Lessons Learned from a Trial by Affidavit
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On January 23, 2014, the Supreme Court of Canada released its landmark decision of *Hryniak v Mauldin.*[1] Although *Hryniak* primarily dealt on a fact and legal scenario that considered the proper implementation of Rule 20 of the *Rules of Civil Procedure,* but its most useful contribution may be the recognition that the Supreme Court of Canada gave to the backlog, inefficiencies, and delay that are key features in Canada's justice system.

One of the most oft cited passages from *Hryniak* that features prominently in not only every single factum relating to the use of Summary Judgment, but also into nearly every argument regarding delay, speaks to the "culture shift" required by all participants of the justice system relating to the effective use of scarce judicial resources.

From the release of *Hryniak* in 2014, we have seen from both the legislators and from the Courts a continued intention to recognize that the delay that is systematically ingrained into the justice system is unacceptable. From *R v. Jordan*[2] in the Criminal context to the implementation of Ontario Regulation 626/00[3] that increased the jurisdiction of the Small Claims Court to all claims seeking money damages of $35,000.00 or less.

[1] *Hryniak v. Mauldin* 2014 SCC 7, 1 SCR 87
[2] R v. Jordan 2016 SCC 27, 2016 1 SCR 631
[3] O. Reg. 626/00: Small Claims Court Jurisdiction and Appeal Limit under the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended

One of the biggest changes felt by all Civil Litigators in Ontario, have been the amendments to the Simplified Procedure of Rule 76 that occurred at or around the same time as the amendments to the Small Claims Court Rules. Rule 76.02(1) makes it mandatory for every action in Ontario seeking money, real property, or personal property with a combined value of $200,000.00 to be commenced under Rule 76. Previously, the monetary jurisdiction of the Simplified Procedure was $100,000.00 or less.

$200,000.00 is a lot of money, and the upper limits of this threshold have brought several different classes of claims under the jurisdiction of Rule 76 and the Simplified Procedure. As a result, the Simplified Procedure can no longer be overlooked. A lawyer must take a hard look at its use from the outset of litigation as there are cost consequences for not using the Simplified Procedure if the amount of the claim falls within its jurisdiction. It is not easy to continue under the Simplified Procedure if it is later determined that the claim will not top $200,000.00, as for the most part the consent of all parties or a Court Order is required to amend down into the Simplified Procedure. This creates a scenario where astute opposing counsel will have an opportunity to ask for their costs thrown away or unnecessarily incurred.[4]

The amendments to the Simplified Procedure have had the most profound changes on the personal injury bar, as its jurisdiction will now encapsulate most routine personal injury litigation without

[4] See *Hewitson Holdings Inc. v. Bur-Met Contracting and Concrete Walls*, 2021, 2021 ONSC 3197 (CanLII) and *Hewitson Holdings Inc. v. Bur-Met Contracting Ltd. et al.* 2021 ONSC 5063 (CanLII) where the Plaintiff on the even of trial sought to move action to Simplified Procedure. The Court held that the cost of an expert report had been needlessly incurred as the evidence indicated that it would not have been incurred if commenced originally under the Simplified Procedure.

or with modest loss of income or future care costs such as most run of the mill claims brought under the *Occupiers Liability Act*.[5]

Lawyers have to be aware that there are some procedural distinctions between actions being prosecuted under the Ordinary Procedure and Simplified Procedure which seem to play on the idea of the 'culture shift' from *Hryniak* and that foster efficiency and the protection of Court time. For example:

- Rule 76.02.1 prohibits either party from delivering a jury notice[6];
- Rule 76.03(1) requires the parties to deliver their affidavit of documents within 10 days of the close of pleadings and requires that each party also provide a list of potential witnesses and their addresses as part of the Affidavit of Documents;
- Rule 76.04(1) prohibits some forms of evidence gathering such as: Examination for Discovery in writing under Rule 35, Cross-examination of a deponent on an affidavit under Rule 39.02, and Examination of a witness on a motion under Rule 39.03;
- Rule 76.04(2) limits examination for discovery to a maximum of three hours per party;
- There is a special motion form (Form 76B) to be used on a motion under the Simplified Rules;
- Rule 76.08 requires that the parties canvas document disclosure, settlement, or partial settlement within 60 days of a defence being filed;

[5] *Occupiers' Liability Act*, R.S.O. 1990, c. O.2, as amended.
[6] Rule 76.02.1(2) states that a party may deliver a jury notice if the action involves a claim for relief arising from: slander, libel, malicious arrest, malicious prosecution and false imprisonment. Filing a jury notice in these types of claims will take the action out of the simplified procedure.

The biggest change under the new Rule 76 is the availability of a Summary Trial that caps the length of a trial to five days under Rule 76.12(2). The Summary Trial rules found in Rule 76.12(1) dictate that evidence in chief including evidence given by an expert will be given by affidavit and will allow for live cross examination and reexamination.

From *Hryniak* in 2014 to the amendments to the simplified procedure in 2014, we have seen the civil justice system adopt procedures that have arguably made affidavit evidence as important, if not more important than *viva voce* evidence. We have seen the civil justice system focus on efficiencies with the goal of only using the Court system when it can no longer be avoided. As part of the culture shift made famous by *Hryniak*, affidavits are playing a crucial role in the fact-finding powers of the Court and are affecting substantive rights through procedure, in not only the amendments to Rule 76 and the simplified procedure but also in motions for summary judgment and proceedings commenced by way of notice of application.

What follows are a few tips, tricks, and considerations learned from conducting a trial with examination in chief proceeding by affidavit which was conducted during the COVID-19 pandemic over Zoom.[7]

Consider Proper Reply

[7] See *Locke et al. v. Quast et al.* 2021 ONSC 3988 (CanLII) and *Locke et al v. Quast et al*, 2021 ONSC 4689 (CanLII) a proceeding that was originally commenced by application and ordered to proceed to a trial of an issue regarding the proper value of a minority shareholder position. At the trial management conference, three weeks before the trial commenced, the parties were ordered to prepare affidavit evidence in place of live examination in chief.

As part of Rule 76 and the Simplified Procedure, Rule 76.10(2) requires that at least 30 days before the pre-trial, the parties are to agree to a proposed trial management plan that considers the length of the opening statement, the presentation of evidence in chief by affidavit, cross examination of deponents, reexamination of deponents, and oral argument. At the pre-trial, Rule 76.10(5) requires that dates be fixed for the delivery of witness affidavits.

This new rule raises practical problems where counsel preparing for trial must turn their mind to preparing their client's evidence long before a trial has started. Traditionally, a party would have the benefit of completely preparing for trial before their first witness ever gave evidence. Now, the amendments require that the parties prepare their evidence months before the dispute sees the inside of a Courtroom. This leads to a scenario where counsel does not have the benefit of full preparation before their client's evidence is presented, which in turn leads to the potential for missed evidence.

Following the completion of the affidavits, the parties will continue preparing for trial and often uncover something that could or should have been included in an affidavit. This then leads the lawyer to a problem where they might consider patching up the missed evidence through reply or re-examination. Opposing counsel should always object to improper reply evidence.

Reply evidence should only be used to contradict or qualify new facts or issues raised in cross-examination which could not have been anticipated or addressed in examination in chief. The general rule in civil cases is that matters which might properly be considered to form part of the

plaintiff's case in chief are to be excluded. In *Allcock, Laight & Westwood Ltd. v. Patten*[8] Ontario's Court of Appeal succinctly set out the principles where it was stated:

> It is well settled that where there is a single issue only to be tried, the party beginning must exhaust his evidence in the first instance and may not split his case by relying on prima facie proof, and when this has been shaken by his adversary, adducing confirmatory evidence… the rule is now so well settled that it requires no further elaboration. It is important in the trial of actions, whether before a jury or a judge alone, that this rule should be observed. A Defendant is entitled to know the case which he has to meet when he presents his defence and it is not open to the plaintiff under the guise of replying to reconfirm the case which he was required to make out in the first instance or take the risk of non- persuasion.

The principal consideration and mindset should always be whether the matter could or should have been raised in examination in chief. Permissible reply evidence is evidence that could not have been anticipated by the party calling the witness in chief. It is crucial when considering dates for delivery of the affidavits under Rule 76, that a party provides itself sufficient time so that full preparation can be undertaken before drafting the affidavits. At the same time, it cannot be done too soon. If too much time passes between delivery of the affidavits and the trial, counsel may find themselves needing to reprepare.

Consider what do to with Hearsay in Affidavits

Generally, hearsay should be avoided, and it is usually frowned upon in the Court as it insulates the person with the best evidence from being cross-examined. Considering the amount of authority against giving hearsay evidence, it is surprising that the Rules still provide for the use of hearsay in some form, in affidavits. For example, the Rules permit to a certain degree the use of hearsay in an affidavit supporting a motion or application. Rule 39.04(4) states that "*An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the*

[8] *Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd et al.* 1966 CanLII 282 (ON CA)

information and the fact of the belief are specified in the affidavit". Rule 39.04(5) states that *"An affidavit for use on an application may contain statements of the deponent's information and believe with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit."* The distinction is that that hearsay may only be used on an affidavit supporting a Notice of Application if the matter is not contentious.

The point here is that hearsay in an affidavit is not always easily identifiable. It is easy to point to a passage in an affidavit that starts by saying *"I am informed by so and so and verily believe it to be true"* as clear hearsay. However sometimes, it is the substance of the evidence and the words used that may provide a clue that the evidence given is not within the affiant's direct belief or knowledge. Words like "I understand", "I believe", "it is my understanding" or "it is my belief" may suggest to the reader that the evidence that follows is hearsay.

There are a couple of options regarding how to deal with hearsay in an affidavit. Counsel could always leave the evidence in the affidavit and show up at the proceeding to argue on the merits and ask that the offending evidence be given no or little weight. The other more aggressive approach would be a motion under Rule 21 to strike the offending paragraphs. The Court has recognized at least two differing opinions on the proper time to bring such a motion. The first would be to bring an interlocutory motion to have the impugned paragraphs struck that would proceed separate and apart and in advance from the proceedings on the merits. The other approach would be to bring the motion to strike at the same time as the proceeding on its merits, to be heard prior to main argument. This would allow the Judge hearing the proceeding to exercise their gate

keeping function to properly assess the evidence and maintain the sanctity of the record and to make any conclusions on the admissibility of evidence.

The advantages of a motion prior to the main proceeding on the merits was discussed in *Holder v. Wray*[9] where Emery J stated:

> An advance ruling on striking all or parts of an affidavit can save the court the time of hearing and deciding evidentiary issues. A motion to strike can screen out evidence that is ultimately extraneous to the real issues between the parties, and that only increase the high cost of litigation. The motion to strike, used judiciously, provides the means by which to weed out frivolous or vexatious evidence that could require reply evidence, and might otherwise widen the scope of any cross-examination that is later found unnecessary. Although there are arguments for and against striking an affidavit in whole or in part prior to the main event, it is a discretionary order to make in the right circumstances. One "special reason" to make such an order in advance of the main hearing would be where the affidavit at issue is "clearly improper and it would inevitably give rise to extraordinary cost or difficulty for the other party."

The Ontario Divisional Court has also offered its opinion on the proper timeframe for a motion to strike affidavit evidence and favours an approach that accurately defines the record before argument is commenced. In *Sierra Club Canada v. Ontario (Ministry of Natural Resources and Ministry of Transportation)*[10] the Divisional Court held:

> We are of the view that this motion should have been brought prior to the hearing by the panel, in order to clarify the contents of the record prior to factums being filed. Proceeding in such a manner would have enabled the parties to define the issues for the hearing based upon properly admissible evidence. I note that this was the procedure followed in the decision of Hanna v. Ontario (Attorney General), 2010 ONSC 4058 (Div. Ct.), If the motion judge is unsure about the relevance of certain material, those issues may be left to be determined by the panel hearing the judicial review.
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> To fail to define the appropriate record for the Court before the hearing encourages the proliferation of collateral issues, as occurred in this application. Filing material

[9] *Holder v Wray* 2018 ONSC 6133 (CanLII)
[10] *Sierra Club Canada v. Ontario (Ministry of Natural Resources and Ministry of Transportation)* 2011 ONSC 4086 (CanLII)

> by one party inevitably precipitates a response from the opposite party. The consequence of failing to define the record is a proceeding before this court that becomes unnecessarily complicated, expensive and lengthy. For the parties and for the court, the ground is continually shifting, and the core issues may be eclipsed by the procedural issues.

The theory is that screening inadmissible evidence at a preliminary stage will result in a more efficient use of parties and the Court's time and resources. If an affidavit contains inadmissible legal argument, opinions, hearsay, or comments it would present a dilemma for the opposing party to choose between ignoring, responding to and/or cross examining on the inadmissible paragraphs. In these cases, it may be wise to consider a pre-emptive or interlocutory motion to strike as it would allow for either a more concise response or a shorter cross-examination.

However, the Court has also recognized a diverging view where it has acknowledged that the admissibility of evidence should be left up to the Justice who is hearing the proceeding on its merits. The Court ruled in *Hunt v Stassen*[11] that

> When a motion to strike is based on the relevance of the affidavit evidence it is often preferable to leave the question to the Court hearing the application because relevance can often only be assessed in the context of the application as a whole. The Judge who hears the application on its merits is usually best situated to make that determination.

The Court has accurately summarized the state of the law and provided practical advice to counsel who may be faced with a dilemma on how to deal with inadmissible evidence, be it hearsay or even irrelevant evidence found in an affidavit. In *Gutierrez v. The Watchtower Bible Tract Society of Canada et al*[12] Perell J guidance was the following:

> By way of my own summary, in the majority of cases, rather than a pre-emptive motion to strike affidavits in whole or in part for non-compliance with the Rules of Civil Procedure, it is preferable that the judge or master hearing the substantive

[11] *Hunt v. Stassen* 2019 ONSC 4466
[12] *Gutierrez v. The Watchtower Bible and Tract Society of Canada et al.,* 2019 ONSC 3069 (CanLII)

> motion rule on the admissibility of the evidence. However, there is no absolute rule, and a pre-emptive motion may be appropriate where either efficiency or fairness require that disputes about the factual record be determined before the substantive motion. On a case-by-case basis, it will be for the judge or master hearing the pre-emptive motion to decide whether to strike the impugned material or to defer the issues of admissibility to the judge or master hearing the substantive motion.

Whatever method counsel chooses will depend on the particular facts of the case. There may be times where the offending evidence is so crucial to the opposing party's case that if struck it could bring the proceeding to an end or substantially limit the issues. In a scenario such as this, it would be wise to consider a preliminary or interlocutory motion to strike. There will also be scenarios where the evidence is not nearly as important, and in a case like that, it may be better to just make submissions on the strength or weight of the evidence at the hearing of the proceeding on its merits.

Consider the Language used in the Affidavit

An affidavit is serious business. A witness that is signing an affidavit is saying that the contents are true and as good as live evidence in Court. Inaccuracies or ambiguities may reduce or completely destroy a party's effectiveness as a witness and make a winnable argument a loser. Just as live evidence may be tested by cross-examination, so too may evidence that is given by way of affidavit.

When a witness signs an affidavit it becomes their evidence, even if the document, as usually happens, was prepared, or drafted by someone else. An affidavit is unique as it provides an opportunity for a lawyer to structure the way evidence is given. At the same time, it should be the party's words and not the words of the lawyer.

A recent Ontario Court of Appeal decision provides some colorful comments on the proper way to prepare an affidavit. In *Teefy Developments (Bathhurst Glen) Limited v. Sun*[13] Nordheimer JA provides:

> I pause, at this point, to reflect on a rather disturbing issue regarding the moving party's affidavit filed on this motion. Her counsel advises that the moving party does not read English. When I inquired how she could have then sworn her affidavit in these proceedings, I was met with the remarkable response that **"everyone" knows that affidavits are prepared by lawyers and clients simply sign what the lawyers tell them to sign.**
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> It should go without saying that that is not the way that any affidavit is properly prepared. **The deponent of an affidavit is required to review its contents and swear or affirm to its truth.** It is the obligation of the person commissioning the affidavit to ensure, among other things, that he or she administers the oath or declaration in the manner required by law before signing the jurat or declaration: *Commissioners for Taking Affidavits Act*, R.S.O. 1990, c. C.17, s. 9(3). If the deponent does not understand English, then the affidavit must be translated for the deponent and the jurat on the affidavit must be changed to reflect that fact.
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> The result, in this case, from the apparent failure to follow those fundamental procedures, is that it calls into question the reliance that I can safely place on the contents of the moving party's affidavit.

The fact pattern in this case is extreme, but the problem is not limited to situations where you might not speak or read English. Too often, affidavits are treated as casually as if a party was signing a COVID declaration, or a work order for car repairs. In fact, a party may even pay more attention when doing those everyday things, because the party mistakenly believes that the lawyer must have it right or that it must say what the lawyer wants it to say to win.

Nothing sinks a case faster than the moment in cross-examination when a witness is asked to read a sentence or paragraph in the party's affidavit and is asked to explain what is meant and the best the party can come up with is that they don't know, they just signed what the lawyer wrote.

[13] *Teefy Developments (Bathurst Glen) Limited v. Sun*

Avoiding this uncomfortable scenario is not difficult - it just requires counsel making sure that witness reads the document carefully before it is signed, making a point to address any questions that may arise from the document, asking if the document contains any errors and above all, making any changes required by the witness so that they can swear a truthful document.

The End