

# Motions for Partial Summary Judgment: Proceed with Caution

October 16, 2017

In [\*Hryniak v Mauldin\*](#), the Supreme Court of Canada held that a summary judgment motion is appropriate if: (i) it can achieve a fair and just adjudication; and (ii) it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.<sup>1</sup>

However, summary judgment motions may not always be the best course of action in the context of the litigation as a whole and may increase cost and delay, particularly in the case of partial summary judgment motions which, unlike motions for summary judgment, do not result in the disposal of an entire action. Karakatsanis J. observed in *Hryniak* that it may not be in the interests of justice to grant summary judgment against a single defendant if the claims against other parties will proceed to trial in any event.<sup>2</sup>

Since *Hryniak*, the Ontario Court of Appeal has considered the appropriateness or advisability of partial summary judgment motions in [\*Baywood Homes Partnership v Haditagh\*](#)<sup>3</sup>, [\*Hamilton \(City\) v Their + Curran Architects Inc.\*](#)<sup>4</sup> and [\*Canadian Imperial Bank of Commerce v Deloitte and Touche\*](#).<sup>5</sup>

In *Baywood*, *Hamilton* and *CIBC*, the Court analyzed the issue from the perspective of whether: (i) there was a risk of duplicative or inconsistent findings at trial, and (ii) granting partial summary judgment was advisable in the context of the litigation as a whole. In each of these cases, the partial summary judgment motion was found to be inadvisable in the context of the litigation as a whole because, among other things:

- the facts underlying the issues on the motion were too closely intertwined with the facts underlying the issues that would proceed to trial;<sup>6</sup>
- the evidence available at trial would provide the trial judge a fuller appreciation of the relationship between the parties and the factual context;<sup>7</sup> and
- the motion did not result in any party being released from the proceeding and did not eliminate or materially shorten the length of trial required.<sup>8</sup>

The Ontario Court of Appeal recently added further commentary on partial summary motions in [\*Butera v Chown, Cairns LLP\*](#), where the Court noted that in addition to the danger of duplicative and inconsistent findings, partial summary judgment motions “raise further problems that are anathema to the stated objectives underlying *Hryniak*”.<sup>9</sup> The Court identified the following four problems:

1. Partial summary judgment motions delay the resolution of the main action: “Typically, an action does not progress in the face of a motion for partial summary judgment. A delay tactic, dressed as a request for partial summary judgment, may be used, albeit improperly, to cause an opposing party to expend time and legal fees on a motion that will not finally determine the action and, at best, will only resolve one element of the action. At worst, the result is only increased fees and delay. There is also always the possibility of an appeal”.<sup>10</sup>
2. Partial summary judgment motions may be very expensive: “The 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.”<sup>11</sup>

3. Partial summary judgment motions may be a waste of judicial resources: “[J]udges, who already face a significant responsibility addressing the increase in summary judgment motions that have flowed since *Hryniak*, are required to spend time hearing partial summary judgment motions and writing comprehensive reasons on an issue that does not dispose of the action.”<sup>12</sup>
4. Partial summary judgment motions carry a higher risk of inconsistent findings: “[T]he record available at the hearing of a partial summary judgment motion will likely not be as expansive as the record at trial therefore increasing the danger of inconsistent findings.”<sup>13</sup>

In *Butera*, the plaintiffs sued the defendants, their former lawyers, for solicitors’ negligence and lost opportunity damages. The defendant had acted for the plaintiffs in a prior proceeding that was dismissed due to a successful limitations defence. The defendants brought a motion for partial summary judgment to dismiss the portion of the plaintiffs’ claim relating to misrepresentation. This motion was granted and subsequently appealed.

In allowing the appeal, the Ontario Court of Appeal held that the motions judge made an extricable error in principle in failing to consider whether partial summary judgment was appropriate in the context of the litigation as a whole. The claims that were proceeding to trial, which included allegations of breach of the duty of good faith, deficient disclosure, negligence and breach of contract, were intertwined with the misrepresentation claims, and an award for partial summary judgment could lead to inconsistent results. Further, the Court noted that had the litigation as a whole been considered, partial summary judgment would not have been an appropriate award as it did not serve the objectives of proportionality, efficiency and cost effectiveness.<sup>14</sup>

*Butera* highlights the courts’ increasing ambivalence towards motions for partial summary judgment. Papp J.A. held that a motion for partial summary judgment should be considered a “rare procedure” that is reserved for an issue or issues that may be readily bifurcated from those in the main action and that may be dealt with expeditiously and in a cost effective manner.<sup>15</sup> This is the approach that is consistent with the objectives of *Hryniak*.

In considering whether to bring a partial summary judgment motion, the moving party should assess whether the motion is advisable and appropriate in the context of the litigation as a whole, keeping in mind the underlying objectives set out in *Hryniak*. Litigants should think twice about bringing a motion for partial summary judgment where the facts, issues and evidence are not easily separated from those related to the claims proceeding to trial, and where a motion for partial summary judgment may only serve to increase costs, delay the resolution of the main action and waste already limited judicial resources.

[1] *Hryniak v Mauldin*, 2014 SCC 7 at para 4.

[2] *Ibid* at para 60.

[3] 2014 ONCA 450 [Baywood].

[4] 2015 ONCA 64 [Hamilton].

[5] 2016 ONCA 922 [CIBC].

[6] *Hamilton*, supra note 4 at paras 20-22.5

[7] *Baywood*, supra note 3 at paras 36-38.

[8] *CIBC*, supra note 5 at paras 37-39.

[9] *Butera v Chown, Cairns LLP*, 2017 ONCA 783 at para 29.

[10] *Ibid* at para 30.

[11] *Ibid* at para 31.

[12] *Ibid* at para 32.

[13] *Ibid* at para 33.

[14] *Ibid* at para 38.

[15] *Ibid* at para 34.

*The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.*

**WeirFoulds**<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

**Toronto Office**

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110

Fax: 416.365.1876

**Oakville Office**

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110

Fax: 905.829.2035