil justice system more accessible and affordable for Ontarians.”¹⁸ The CJRP terms of reference emphasized that Justice

14. *Ibid* at para 20.

15. *Ibid* at 130.

16. (1990), 1 CPC (3d) 124, [1990] OJ No 1429 (HCJ) at 129-30.

17. Janet Walker, “Summary Judgment Has its Day in Court” (2012) 37:2 *Queen’s LJ* 697 at 702.

18. Ontario Ministry of the Attorney General, *Civil Justice Reform Project: Summary of Findings and Recommendations*, by Coulter A Osborne, November 2007, at Appendix A (Terms of Reference) & B (Consultation Letter).

Osborne's reform proposals should "provide meaningful results in enhancing access to justice for Ontarians."¹⁹

After canvassing ideas for reform from bar associations, lawyers, judges, and the public,²⁰ in November 2007 Justice Osborne submitted the CJRP's report (the "Osborne Report"), which outlined numerous recommendations for civil justice reform, including respecting summary judgment.²¹ Specifically, the Osborne Report recommended that motions judges be expressly permitted to weigh evidence, draw inferences, and evaluate credibility on a summary judgment motion (*i.e.*, do precisely that which the Court of Appeal had held a motions judge cannot do);²² that the *Rules* provide for a "mini-trial" where witnesses can testify on relevant issues in a summary fashion without having to proceed to a full trial;²³ and that the presumption of ordering substantial indemnity costs against a moving party who is unsuccessful in obtaining summary judgment be eliminated due to concerns that it deterred parties from bringing Rule 20 motions.²⁴

C. AMENDMENTS TO THE RULES OF CIVIL PROCEDURE IN 2010

In 2008 and 2009, following further consultation with judges, lawyers, and the public to discuss the Osborne Report's recommendations, Ontario enacted regulations to amend the *Rules of Civil Procedure* to effect some of the proposed reforms.²⁵ In addition to the summary judgment reforms, the amendments narrowed the scope of discovery; required parties to agree on a written discovery plan prior to exchanging documents; made pre-trial conferences mandatory for all civil actions; increased the monetary limit for simplified procedure actions and for the Small Claims Court; established various requirements for expert witnesses; and imposed an overarching principle of proportionality.²⁶

19. *Ibid* at Appendix A.

20. *Ibid* at 4-6.

21. *Ibid* at ii. The report also recommended reform to the Small Claims Court and simplified procedure process and jurisdiction; the discovery process; the process for proffering expert evidence; and pre-trial conferences.

22. *Ibid*.

23. *Ibid* at 36.

24. *Ibid* at 36-37. Acknowledging the need to deter parties from using Rule 20 as a delay tactic, Justice Osborne suggested that substantial indemnity costs could be awarded by motions judges against parties who act in bad faith, but ought not be presumptive.

25. Ontario Ministry of the Attorney General, "What's New? Changes to the Rules of Civil Procedure" (January 2010) online: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.php>.

26. *Ibid*. See also O Reg 438/08; O Reg 394/09.

Three key changes were made to Rule 20. First, the test for granting summary judgment was changed from “no genuine issue for trial” to “no genuine issue requiring a trial.”²⁷ Second, motions judges were granted the power to weigh evidence, evaluate credibility, and draw reasonable inferences from evidence. Justice Osborne’s suggestion that a mini-trial could be directed to resolve the issues on summary judgment was accepted in part: pursuant to Rule 20.04(2.2), judges can order the presentation of oral evidence on a summary judgment motion to determine whether there is a genuine issue requiring a trial. Third, the amended *Rules* implemented Justice Osborne’s recommendation respecting costs: on a failed summary judgment motion, costs will presumptively be determined on a partial indemnity basis, although substantial indemnity costs may be ordered where a party acts unreasonably or in bad faith.²⁸ The amended summary judgment rules took immediate effect on January 1, 2010. The new standards and powers applied to all summary judgment motions, regardless of whether the motion was filed before or after that date.²⁹

D. COURTS’ INTERPRETATION AND USE OF AMENDED RULE 20

1. ONTARIO SUPERIOR COURT: KEY DECISIONS IN 2010–2011

Motions judges in Ontario initially developed divergent approaches in applying the revised test and their new powers.³⁰ In *Healey v Lakeridge Health Corp.*, Justice Perell acknowledged that the new powers granted to motions judges by Rule 20.04(2.1) were a “statutory reversal of the case law,” and that the reframed test was intended to make summary judgment more readily available.³¹ In *Lawless v Anderson*, Justice DM Brown highlighted that the “[n]ew Rule 20” introduced a “radical change” by arming motions judges with greater powers to review

27. *Rules*, *supra* note 1, r 20.04 [emphasis added]. Interestingly, Justice Osborne had specifically recommended that the “no genuine issue for trial” test *not* be amended; he was of the view that it was the limits on motions judges’ powers on summary judgment motions, rather than the test for granting such motions, that limited the effectiveness of Rule 20. See Osborne Report, *supra* note 18 at 35. The phrase “no genuine issue requiring a trial” appears to have derived from the Ontario Court of Appeal’s decision in *Ungerman*. See text accompanying note 8. See also *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764, at para 30 n 3, 108 OR (3d) 1.

28. *Rules*, *supra* note 1, r 20.06.

29. *Onex Corp v American Home Assurance* (2009), 100 OR (3d) 313, 2009 CarswellOnt 9401.

30. *Supra* note 17 at 713. This section has also benefitted from other discussions of cases applying the amended *Rules*. See generally Carole J Brown & Steven Kennedy, “Changing the Rules of the Game: Rewinding the First Ten Months of the New *Rules of Civil Procedure*” (2011) 37:4 Adv Q 443.

31. *Healey v Lakeridge Health Corp.*, 2010 ONSC 725 at paras 20-23, 185 ACWS (3d) 325 [*Healey*], aff’d 2011 ONCA 55.

evidence, “vest[ing] in a motion judge the powers typically exercised by a trial judge.”³² Using those new powers, Justice Brown was able to determine an issue of discoverability on a summary judgment motion premised on a lapsed limitation period, and granted judgment in favour of the defendant.³³

Not all Superior Court judges, however, recognized the significance of the Rule 20 amendments. In *Cuthbert v TD Canada Trust*, Justice Karakatsanis held that despite the new rules “it is not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment.”³⁴ In both *Cuthbert* and *Hino Motors Canada v Kell*, Justice Karakatsanis held that the test for summary judgment “has not changed.”³⁵

Motions judges in Ontario had not agreed on the appropriate interpretive approach of the new Rule 20 in the first two years following the amendments. A unified standard would not appear until the Court of Appeal announced its “fresh approach to the interpretation and application of the amended Rule 20” in *Combined Air Mechanical Services Inc v Flesch*.³⁶

2. ONTARIO COURT OF APPEAL: COMBINED AIR AND THE FULL APPRECIATION TEST

In *Combined Air Mechanical Services v Flesch* (“*Combined Air*”), the Ontario Court of Appeal observed that “it has become a matter of some controversy and uncertainty as to whether it is appropriate for a motion judge to use the new powers conferred by the amended Rule 20 to decide an action on the basis of the evidence presented on a motion for summary judgment.”³⁷ To address this, the court convened a five-judge panel to consider appeals of five different summary judgment motions decided under the amended Rule 20,³⁸ with the express purpose of providing some clarification and guidance for the bench and bar.³⁹

32. *Lawless v Anderson*, 2010 ONSC 2723 at para 19, 188 ACWS (3d) 1006.

33. *Ibid* at paras 22, 63.

34. *Cuthbert v TD Canada Trust*, 2010 ONSC 830 at para 11, 185 ACWS (3d) 768 [*Cuthbert*].

35. *Hino Motors Canada v Kell*, 2010 ONSC 1329 at para 7, 185 ACWS (3d) 1100 [*Hino Motors*]; *Cuthbert*, *supra* note 34 at para 11, citing *Ungerman*, *supra* note 8.

36. 2011 ONCA 764 at para 35, 108 OR (3d) 1 [*Combined Air*].

37. *Combined Air*, *supra* note 36 at para 5.

38. Appeals from *Combined Air v Flesch*, 2010 ONSC 1729, 187 ACWS (3d) 100, Belobaba J; *Bruno Appliance v Cassels Brock & Blackwell LLP*, 2010 ONSC 5490, 229 ACWS (3d) 932, Grace J (addressing two parties’ separate motions); *394 Lakeshore Oakville Holdings Inc v Misek*, 2010 ONSC 600, 194 ACWS (3d) 1313, Perell J; *Parker v Casalese*, 2010 ONSC 5636, 194 ACWS (3d) 95 (Div Ct) Kruzick, Swinton, and Harvison Young JJ.

39. *Combined Air*, *supra* note 36 at para 6.

In unanimous reasons “by the Court,” the Court of Appeal held that the amended Rule 20 permits a motions judge to grant summary judgment to dispose of an action “where he or she is satisfied that by exercising the powers that are now available on a motion for summary judgment, there is no factual or legal issue raised by the parties that requires a trial for its fair and just resolution.”⁴⁰ The court accepted that the new rule made clear that the restrictions formerly imposed on motions judges (as articulated by the Court of Appeal in *Aguonie* and *Dawson*) were no longer applicable, and that the amendments were “meant to introduce significant changes in the manner in which summary judgment motions are to be decided.”⁴¹

Discussing the new wording of the test (from “no genuine issue for trial” to “no genuine issue requiring a trial”), the court held:

This change in language is more than mere semantics. The prior wording served mainly to winnow out plainly unmeritorious litigation. The amended wording, coupled with the enhanced powers under rule 20.04(2.1) and (2.2), now permit the motion judge to dispose of cases on the merits where the trial process is not required in the “interest of justice.”⁴²

The court emphasized, however, that the new rule was intended to eliminate *unnecessary* trials—not all trials—and proceeded to discuss why a trial is necessary for the fair and just resolution of many cases.⁴³ It highlighted a trial judge’s “privileged position,” participation in the trial dynamic, and “total familiarity with the evidence,”⁴⁴ noting that a trial judge “sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses.”⁴⁵ The court concluded that a trial judge’s participatory role “provides a greater assurance of fairness in the process for resolving a dispute.”⁴⁶

The Court of Appeal held that on a motion for summary judgment, the motion judge must ask: “can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?”⁴⁷

40. *Ibid* at para 37.

41. *Ibid* at para 36.

42. *Ibid* at para 44.

43. *Ibid* at para 38.

44. *Ibid* at para 46, citing RD Gibbens, “Appellate Review of Findings of Fact” (1992) 13:4 Adv Q 445 at 446.

45. *Ibid* at para 47.

46. *Ibid*.

47. *Ibid* at para 50.

Before using the new powers to weigh evidence, evaluate credibility, and draw inferences, the court held, a motions judge must apply the “full appreciation test” and be satisfied that the interests of justice do not require that those powers be exercised only after a trial.⁴⁸

The court explained that in cases that call for multiple findings of fact on the basis of evidence emanating from a number of witnesses and a voluminous record, “a summary judgment motion *cannot* serve as an adequate substitute for the trial process.”⁴⁹ It emphasized that achieving familiarity with the total body of evidence in the motion record is not the same as “fully appreciating” the evidence; a motions judge must consider “whether he or she can accurately weigh and draw inferences from the evidence without the benefit of the trial narrative, without the ability to hear the witnesses speak in their own words and without the assistance of counsel as the judge examines the record in chambers.”⁵⁰

The Court of Appeal suggested that the full appreciation test might be met “in document-driven cases with limited testimonial evidence,” “in cases with limited contentious factual issues,” and “in cases where the record can be supplemented to the requisite degree at the motion judge’s direction by hearing oral evidence on discrete issues.”⁵¹ The court listed various “hallmarks” of the types of actions that are *inappropriate* for summary judgment and require a trial, including where there is a voluminous motion record, evidence is required from many witnesses, different theories of liability are advanced against different defendants, numerous findings of fact are required, credibility determinations lie at the heart of the dispute, or there is conflicting evidence on key issues from major witnesses.⁵²

Although the Court of Appeal had created a unified standard to be applied across Ontario on motions for summary judgment, the court’s reasons emphasized the advantages of resolving disputes at trial, and sought to circumscribe motions judges’ powers⁵³—just as was done by the Court of Appeal in *Aguonie* and *Dawson* under the former Rule 20.

48. *Ibid* at para 75.

49. *Ibid* at para 51 [emphasis added].

50. *Ibid* at paras 53-54.

51. *Ibid* at para 52.

52. *Ibid* at para 148.

53. See *e.g.* “The discretion to order oral evidence pursuant to rule 20.04(2.2) is circumscribed and cannot be used to convert a summary judgment motion into a trial... The discretion to direct the calling of oral evidence on the motion amounts to no more than another tool to better enable the motion judge to determine whether it is safe to proceed with a summary disposition rather than requiring a trial.” *Ibid* at para 60.

3. SUPREME COURT OF CANADA: HRYNIAK AND THE CULTURE SHIFT

Robert Hryniak, one of the parties in *Combined Air*, appealed the Court of Appeal's determination that the motions judge in his case had not erred in granting summary judgment against him. His appeal was heard by the Supreme Court of Canada on 23 March 2013,⁵⁴ alongside a companion appeal brought by Bruno Appliance and Furniture (another party in the *Combined Air* appeals).⁵⁵ Both cases related to allegations of civil fraud against Hryniak. In an interesting turn of events, Justice Karakatsanis—who had issued two decisions minimizing the impact of the Rule 20 amendments when she sat on the Ontario Superior Court⁵⁶—authored the Supreme Court's unanimous decision in *Hryniak*.

The Court began its reasons by acknowledging that many Canadians simply cannot afford to sue when they are wronged, or defend themselves when they are sued, because trials have become increasingly expensive and protracted.⁵⁷ Such circumstances threaten the rule of law and hinder the development of the common law, and have resulted in increased recognition that a culture shift is required in order for Canadians to have timely and affordable access to the civil justice system.⁵⁸ This culture shift, the Court held, requires

moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that *new models of adjudication can be fair and just*.⁵⁹

Significantly, and in contrast to the views of the Court of Appeal as expressed in *Combined Air*, the Supreme Court held that we “must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.”⁶⁰

The Supreme Court overruled the approach provided in *Combined Air*, holding that “the Ontario Court of Appeal placed too high a premium on the “full appreciation” of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants.”⁶¹ The Court held that while the goal remains to maintain “a fair and just process,” such a process is

54. *Hryniak v Mauldin*, 2014 SCC 7, 1 SCR 87 [*Hryniak*].

55. *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8, 1 SCR 126 [*Bruno*].

56. See *Cuthbert*, *supra* note 34; *Hino Motors*, *supra* note 35. See the text accompanying notes 34 & 35.

57. *Hryniak*, *supra* note 54 at para 1.

58. *Ibid* at para 2.

59. *Ibid* [emphasis added].

60. *Ibid* at para 27.

61. *Ibid* at para 4.

illusory unless it is also accessible, timely, and affordable—and the cost and delay of the traditional trial process effectively denies many ordinary Canadians the opportunity to adjudicate their disputes. As such, “the best forum for resolving a dispute is not always that with the most painstaking procedure.”⁶²

Reviewing the 2010 amendments, the Supreme Court held that the new Rule 20 “demonstrates that a trial is not the default procedure.”⁶³ The Court reversed the onus that the Court of Appeal held must be applied in *Combined Air*, holding that the new fact-finding powers granted to motions judges are *presumptively* available, and ought to be exercised *unless* the interest of justice requires them to be exercised only at trial. The Supreme Court concluded that the 2010 amendments were “designed to transform Rule 20 from a means to weed out unmeritorious claims to a significant alternative model of adjudication.”⁶⁴

Rather than list relevant factors and categories of cases, as the Court of Appeal had done, the Supreme Court preferred to articulate general principles for determining whether there is no genuine issue for trial, holding:

There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.⁶⁵

Although still providing little by way of concrete guidance, Justice Karakatsanis elaborated on this general rule as follows:

When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating 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.*⁶⁶

The Court emphasized that a documentary record, particularly when supplemented with motions judges’ new fact-finding tools, will often be enough to resolve a dispute fairly and justly, calling the new powers granted by Rules 20.04(2.1) and (2.2) “an equally valid, if less extensive, manner of fact finding.”⁶⁷

62. *Ibid* at paras 24, 28.

63. *Ibid* at para 43.

64. *Ibid* at para 45.

65. *Ibid* at para 49.

66. *Ibid* at para 50 [emphasis added].

67. *Ibid* at para 57.

With its reasons in *Hryniak*, the Supreme Court of Canada sought to push both the bar and bench away from a presumption that cases should be resolved at trial in favour of summary judgment and other more expeditious, cost-effective, and proportionate means of dispute resolution. Although the Court did not provide concrete guidance for determining what constitutes a fair and just result, its message was clear: the culture of civil litigation needed to change in order to promote timely and affordable access to the civil justice system. Summary judgment motions form an important part of this culture shift.

II. PURPOSE AND METHODOLOGY: EMPIRICAL REVIEW OF SUMMARY JUDGMENT IN ONTARIO (2004–2015)

A. GOALS OF THE STUDY

In founding the Civil Justice Reform Project, the Ministry of the Attorney General recognized that Ontario needed “to make the civil justice system more accessible and affordable for Ontarians.”⁶⁸ Justice Osborne was tasked with making recommendations about reforms to the *Rules of Civil Procedure* that would “provide meaningful results in enhancing access to justice for Ontarians.”⁶⁹ With respect to summary judgment motions, the Osborne Report responded to concerns that they were brought infrequently, and that Rule 20 was not working as intended.⁷⁰ The 2010 amendments to the *Rules* (stemming from the Osborne Report recommendations) ostensibly sought to address these issues.

The Supreme Court in *Hryniak* lamented Canadians’ inability to bring or respond to lawsuits due to the time and expense required by trials. Accordingly, it championed a “culture shift...moving emphasis away from the conventional trial” in favour of summary judgment, in order to allow Canadians to have timely and affordable access to the civil justice system.⁷¹

This article seeks to empirically evaluate whether the 2010 amendments to Rule 20 and their subsequent judicial interpretations did, in fact, “provide meaningful results in enhancing access to justice for Ontarians”⁷² and “promote timely and affordable access to the civil justice system.”⁷³ Accordingly, I will review how the number and outcomes of summary judgment motions changed before and after the 2010 amendments, analyzing data from 2004–2015, observing in

68. *Supra* note 18 at Appendix A & B.

69. *Ibid* at Appendix A.

70. *Ibid* at 33.

71. *Hryniak*, *supra* note 54 at paras 1-2.

72. *Supra* note 18 at Appendix A.

73. *Hryniak*, *supra* note 54 at para 2.

particular whether and how patterns changed following three key dates: January 1, 2010, when amendments to Rule 20 came into effect; December 5, 2011, when the Ontario Court of Appeal released its decision in *Combined Air*; and January 23, 2014, when the Supreme Court of Canada released its decision in *Hryniak*. I will assess this data with a view to answering the following questions: (1) Did the number of summary judgment motions decided in Ontario increase? (2) Did the number of summary judgment motions granted increase? and (3) Did the proportion of summary judgment motions granted increase?

By assembling and analyzing a single data set using a consistent methodology, I hope to meaningfully examine long-term trends as to how Rule 20 has been interpreted and applied, and to observe how litigants' and judges' behaviour has been affected by the amendments to Rule 20 and its subsequent interpretation by appellate courts. Ultimately, this article seeks to answer the question: Did summary judgment reform achieve its desired effects?

B. METHODOLOGY

1. SOURCE OF DATA (JUDGMENTS)

I sought to review all reported⁷⁴ decisions rendered on motions for summary judgment pursuant to Rule 20 of the Ontario *Rules of Civil Procedure* from 2004 to 2015 (the six years prior to and six years following the relevant amendments). I collected, as primary data, all Ontario cases decided between 1 January 2004 to 31 December 2015 containing the search terms “summary judgment,” or “summary judgement” and “motion.” I downloaded all 6,517 cases that met these parameters from Quicklaw⁷⁵ on 3 January 2016.

2. METHOD OF SORTING AND CODING JUDGMENTS

The search terms used to collect the summary judgment decisions (described above) were over inclusive; they captured numerous cases that were not summary judgment motions, including trial decisions, procedural motions, and costs motions referring to an earlier summary judgment motion; motions referring to the general concepts of proportionality and access to justice as articulated in the Osborne Report, *Combined Air*, and *Hryniak*; motions for leave to appeal

74. “Reported” refers to decisions available through the three major Canadian publishers of court decisions: CanLII, Westlaw (Carswell), and Quicklaw (LexisNexis), not only cases published in print law reports.

75. I also reviewed CanLII and Westlaw, but used Quicklaw as my source because it gathered the most results from this search query. The Quicklaw search resulted in 6,517 cases after excluding duplicates (*i.e.* cases reported in multiple sources). An identical search in Westlaw garnered 6,322 results, and CanLII had 6,319 results.

a summary judgment decision; and motions similar to summary judgment pursuant to the *Construction Lien Act* or proceeding under the *Family Law Rules*.⁷⁶ I reviewed each of the 6,517 decisions collected to identify and exclude from the dataset all decisions that were *not* decisions on motions for summary judgment pursuant to Rule 20, or appeals thereof. This left 2,960 decisions pursuant to Rule 20 motions for analysis. Each of the 2,960 summary judgment decisions were coded for the following variables:⁷⁷

1. Case name
2. Court file number or docket
3. Citation(s)
4. Date the summary judgment motion was heard⁷⁸
5. Date of summary judgment decision
6. Name of judge(s) or master presiding over summary judgment motion
7. Whether the decision-maker was a judge or a master
8. Level of court (*i.e.* Ontario Superior Court, Ontario Superior Court–Commercial List Divisional Court, or Court of Appeal)
9. Moving party⁷⁹

76. The search also captured cases decided under Rule 76.07 (summary judgment in simplified procedure actions), before it was revoked in March 2008. These were included in the dataset for the purpose of consistency, as for the majority of the study period (upon revocation of Rule 76.07) summary judgments under simplified procedure rules were governed by Rule 20. It should be noted, however, that prior to March 2008, Rule 76.07(9) provided for a different test than Rule 20: “The presiding judge shall grant judgment on the motion unless, (a) he or she is unable to decide the issues in the action without cross-examination; or (b) it would be otherwise unjust to decide the issues on the motion.”

77. The data were first reviewed using software developed for the purpose of this research to gather various easily identifiable data points (*i.e.*, those which appear in each judgment in the same format and location), then input this data into an Excel spreadsheet. Review and coding for the moving party, disposition, representation, and appeal status was done manually by the author.

78. Where the motion was heard over multiple dates, only the first date is identified. I made this update to the dataset manually on my review of each case. If the decision only identified one date, it was deemed to be both the date the motion was heard and the date of decision.

79. Coded as follows: (1) Plaintiff(s); (2) Defendant(s); (3) Plaintiff(s) with defendant cross-motion; (4) Defendant(s) with plaintiff cross-motion. Where the moving party was a third or fourth party, they were deemed “plaintiff” or “defendant” depending on their role in the claim, counterclaim, or cross-claim to which the summary judgment motion pertained. For instance, if a third party moved for summary judgment to dismiss the plaintiff’s claim against it, it would be deemed a defendant. However, if a third party moved for summary judgment on her counterclaim against the plaintiff (defendant by counterclaim), the third party would be deemed a plaintiff for the purpose of the summary judgment motion.

10. Summary judgment disposition⁸⁰
11. Whether the party was self-represented⁸¹
12. Appeal status⁸²

The process of reviewing and coding the data for appeals is worth noting briefly, as it was necessary to ensure both that cases were not double counted, and that the ultimate result of a case was properly recorded. I coded all decisions of the Court of Appeal to indicate whether it granted, dismissed, or partially granted the appeal. I then located in the dataset the decision which formed the basis of the appeal, and coded it as to whether it was reversed, affirmed, or partially granted. For the purpose of counting the number of motions for summary judgment *heard* in the analysis below, only the summary judgment motions *at first instance* were included in the dataset. Appeals were excluded so that each motion was only counted once, when it was first heard. For the purpose of determining the number and proportion of summary judgment motions *granted*, only one decision reflecting the final determination of the summary judgment motion was included in the dataset. Dismissed appeals and reversed and partially-reversed motion decisions were excluded from that analysis.⁸³

3. THE COMPREHENSIVENESS OF THE DATASET

The process of reviewing appeal decisions revealed an important issue with the dataset: there were 168 appeal decisions where the underlying motion decision

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80. Coded as follows: (1) Granted; (2) Dismissed; (3) Partially granted; (4) Granted for one defendant, but dismissed for another; (5) Motion granted, cross-motion dismissed; (6) Cross-motion granted, motion dismissed; (7) Partially granted for non-moving party; (8) Granted for non-moving party. For further explanation on how these were determined see note 94 below.
 81. Coded as follows: (1) losing party was self-represented; (2) winning party was self-represented; (3) both parties were self-represented; (4) “no one appearing” for losing party. I note that where a party was unrepresented but at least one other party with whom interests were aligned was represented by counsel, the party was *not* deemed to be self-represented. This arose on very few occasions, typically in the context of co-defendants with substantially overlapping interests in defending the claim.
 82. Coded as follows: (1) Appeal granted; (2) Appeal dismissed; (3) Appeal partially granted; (4) Appealed and reversed; (5) Appealed but affirmed; (6) Appealed, partially granted; (7) Leave motion; (8) Appeal dismissed, but underlying decision not reported; (9) Appeal granted, but underlying decision not reported.
 83. Any appeals which pertained to motions decided before the study period (*i.e.*, prior to 2004) were also excluded from the database.

was not reported.⁸⁴ Although this issue could be addressed for the decisions in the database,⁸⁵ it raises the question of how many decisions are not (and could not be) included in the database because they were never reported. I embarked on this project with the inaccurate assumption that Ontario's courts were reporting all their summary judgment decisions to Quicklaw, Westlaw, or CanLII. Discovering that numerous appeals pertained to unreported summary judgment motion decisions proved this assumption to be incorrect. There was a total of 509 appeal decisions in the dataset, meaning that of all summary judgment appeals decided from 2004–2015, 33 per cent pertained to decisions that were not reported on Quicklaw, Westlaw, or CanLII. This is a rough measure, but it suggests that a significant proportion of motion decisions in Ontario courts go unreported.

As a result, the unfortunate reality is that the dataset used for this analysis does not include all summary judgment motion decisions in Ontario courts, as it is limited to those decisions that were reported. It is not possible to know what decisions are not reported.⁸⁶ It is worth noting, however, that year-over-year analysis of the number of appeals of unreported decisions suggests

84. Upon realizing that the lower court decision was not in the database, I confirmed that in each of these 168 cases, the lower court decision could not be found on any of Quicklaw, Westlaw, or CanLII.

85. These decisions were coded in a manner so they could stand in for the unreported lower court decision: the "date heard" variable was modified to refer to the date the original motion was heard, as indicated in the appeal decision. The appeal decision could then be used in both the analysis of the number of motions heard and of the number and proportion of motions granted.

86. I note that prior to developing my methodology of pulling all reported decisions from Quicklaw, I first spoke with two representatives from the office of Management Information at the Ontario Ministry of the Attorney General (MAG) about the possibility of obtaining summary judgment data directly from the Ontario Superior Court. Unfortunately this was not possible. Court administration is arranged at the regional level in eight judicial regions in Ontario, and until recently court files were paper-based and physically located in each region's court office. From my discussions with the MAG representatives, I understand that it was not until 2009 that a unified electronic filing database was rolled out across all eight judicial regions. See interview with Jim Andersen & Balwant Neote, January 11, 2016. Between 2009 and 2014, there were further efforts to update and consolidate Ontario courts' case management systems into a new Court Information Management System, but this project was abandoned when only partially completed. See *e.g.* Drew Hasselbeck, "Ontario moves towards digital court records," *Financial Post* (9 May 2012), online: <<http://business.financialpost.com/legal-post/ontario-moves-toward-digital-court-records>>; Allison Jones, "Ontario admits it blew \$4.5-million on failed court modernization project," *National Post* (19 September 2014), online: <<http://news.nationalpost.com/news/canada/ontario-admits-it-blew-4-5-million-on-failed-court-modernization-project>>. As a result, although some data could be obtained from MAG on summary judgment motions, the data would be incomplete (as it would not cover the time period required of this study), and it would not necessarily be consistent across judicial regions in Ontario. Using data obtained from

that the proportion of unreported decisions remains fairly consistent across the study period.⁸⁷

Finally, in reviewing all appeal decisions, I discovered a handful of cases where the underlying decision was reported, but had not been captured in my search terms (*i.e.*, the terms “motion” or “summary judgment” did not appear in the text of the decision).⁸⁸ This occurred fifteen times, which represents 2.9 per cent of the 509 appeals. I collected, reviewed, and added each of these cases to the dataset.

Although (as noted in section B(2)) the search terms used were vastly over inclusive, it was perhaps inevitable that a few decisions would not be captured because of the particularities of wording by a handful of judges in a handful of cases.⁸⁹ These fifteen decisions may represent a sample of other Rule 20 motions that were not later captured (because they were not appealed), but in any case pale in comparison to the 168 decisions that were simply unreported. Nevertheless, the dataset represents rather a substantial (perhaps two-thirds) representative sample of all decisions pursuant to Rule 20 during the study period.

III. RESULTS: EMPIRICAL REVIEW OF SUMMARY JUDGMENT IN ONTARIO (2004–2015)

A. NUMBER OF MOTIONS FOR SUMMARY JUDGMENTS RENDERED

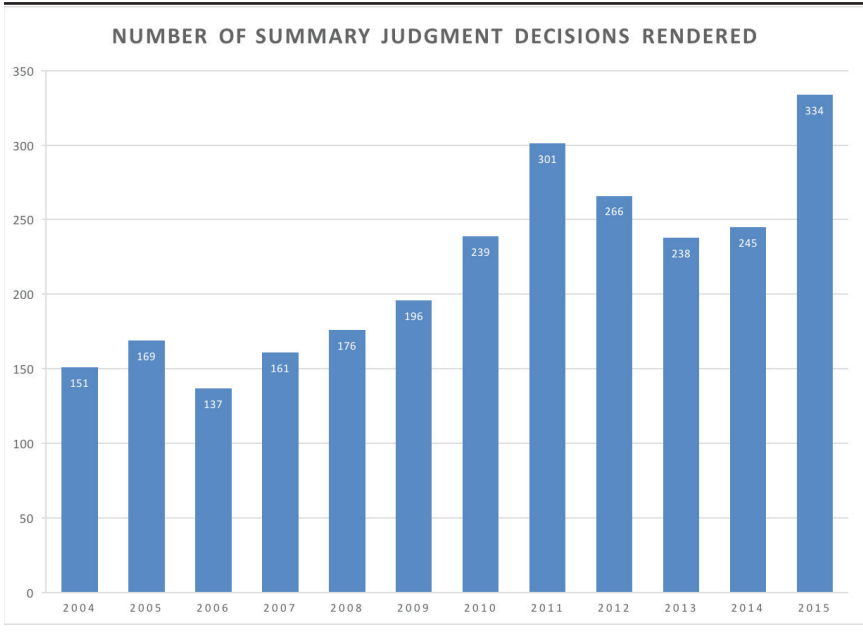
The number of motions for summary judgment rendered has in fact increased since the reforms came into effect on 1 January 2010. In every year since the

reported summary judgment decisions was thus the preferred form of obtaining data that was consistent and as comprehensive as possible over the full study period.

87. The distribution of the number of appeals of unreported decisions year-over-year is substantially similar to the distribution of all appeals of summary judgment decisions by year during the period.
88. Collecting decisions on the basis of search terms was required because there is no straightforward way to otherwise gather all summary judgment motions or motions decided pursuant to Rule 20; neither judges nor the courts label or otherwise categorize decisions as such, and the databases of decisions citing certain rules in Quicklaw and Westlaw are unfortunately inconsistent and under-inclusive for our purposes (they tend to categorize cases by whether the text of the decision including the words “rule 20” or “r. 20,” which raises the same problem as search terms, but to a greater degree).
89. It is also worth noting that Westlaw’s KeyCite and Quicklaw’s QuickCite tools, which seek to identify all cases that cite a particular legislative section (including a Rule), proved insufficient for the task of data collection for this study. This is primarily because they rely on the judge using the term “Rule 20” in her reasons, as well as an editor identifying this and linking the term to the KeyCite or QuickCite database. My efforts to use these tools revealed far fewer cases than the 2,960 identified using search terms and manual review by the author.

reforms, the number of summary judgment decisions has been greater than all the years prior to 2010 reviewed:

FIGURE 1: NUMBER OF SUMMARY JUDGMENT MOTIONS DECIDED IN ONTARIO, BY YEAR DECISION WAS RENDERED (2004-2015).



Notably, following an initial high watermark in 2011, there is a clear decline in the number of motions heard in 2012 and 2013 (although the number of motions heard in these years still remained greater than the number in each of the years prior to the rule change). This decline is likely due to the decision in *Combined Air* in December 2011, in which the Court of Appeal emphasized the benefits of trial and held that summary judgment under the new rule should only be granted if the motion judge can gain a full appreciation of the facts without a trial. This suggests that litigants and lawyers making decisions about whether to file a summary judgment motion understood the *Combined Air* decision as reining in the expansion of the rule.

However, after the Supreme Court's decision in *Hryniak* on 23 January 2014 made clear that the summary judgment procedure should be used more often, we observe the number of motions increasing once again. The increase in 2014

is small, but the increase in 2015 is dramatic. The delay before we observe the substantial increase in the number of summary judgment decisions rendered is likely due to the time it takes for motions to work their way through the court process—it takes several months to prepare, schedule, and eventually argue a motion once a litigant decides to pursue summary judgment,⁹⁰ and over 90 per cent of summary judgment motions heard in 2014 were reserved for an average of seventy-five days before a decision was ultimately rendered.⁹¹ Many litigants who filed motions following the Supreme Court's decision in *Hryniak* in January 2014 would thus not see a decision rendered on their motion until 2015.

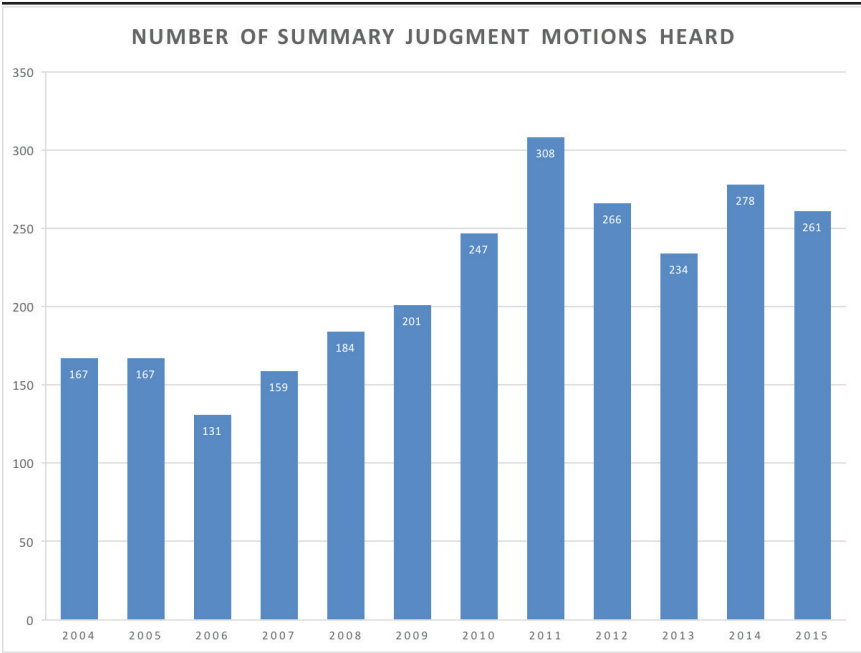
Ultimately, the number of summary judgment motions decided in Ontario in 2015 was a 70 per cent increase over the number decided in 2009 (the last year under the old Rule 20, as well as the year in the study period prior to 2010 with the greatest number of summary judgment motions). Even before appellate courts were able to offer guidance, and after the Court of Appeal interpreted the rule in a restrictive manner in *Combined Air*, the number of summary judgment motions increased under the new rule: 2010 showed a 22 per cent increase in motions decided as compared to 2009, and in 2013 (the year in the study period under the new rule with the fewest summary judgment decisions rendered), there was still a 21 per cent increase from 2009. Overall, the number of summary judgments decided between 2010–2015 was 65 per cent higher than the number decided between 2004–2009.

Another way to consider patterns in the number of summary judgment motions is by the date the motion was *heard* (rather than when the decision was rendered). The number of motions heard increased in 2010 and 2011, before falling in 2012 and 2013 following *Combined Air*. In 2014, following *Hryniak*, the number of motions heard jumped up once again:

90. The wait time for a summary judgment motion to be scheduled and heard varies by court region, and can change over time as the court develops new practice directions and processes to schedule motions. From personal experience practicing in Toronto in 2014 and 2015, it could take a couple months to prepare and exchange motion materials, at which time the parties would need to attend motion scheduling court to get a summary judgment date, which could be four to six months away. In 2015, the Toronto region instituted a new system called Civil Practice Court, which required parties to be ready for their motion to be heard within 100 days in order to get a date—in my experience, although this reduced the delay between scheduling the motion and having it heard, it increased the time from initiating a motion to having it scheduled. In either case, further delay could result in scheduling and conducting cross examinations on affidavits.

91. Calculations conducted on the dataset in a worksheet on file with the author.

FIGURE 2: NUMBER OF SUMMARY JUDGMENT MOTIONS DECIDED IN ONTARIO, BY YEAR MOTION WAS HEARD (2004-2015).



Although the number of motions heard appears to decrease in 2015, this can likely be accounted for by the fact that the dataset was limited to *judgments rendered* up to 31 December 2015. Since judgments are often reserved for a number of months after they are heard, it is likely that more motions were heard in 2015, but had not been released by the end of the study period.⁹²

Interestingly, statistics from the Ministry of the Attorney General (MAG) indicate that both the overall number of new civil actions initiated in Ontario and the number of proceedings heard (including motions) by the Superior

92. Summary judgment motions heard from 2010–2015 were reserved for an average of 59 days. See “Reserve time” worksheet, on file with the author. If we view the 2015 data as representing just 306 days of the year to account for judgments under reserve, then extrapolate to estimate how many motions would be heard over 365 days of 2015, we would see 311 decisions heard in 2015—the highest of all years in the study period.

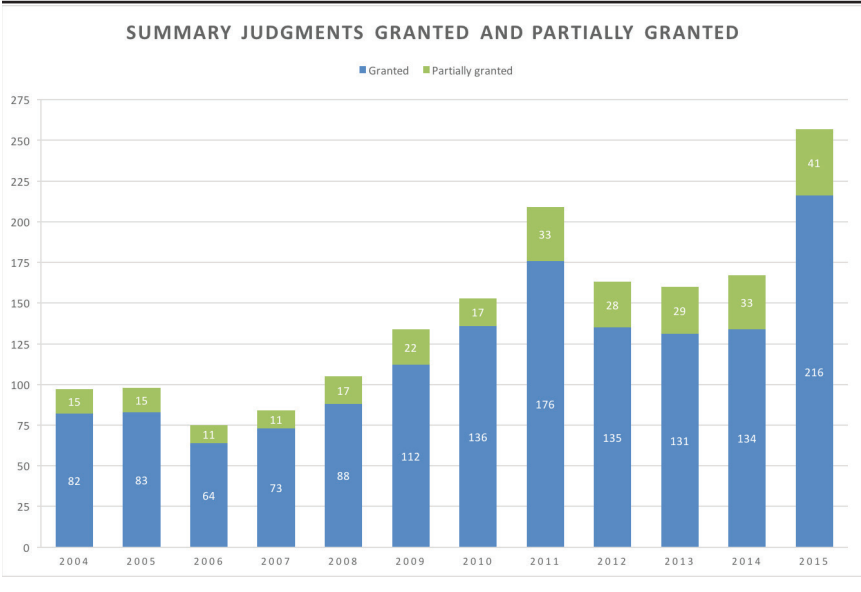
Court per year *decreased* after 2009.⁹³ This suggests that the increase of summary judgment motions after the reforms is not attributable to an increase in the number of motions generally, or an increase in the number of actions in the Ontario Superior Court.

B. NUMBER OF MOTIONS FOR SUMMARY JUDGMENT GRANTED

The data also demonstrate an increase in the number of summary judgment motions granted and partially granted each year following the implementation of the 2010 amendments:⁹⁴

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93. “New civil actions” includes all new files commenced by claim, statement of claim, notice of action, and third or subsequent party claim, and does not include Small Claims Court proceedings or family proceedings. “Proceedings heard” includes trials, pre-trials, settlement conferences, motions, case conferences, assessment hearings, status hearings, references before Masters, passing of accounts, and appeal hearings. Unfortunately, MAG data for the number of proceedings heard is only available by MAG fiscal year (April 1 to March 31), and only up to 2012-2013, so it is not possible at this time to assess the trends observed following *Combined Air* and *Hryniak* as against the total number of hearings. It is worth noting, however, that when summary judgment motions heard are analyzed by MAG fiscal year, there is no significant change to the patterns observed when reviewing by calendar year. See “Number of New Actions Received” (data table obtained on June 14, 2016 by request to the Management Information Unit, Court Services Division, Ministry of the Attorney General; on file with the author); Ministry of the Attorney General Court Services Division, “Annual Report 2004/05” (April 2005) at B5, online: <https://web.archive.org/web/20151204210639/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_05.pdf>; Ministry of the Attorney General Court Services Division, “Annual Report 2008/09” (28 May 2016) at 31, online: <https://web.archive.org/web/20150918231116/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_08/Court_Services_Annual_Report_FULL_EN.pdf>; Ministry of the Attorney General Court Services Division, “Annual Report 2012-2013,” online: <https://web.archive.org/web/20151204210257/http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/courts_annual_12/Court_Services_Annual_Report_FULL_EN.pdf>.
94. The categories of “Granted,” “Dismissed,” and “Partially granted” include groups as follows: I deemed a motion to have been “Granted” where summary judgment was dispositive of the action, including where there were cross motions and one was wholly granted and the other dismissed. I deemed a motion to have been “Partially granted” where a motion for partial summary judgment was granted; where a motion for summary judgment was granted in part (on some issues but not all); and where summary judgment was granted for one party, but not other moving parties. Motions were deemed “Dismissed” when the motion was wholly dismissed. These dispositions represent the final disposition of the motion as at December 31, 2015, including any appeals whose decisions had been rendered by that date (i.e. if a motion was granted by the motions judge but an appeal was granted dismissing the motion, the motion is deemed to have been dismissed). Considering the final disposition on appeal, rather than a decision at first instance that was reversed or varied, is the reason for the small discrepancy in year-over-year totals when compared to Figure 1.

FIGURE 3: NUMBER OF SUMMARY JUDGMENT MOTIONS GRANTED OR PARTIALLY GRANTED, BY YEAR OF JUDGMENT (2004-2015).



Once again, the greatest increases can be seen in 2011 and 2015—one year after each of the implementation of the new Rule 20 and the *Hryniak* decision.⁹⁵ Moreover, the number of motions granted and partially granted drops sharply in 2012, following the *Combined Air* decision. This suggests that not only were litigants and lawyers' decisions as to whether to bring a summary motion influenced by the changes to Rule 20 and judicial interpretation of the new rule, but that motions judges followed the Court of Appeal's guidance from *Combined Air*, which held that judges must be able to obtain a full appreciation of the evidence in order to grant summary judgment, and reined in the use of their expanded powers accordingly.

The number of summary judgment motions granted or partially granted remained at that decreased level (albeit still at least 21 per cent greater than pre-2010 levels) until 2015 saw an increase in motions before the court

95. This is consistent with my estimate of the time required for a motion initiated after (in response to) a key event to be prepared, scheduled, heard, and decided. See *supra* note 90; *supra* note 91 and the accompanying text.

following *Hryniak*. In 2015, 257 summary judgment motions were granted or partially granted—nearly double the number that had been granted or partially granted in 2009.

C. PROPORTION OF MOTIONS FOR SUMMARY JUDGMENT GRANTED

In addition to the number of summary judgment motions granted under the new Rule 20, we must also consider whether the *proportion* of motions granted has changed over the study period in light of the revised test for granting summary judgment, motions judges' new powers to assess and weigh evidence, and the push for a "culture shift" away from viewing traditional trials as the default and preferred means of civil dispute resolution. In this regard, the data are a little less clear:

TABLE 1: PROPORTION OF SUMMARY JUDGMENT MOTIONS GRANTED, PARTIALLY GRANTED, AND DISMISSED, BY YEAR OF JUDGMENT (2014-2015).

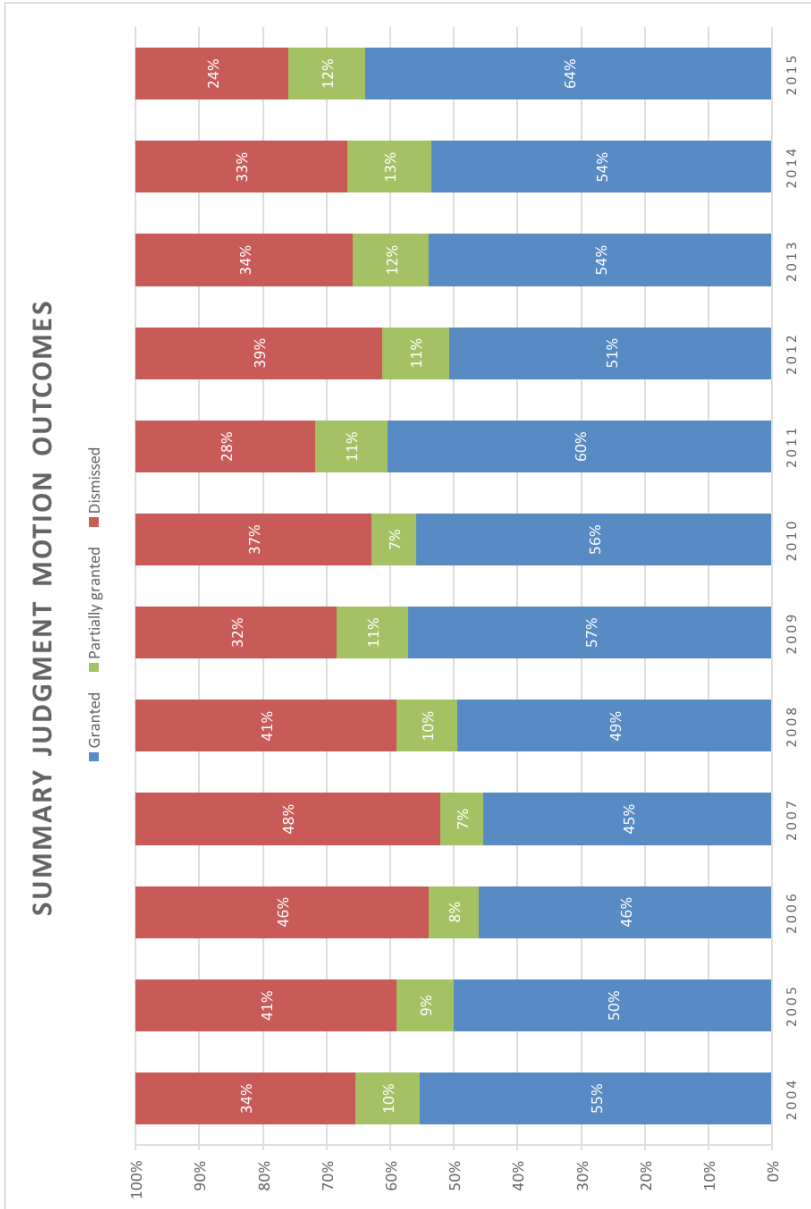
	Granted	Partially granted	Granted or partially granted	Dismissed
2004	55%	10%	66%	34%
2005	50%	9%	59%	41%
2006	46%	8%	54%	46%
2007	45%	7%	52%	48%
2008	49%	10%	59%	41%
2009	57%	11%	68%	32%
2010	56%	7%	63%	37%
2011	60%	11%	72%	28%
2012	51%	11%	61%	39%
2013	54%	12%	66%	34%
2014	54%	13%	67%	33%
2015	64%	12%	76%	24%
2004-2009	51%	9%	60%	40%
2010-2015	57%	11%	68%	32%
2010-2013	55%	10%	66%	34%
2014-2015	60%	13%	72%	28%

In comparing the six-year periods before and after the amendments, the proportion of summary judgment motions granted or partially granted has gone up from 60 per cent in 2004-2009 to 68 per cent in 2010-2015.

Given that standard for summary judgment was in flux for the first few years following the introduction of the new Rule 20 as motions judges muddled through their own interpretations of the rule and followed the Court of Appeal's later-overruled guidance in *Combined Air*, one might focus on the outcomes of summary judgment motions decided in 2014 and 2015 (essentially, the period since *Hryniak*) as compared to outcomes in the pre-2010 period. This reveals an even bigger change: the proportion of motions granted or partially granted increased from 60 per cent in 2004–2009 to 72 per cent in 2014–2015. (One notes, however, that the proportion of motions granted or partially granted in the 2010–2013 period of flux under the new Rule 20 remained greater than in the pre-2010 period, at 66 per cent versus 60 per cent.)

These findings suggest that relaxing the test for granting summary judgment, expanding motions judges' powers to assess and weigh evidence, and pushing for a culture shift did, in fact, result in a greater proportion of summary judgment motions being granted. However, when breaking down the data year-by-year, these proportions vary significantly:

FIGURE 4: PROPORTION OF SUMMARY JUDGMENT MOTIONS GRANTED, PARTIALLY GRANTED, AND DISMISSED, BY YEAR OF JUDGMENT (2004-2015).



In particular, the year-over-year data show that in 2004 and 2009, under the old Rule 20, 66–68 per cent of summary judgment motions were granted or partially granted—a greater proportion than in 2010 and 2012, and a similar proportion to 2013 and 2014. Only in 2011 and 2015 were the proportions of motions granted and partially granted greater than they had been in every year studied prior to the amendments.

Notably, the proportion of summary judgment motions granted or partially granted in 2004 and 2009 is significantly greater than in the other four pre-amendment years studied. In each of the years from 2005 to 2008, the proportion remained below 60 per cent—lower than all years under the new Rule 20. Considering the entire six year pre-amendment period as a whole certainly suggests that the new rule made a difference in terms of motions judges' ability or inclination to grant summary judgment. Perhaps the outcomes in summary judgment motions in 2004 and 2009 were aberrations. Nevertheless, a review of the year-over-year data urges caution in drawing sweeping conclusions. More time may be required before we can firmly conclude that the new Rule 20 has increased a moving party's chances of success on a summary judgment motion.

IV. DISCUSSION

A. SUMMARY CONCLUSIONS

The following conclusions emerge from the review and analysis of all reported summary judgment motions decided between 2004–2015.

1. NUMBER OF SUMMARY JUDGMENT MOTIONS DECIDED

The number of summary judgment motions has increased since the 2010 reforms. In every year since the amendments, the number of decisions has been greater than in each of the six years prior to the amendments. Summary judgment motions decided in Ontario in 2015 saw a 70 per cent increase over the number decided in 2009, and even before appellate guidance was provided, the number had increased by 22 per cent in 2010 over 2009. Overall, the number of summary judgments decided between 2010 and 2015 was 65 per cent greater than the number decided between 2004–2009.

The number of summary judgment motions has also been responsive to judicial direction. In 2012 and 2013 (the two years following *Combined Air*, which promoted a restrictive interpretation of Rule 20), the number of summary judgment motions decreased to 266 and 238, respectively, from an initial high watermark of 301 in 2011. Moreover, following the Supreme Court's push for a

“culture shift” in *Hryniak*, the number of summary judgment motions increased to its highest level yet (334 decisions rendered in 2015).

Overall, the number of motions for summary judgment decided in the six-year period following the reforms was 64 per cent greater than the number decided in the six years prior to the reforms.

This data suggest that litigants have, in fact, responded to the summary judgment reforms by seeking to resolve more of their civil disputes (or at least a part thereof) by summary judgment. In short, litigants’ response appears to be as intended.

2. NUMBER OF SUMMARY JUDGMENT MOTIONS GRANTED

The number of summary judgment motions granted or partially granted has increased since the 2010 reforms. In every year since the amendments, the number of motions granted or partially granted has been greater than in each of the six years prior to the amendments. The number of summary judgment motions granted or partially granted in 2015 was 92 per cent greater than the number granted or partially granted in 2009.

The number of motions granted also appears to have been responsive to appellate guidance. The greatest increases in the number of motions granted were in 2011 (the year following the initial implementation of the new Rule 20) and 2015 (the year after the *Hryniak* decision), and the number of motions granted and partially granted dropped sharply in 2012, the year following the *Combined Air* decision. Overall, the number of summary judgment motions granted or partially granted in the six-year period following the amendments to Rule 20 was 87 per cent greater than the number granted or partially granted in the six years prior to the amendments.

3. PROPORTION OF SUMMARY JUDGMENT MOTIONS GRANTED

Overall, the proportion of summary judgment motions granted or partially granted in the six-year period after the reforms (2010–2015) was 68 per cent, an increase over the 60 per cent granted or partially granted in the six-year period prior to the reforms (2004–2009). The proportion of motions granted in 2014–2015 (the post-*Hryniak* period) increased further to 72 per cent. This may be a better indicator of the success rate of summary judgments under the new regime, in light of the initial inconsistency in the interpretation and application of the new Rule 20 (without appellate guidance, and under the now-overruled *Combined Air* ‘full appreciation’ test).

Although it appears the success rate on summary judgments has increased following the reforms, we should refrain from drawing any sweeping conclusions at this juncture. Year-over-year data on the proportion of summary judgment motions granted or partially granted showed significant variability in the pre-2010 period, and two of the six pre-2010 years studied actually showed higher success rates than at least two individual years in the post-2010 period. Given the further increased proportion of successful summary judgment motions in 2014 and 2015, we are poised to be able to draw a more meaningful conclusion in a few years after more time has passed since the reforms and since *Hryniak*.

Taken together with the data on the number of summary judgment motions granted, however, these data suggest that judges have in fact largely responded to the reforms by granting summary judgments to resolve more civil disputes. In short, judges' response also appears to be as intended.

B. THE ROLE OF APPEALS

It is worth briefly noting how the number and outcome of appeals changed over the study period. After all, the new Rule 20 may not be serving to expedite the resolution and lower the cost of civil disputes if it resulted in an increase in reversals of summary judgment decisions on appeal, or a significant increase in the proportion of summary judgment decisions that proceeded to appeal.⁹⁶

An analysis of the number and outcome of summary judgment appeals does not significantly affect the conclusions noted above:

TABLE 2: NUMBER AND OUTCOME OF APPEALS OF SUMMARY JUDGMENT MOTIONS BY YEAR THE MOTION WAS HEARD (2014-2015).

Year	Total SJ decisions rendered	# SJ decisions appealed	% SJ decisions appealed	# SJ decisions reversed	% SJ appeals reversing	% SJ decisions reversed
2004	151	22	15%	5	23%	3%
2005	169	31	18%	11	35%	7%
2006	137	29	21%	12	41%	9%
2007	161	31	19%	11	35%	7%
2008	176	26	15%	6	23%	3%
2009	196	31	16%	10	32%	5%
2010	239	50	21%	7	14%	3%

96. I am grateful to an anonymous peer reviewer for the *Osgoode Hall Law Journal* for drawing this issue to my attention.

TABLE 2: NUMBER AND OUTCOME OF APPEALS OF SUMMARY JUDGMENT MOTIONS BY YEAR THE MOTION WAS HEARD (2014-2015).

Year	Total SJ decisions rendered	# SJ decisions appealed	% SJ decisions appealed	# SJ decisions reversed	% SJ appeals reversing	% SJ decisions reversed
2011	301	60	20%	18	30%	6%
2012	266	55	21%	17	31%	6%
2013	238	57	24%	9	16%	4%
2014	245	60	24%	9	15%	4%
2015*	334	51	15%	9	18%	3%
2004-2009 (average)	165	28.3	17%	9.2	32%	6%
2010-2014* (average)	257.8	56.4	22%	12	21%	5%

Note that “reversed” includes appeals that were partially granted throughout. *Although data from 2010-15 is used elsewhere in this study, 2015 decisions were excluded for the purpose of averaging appeals by the year the motion was heard, as the dataset was incomplete in this regard (i.e. the dataset, which was composed of judgments up to the end of 2015, did not include subsequent appeals of all motions that had been heard up to the end 2015).

The number of summary judgment motions appealed and the number of summary judgment motions reversed both increased following the 2010 rule changes, but this is unsurprising given the increase in summary judgment motions heard since 2010, with which it is consistent.

The proportion of summary judgment decisions that were reversed on appeal, however, decreased slightly from 6 per cent to 5 per cent, and the proportion of summary judgment appeals that resulted in a reversal decreased from 32 per cent to 21 per cent in the period following 2010. These findings belie the concern that despite increased use of the summary judgment process to resolve civil disputes, the overall litigation process is actually being slowed (and made more expensive) by incorrect decisions on summary judgment that must later be reversed.

It should be observed, however, that the number of summary judgment decisions appealed increased disproportionately since 2010. The data show that 22 per cent of summary judgment decisions rendered from 2010–2014 were appealed, up from 17 per cent from 2004–2009. This may suggest that summary judgment motions are taking longer to reach a final resolution in the post-2010 period, even if the motions judges’ decisions are being upheld on appeal. Alternatively, it may simply be reflective of the interpretive flux that resulted from the initial implementation of the new Rule 20 and the shifting standards provided by the appellate decisions in *Combined Air* and *Hryniak*. The

appropriate comparator to assess whether these increased appeals are slowing down the civil dispute resolution process is the increase (if any) in the number and proportion of *trial* decisions appealed during the relevant period, which is outside the scope of this study.

Ultimately, as discussed in Section D below, further research relating to the duration and cost of a matter that proceeds to trial versus the duration and cost of a matter resolved through summary judgment will be required to more conclusively determine whether the increased use of summary judgment procedures since 2010 is, in fact, reducing the time and cost required for civil dispute resolution.

C. LESSONS FOR FUTURE CIVIL JUSTICE REFORM

A few lessons on effecting civil justice reform emerge from Ontario's experience with amending the rules on summary judgment. First, it is encouraging to see that litigants responded rationally to efforts to increase the use of summary judgment procedure by filing more summary judgment motions. The reforms certainly achieved their intended effect on litigants' motion-filing behaviour. The increase in summary judgment motions heard was immediate, and remained even after the Ontario Court of Appeal urged caution and set the high 'full appreciation' threshold for disposing of an action on summary judgment before trial. This suggests that litigants' behaviour can be influenced by amendments to the *Rules*, even before appellate courts step in to provide interpretive guidance.

I also observed that judges similarly responded rationally to the reforms by granting more summary judgment motions. Although more data should be collected and analyzed to confirm trends in success rates of summary judgment motion in the years post-*Hryniak*, it appears that motions judges are making use of their expanded powers, and that in doing so they are increasingly able to find the necessary facts to resolve the dispute, as intended by the new Rule 20. Prior to *Combined Air*, motions judges' interpretation of their authority under the new Rule 20 varied widely, with some seeing the amendments as a significant expansion of the summary judgment procedure, and others viewing the reforms as having a minor effect, if any.⁹⁷ After four years under the new rule, the Supreme Court of Canada clarified in *Hryniak* that an expansive approach to summary judgment

97. See e.g. *Lawless v Anderson*, 2010 ONSC 2723 at para 19, 188 ACWS (3d) 1006. Here DM Brown J stated that the new Rule 20 introduced a "radical change" and "vests in a motion judge the powers typically exercised by a trial judge." Compare *Cuthbert v TD Canada Trust*, 2010 ONSC 830 at para 11, 185 ACWS (3d) 768. Here Karakatsanis J held that the test for summary judgment "has not changed" and that "it is not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment."

was required by the new Rule 20, and in the years since we have seen the most dramatic changes in the prevalence and success of summary judgment motions. This experience suggests that appellate courts' interpretation (and the accordant delay) may be required before motions judges take a consistent approach in the application of a new rule.

There is a potential downside, however, to relying on appellate courts to provide an interpretive approach to meaningfully effect a civil justice initiative. Ontario's experience with *Combined Air*, whose restrictive full appreciation test to granting summary judgment was overruled by *Hryniak*, threatened to create the same "interpretive erosion" Ontario experienced with the previous Rule 20 following its introduction in 1985, when initial enthusiasm for an expanded role for summary judgment gave way to increasingly narrow judicial interpretations of the rules in question, resulting in their infrequent use.⁹⁸

Furthermore, pushing the interpretation of the new Rule 20 through two appellate courts resulted in a period of flux as to the standard to be applied on summary judgment, creating uncertainty for litigants as to whether their motion would, in fact, save time and expense. If MAG or the Rules Committee wish to ensure a civil justice reform measure achieves its intended effects prior to its interpretation by an appellate court, amendments to the *Rules* should be clear and explicit about judges' powers and when they may be used, and the test to be applied to the rule in question.

Ultimately, however, this study suggests that to effect meaningful change the stakeholders in the justice system must work together. Although we observed a moderate increase in summary judgment motions in the first two years following the rule change, these gains were significantly reduced when the Ontario Court of Appeal issued its decision in *Combined Air* that reined in the use of the rule. The gains returned and increased further after the Supreme Court of Canada promoted the use of summary judgment in *Hryniak*. These patterns suggest that access to justice initiatives cannot effect meaningful change if policymakers and courts are working at cross-purposes. Although small gains may be achieved through a change in the rules or through the case law, both are required to effect a culture shift.

D. QUESTIONS FOR FUTURE STUDY

Despite recent improvements in the use of summary judgment procedures, Ontario's civil justice system has a long way to go in making the civil justice system more accessible and affordable. This study provides some insight as to how one

98. See Peter EJ Wells, Adrienne Boudreau & Annik Forristal, "A New Departure and a Fresh Approach: The Ontario Court of Appeal Decision in *Combined Air*" (2012) 39:4 Adv Q 477.

reform measure affected litigants' and judges' behaviour in filing and granting motions for summary judgment. There remain, however, numerous questions about whether and how the new summary judgment rule truly enhances access to justice by lowering the overall costs of an action from commencement to resolution, and by expediting the duration of an action from commencement to resolution.

The following are a few issues that require further study, which could build on this research to enhance the scholarship in this area:

1. Did *Hryniak* have a similar effect on summary judgment motions in other provinces (or in the Federal Court), even if they did not amend the text of their summary judgment rules?
2. What happens to cases where a summary judgment motion is dismissed or only partially granted?
 - a. What proportion go on to trial?
 - b. Are there many consent dismissals shortly after, which may indicate that once parties put their best foot forward on summary judgment they are inclined to settle out of court?
 - c. Are motions judges following through on the suggestion in *Hryniak* to follow through with the matter using case management procedures?
3. What does the data show in respect of the time between commencement of a case to its final disposition?
 - a. Has the increased use of summary judgment decreased the overall time it takes to resolve a civil dispute?
 - b. In actions where a summary judgment motion is pursued unsuccessfully, does the motion have the effect of increasing the duration (and corresponding costs) of the case?
4. How long is the delay in scheduling a summary judgment motion versus the delay in waiting for a trial date in various judicial regions? Has the increased use of summary judgment motions increased the delay in scheduling a summary judgment motion? Has our problem of waiting months for trial been replaced or supplemented with a problem of waiting months for a summary judgment motion date?
5. Do litigants whose actions are resolved by way of summary judgment feel it was an adequate substitute for a trial? Or has increased efficiency in access to the courts reduced litigants' satisfaction with the quality of justice that results?

V. CONCLUSION

The data analyzed in this study demonstrate that the culture shift espoused by the Supreme Court in *Hryniak* following the implementation of the new Rule 20 has indeed begun. Ontario has a long way to go in making the civil justice system more accessible and affordable for Ontarians, as we have observed an increase in the number of summary judgment motions decided, an increase in the number of summary judgment motions granted, and, at a high level, an increase in the proportion of successful summary judgment motions since the reforms. There remains much work to do in improving access to civil justice in Canada, but the amendments to Ontario's summary judgment rule and its subsequent judicial interpretation have been a step in the right direction. One hopes the lessons learned from Ontario's new Rule 20 will provide guidance for other civil justice reform projects, so we can continue achieving meaningful results in enhancing access to justice for Canadians.

