COURT OF APPEAL FOR ONTARIO

CITATION: Moffitt v. TD Canada Trust, 2023 ONCA 349
DATE: 20230517
DOCKET: C69913

Brown, Sossin and Copeland JJ.A.

BETWEEN

Bruce Moffitt, by his Litigation Guardian, Catherine Moffitt,
Catherine Moffit, Ella Bakker-Moffitt and
Lucas Porter-Bakker

Plaintiffs
(Appellants)

and

TD Canada Trust, Ferdinand Pangan, and ~~John Doe~~
Jason Green

Defendants
(Respondent)

Christopher I.R. Morrison and Sherilyn Pickering, for the appellants

David Zuber and James Tausendfreund, for the respondent

Heard: February 13, 2023

On appeal from the order of Justice William M. LeMay of the Superior Court of Justice, dated September 16, 2021, with reasons reported at 2021 ONSC 6133.

Brown J.A.:

I. OVERVIEW

[1] This appeal raises three issues: (i) the availability of summary judgment in a civil action in which a party has served a jury notice; (ii) the motion judge's exclusion of expert evidence; and (iii) the fairness of the summary judgment process used in this case.

[2] The appellant, Bruce Moffitt, suffered a vicious assault one evening when he was using an ATM machine located in the vestibule of one of the Toronto branches of the respondent, TD Canada Trust ("TD"). The assault was captured by video cameras at the ATM.

[3] Mr. Moffitt and the other appellants sued his assailant, the respondent Ferdinand Pangan, and the person who accompanied Mr. Pangan at the ATM, Jason Green. They also sued TD for damages based on occupier's liability and negligence.

[4] The appellants served a jury notice which, pursuant to s. 108(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, requires that "the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided."

[5] TD moved for summary judgment dismissing the action against it on the basis that there was no genuine issue requiring a trial regarding its liability. The motion judge granted the motion. The appellants contend the motion judge erred in so doing. They seek to set aside the summary judgment and restore the

action to be tried by a civil jury. The appellants submit that in granting summary judgment the motion judge made three reversible errors. Specifically, he:

(i) erred in law by granting summary judgment in the face of their jury notice that required a jury to make the findings of fact;
(ii) improperly excluded the opinion evidence of an expert, Mr. Lance Foster, a security consultant, filed by the appellants on the motion; and
(iii) conducted the pre-motion case management process and the summary judgment motion in a procedurally unfair manner.

[6] For the reasons set out below, I am not persuaded by the appellants' submissions: it was open to the motion judge to grant summary judgment in an action in which the plaintiffs had served a jury notice and I see no error in the test that he applied; the motion judge properly exercised his duty as gate-keeper in excluding the evidence of Mr. Foster; and he conducted the motion in a procedurally fair manner. I would dismiss the appellants' appeal.

II. BACKGROUND FACTS

[7] In May 2013, TD operated a branch at 673 Warden Avenue, Toronto. An ATM machine was located in the branch's vestibule.

[8] On the evening of May 28, 2013, Mr. Moffitt (who was 50 years old at the time) entered the vestibule around 10:15 p.m. to use the ATM. At 10:21 p.m., the defendants, Ferdinand Pangan and Jason Green, entered the vestibule. Much of their clash with Mr. Moffitt was recorded by video cameras at the branch.

[9] Mr. Pangan and Mr. Green waited behind Mr. Moffitt for about four minutes as he tried to use the machine. Mr. Moffitt turned to leave the vestibule at about 10:25 p.m. As he passed the defendants a physical altercation broke out between Mr. Moffitt and Mr. Pangan. The latter beat up Mr. Moffitt, stomping on his head. After leaving the ATM vestibule, Mr. Pangan returned three times to further assault Mr. Moffitt. Mr. Pangan also stole Mr. Moffitt's sneakers and wallet.

[10] Mr. Moffitt lay, untended, on the floor of the vestibule for some time. Three customers entered the vestibule to use the ATM after the assault. Remarkably, two offered no aid to Mr. Moffitt; the third ultimately called 911. Emergency responders arrived approximately 30 minutes after the initial assault.

[11] Mr. Moffitt was left with serious injuries: he was in a coma for a month; hospitalized for almost four months; suffered a traumatic brain injury; experienced great difficulty in communicating with others; and could not testify about the event.

[12] Mr. Pangan was charged with attempted murder and other offences. He pleaded guilty to robbery, aggravated assault, and possession of stolen property; he was acquitted of attempted murder: *R. v. Pangan*, 2014 ONCJ 229. Mr. Pangan received a custodial sentence of 8.5 years.

III. LITIGATION HISTORY

[13] The appellants commenced this action in May 2015 and served a jury notice. Mr. Moffitt's sister, Catherine Moffitt, is acting as his litigation guardian. Mr. Moffitt

seeks damages for negligence and assault against Messrs. Pangan and Green. He seeks damages against TD based on negligence and breach of the *Occupier's Liability Act*, R.S.O. 1990, c. O.2. In addition to the damages sought by Mr. Moffitt, damages under the *Family Law Act*, R.S.O. 1990, c. F.3, are sought by Catherine Moffitt, Ella Bakker-Moffitt (Mr. Moffitt's daughter), and Lucas Porter-Bakker (Mr. Moffitt's step-son).

[14] In the fall of 2017, TD initiated this summary judgment motion after the completion of discoveries. The original motion hearing date of October 2018 was vacated and the motion judge was appointed to case management the action.

[15] A timetable for the action was set in October 2018. The motion was rescheduled for hearing in May 2019. Motions concerning undertakings/refusals and a third-party documents request by the appellants caused a further rescheduling of the motion to September 2019. In February 2019, the motion judge gave directions regarding the delivery of experts' reports.

[16] The motion did not proceed on September 9, 2019 as scheduled. Instead, on that date the parties made submissions regarding how to conduct cross-examinations on the expert evidence filed on the motion. Since the admissibility of some of the expert evidence was contested, the motion judge directed a *voir dire* take place before him on March 10 and 11, 2020 for the cross-examinations of the experts. Argument on the summary judgment

motion would take place the following day, March 12, 2020. The appellants objected to those directions. At the time, the appellants took the position that the matter was too complicated to be dealt with by way of a summary judgment motion and, instead, should proceed to a trial by judge and jury. The motion judge disagreed: *Moffitt v. TD Canada Trust*, 2019 ONSC 5208, at para. 4.

[17] The hearing of the summary judgment motion proceeded as directed in March 2020. After reserving his decision, the motion judge issued further directions in January 2021 regarding certain issues on which he required additional submissions. Further oral submissions were made on February 2, 2021; supplementary written submissions were filed by March 5, 2021; and the motion judge released his reasons dismissing the action against TD on September 16, 2021.

IV. FIRST GROUND OF APPEAL: THE MOTION JUDGE ERRED IN GRANTING SUMMARY JUDGMENT IN THE FACE OF THE APPELLANTS' JURY NOTICE

A. THE ALLEGED ERROR AND THE PARTIES' POSITIONS

[18] Before the motion judge, the appellants took the position that it would be inappropriate to decide the issue of TD's liability on a paper record because *viva voce* evidence was required on the issue of Mr. Pangan's motivation for the assaults. In the appellants' view, whether Mr. Pangan's attacks were planned or random was relevant to the issue of breach of the standard of care.

Counsel contended that a transcript of Mr. Pangan's discovery was a poor basis upon which to determine his motivations, whereas at trial a jury would be able to assess his *viva voce* evidence.

[19] The appellants acknowledged that the delivery of a jury notice did not preclude a court from granting summary judgment. However, they argued that a special test should apply on summary judgment motions in civil actions where a party has delivered a jury notice (for convenience, a "civil jury action"). Drawing on the test suggested in *Roy v. Ottawa Capital Area Crime Stoppers*, 2018 ONSC 4207, 142 O.R. (3d) 507, at para. 38, the appellants argued that summary judgment should only be granted in a civil jury action where the evidence is such that no reasonable jury properly instructed could find for the plaintiff.

[20] The motion judge disagreed that a special test should apply on summary judgment motions brought in civil jury actions as that would be inconsistent with the text of r. 20 and the direction of the Supreme Court of Canada in the seminal case of *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, that summary judgment should be granted when it is just and proportionate to do so.[1]

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[1] In addition, the motion judge incorrectly cited the decision of this court in *Mars Canada Inc. v. Bemco Cash and Carry Inc.*, 2018 ONCA 239, 140 O.R. (3d) 81, for the proposition that summary judgment could

[21] Instead, the motion judge concluded that the existence of a jury notice is simply one of many factors to consider when determining whether to grant summary judgment, including whether it was in the interests of justice to use the expanded fact-finding powers set out in rr. 20.04(2.1) and (2.2).

[22] The motion judge did not regard the present case as a complex factual dispute. In his view, several groups of facts were not in dispute: those regarding the assault; the crime levels at the TD branch and in the surrounding community; and what risk assessments TD performed both before and after the assault of Mr. Moffit. The main evidentiary dispute concerned the inferences to be drawn from the expert evidence and the resolution of their differing opinions. The motion judge observed that *viva voce* evidence had been heard from the experts on the *voir dire*. In the circumstances, he was persuaded the matter could be resolved by the summary judgment process.

[23] On this appeal, the appellants start their argument with the well-established proposition that *CJA*, s. 108(1) grants a civil litigant a "substantive right of great importance" to have issues of fact tried by a jury, a right which should not be

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be granted in civil jury actions. That decision did not consider the issue of summary judgment in a civil jury action.

interfered with without “cogent reasons.” As mentioned, the appellants argue that, to establish such “cogent reasons” in a civil jury action, the moving party must demonstrate that the evidence is such that no reasonable jury properly instructed could find for the responding party: *Roy*, at para. 38. The appellants submit the motion judge erred by failing to apply that special test to his assessment of TD’s summary judgment motion. Instead, he wrongly applied an approach that was overly simplistic and trivialized the role of the jury. This simplistic approach was improper in a case where the fact-finding exercise would involve weighing the reasonable risks of allowing access at night to unsupervised ATMs against the potential harm they could cause or facilitate, a classic role for a jury to perform as it engaged societal values. The appellants also contend a jury likely would have brought a broader perspective to bear on the evidence in this case and would have weighed it differently than the motion judge. Accordingly, by applying the wrong legal test and reaching a decision that a jury might not have reached, they contend the motion judge committed reversible error.

[24] TD submits the approach taken by the motion judge adhered to the principles for summary judgment motions articulated by the Supreme Court in *Hryniak*, including that court’s call for a “culture shift” in the civil justice system. The language of r. 20 does not preclude bringing a summary judgment motion in a civil jury action. As well, the motion judge properly applied and considered

the three factors *Hryniak* directs a court to consider in granting summary judgment, namely whether the summary process (i) allows the judge to make the necessary findings of fact, (ii) allows the judge to apply the law to the facts, and (iii) is a proportionate, more expeditious and less expensive means to achieve a just result. In applying that approach, the motion judge correctly treated the existence of a jury notice as one factor to consider in determining whether to grant summary judgment, but not the primary one.

B. ANALYSIS OF THE APPLICABLE PRINCIPLES

[25] As this court has not previously considered the issue of summary judgment motions brought in civil jury actions, I propose to start the analysis by examining the broad perspective the *Hryniak* decision brought to the evaluation of civil adjudication tools. I will then place the civil jury trial within that larger context. Next will follow an examination of the scope of the "right" to a civil jury trial. I then will address the approach motion judges should take when faced with a summary judgment motion in a civil jury trial action. Finally, I will apply the principles to the present case.

Hryniak v. Mauldin: A report card on Ontario's civil justice system

[26] The most recent "report card" on the health of Ontario's civil justice system was offered almost a decade ago in the Supreme Court's decision in *Hryniak*, a case that focused on how courts should implement the summary judgment rule

amendments made in 2010. In setting the context for its analysis, the Supreme Court made several observations about the parlous state of Ontario's civil justice system:

- Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued and cannot afford to go to trial: at para. 1;
- Trials have become increasingly expensive and protracted. A conventional trial is not a realistic alternative for most litigants: at paras. 1, 4 and 24;
- A "culture shift" therefore is required to create an environment that promotes timely and affordable access to the civil justice system, in part by moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case: at para. 2; and
- The balance between procedure and access to justice struck by the civil justice system must now recognize that new models of adjudication can be fair and just and that alternative models of adjudication are no less legitimate than the conventional trial: at paras. 2 and 27.

[27] Although improving the health of the civil justice system requires greater use of non-trial models of adjudication, the Supreme Court, at para. 28, emphasized that the principal goal of the civil justice system must remain the same, namely:

> [A] fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to

> apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

The "menu" of final-adjudication-on-the-merits procedural tools

[28] Ontario's *Rules of Civil Procedure* offer litigants a "menu" of procedures for the final adjudication of a case on its merits. While every Ontario litigant is entitled to their "day in court", that day most likely will not involve a trial, much less a civil jury trial. To provide all civil litigants with "the just, most expeditious and least expensive determination of every civil proceeding on its merits," as r. 1.04(1) requires, the *Rules* offer a "menu" of procedural tools from which parties may choose to obtain the final adjudication of their proceeding. The "menu" of such final-adjudication-on-the-merits procedural tools includes the following:

- Where the determination of a question of law may dispose of all or part of an action, a party may move before trial for its determination (r. 21.01(1)(a)) or the parties may jointly state a special case: r. 22.01;
- A party may move to strike out the pleading of the opposite party on the basis that it discloses no reasonable cause of action or defence: r. 21.01(1)(b);
- A party may seek to avoid the trial process by choosing to assert its claim by way of an application, rather than by an action: r. 14.05(3). An application

is designed to be a faster, less costly procedure than an action. In fact, some statutes require litigants to advance their claims for relief by way of an application, such as the oppression provisions of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248(1);

- Where a litigant asserts a monetary or property claim for $200,000 or less, it can utilize the *Rules*' simplified procedure process that culminates in a "slimmed-down", or summary, trial: r. 76;
- The parties can agree to have their dispute determined by the summary judgment process: r. 20.04(2)(b); or
- One party can seek summary judgment by demonstrating that there is no genuine issue requiring a trial with respect to a claim or defence: r. 20.04(2)(a).

[29] Even when a civil proceeding does not settle (as the overwhelming majority do), the *Rules*' extensive menu of non-trial procedures available to adjudicate a proceeding, coupled with the increased popularity of the summary judgment motion following r. 20's 2010 amendments (O. Reg. 438/08), make it more likely

than not that a trial will not be the procedural tool that finally determines a civil proceeding.[2]

[2] It is an unfortunate state of affairs that neither the Superior Court of Justice in Ontario nor the Court of Appeal for Ontario publishes information about how they manage and dispose of their caseload. The lack of detailed, consistent operational data from those courts and the resulting lack of transparency, impedes the ability to understand and then improve the performance of those courts. To gain some understanding of how those courts deal with cases in practice, one is left to resort to the imprecise tool of examining cases reported on CanLII.

One can develop a rough profile of the use of various final-adjudication-on-the-merits procedural devices by reviewing decisions from the Superior Court of Justice posted on CanLII. I developed such a profile for decisions posted in March 2023, using the data recorded on CanLII as of April 14, 2023. I picked the month of March 2023 at random.

Of the 261 cases reported on CanLII from the Ontario Superior Court of Justice, 53 involved civil (non-family) proceedings in which a party sought a final adjudication on the merits. The most frequently used procedural device was the application (24 decisions), followed by summary judgment (10 decisions), non-jury trials, including a r. 76 simplified procedure trial (10 decisions), r. 21.01 motions (4), default judgment motions (3), a r. 21.02 motion (1), and a r. 34.15 motion (1), as summarized on the following table:

Procedural tool	**Number of cases reported**
Application	24
Summary judgment	10
Non-jury trials	10
R. 21.01 motions	4
Default judgment	3
R. 21.02 motion	1
R. 34.15 motion	1
Total:	53

Civil jury trials

[30] A civil jury trial is one procedural tool offered by the *Rules*' extensive menu of final-adjudication-on-the-merits procedural tools. Section 108(1) of the *CJA* provides that a party to an action in the Superior Court of Justice "may require that the issues of fact be tried or the damages assessed, or both, by a jury, unless otherwise provided." However, the option of a civil jury trial is a limited one. A jury trial is not available in all civil actions. For example, a proceeding against the Crown or an officer or employee of the Crown must be tried without a jury: *Crown Liability and Proceedings Act, 2019*, S.O. 2019, c. 7, Sched. 17, s. 20. As well, *CJA* s. 108(2) precludes jury trials in a large number of actions that seek specified relief [3] and in simplified proceedings under r. 76.

These numbers suggest, at least for the month randomly picked, that parties resort to non-trial procedural devices to obtain a final adjudication approximately four times more frequently than to trials. Unfortunately, the data for March 2023 did not reveal how many civil jury trials may have been disposed of in that month. Given the nature of jury trials, one would not expect to see such a trial generate a decision posted on CanLII unless the trial had involved matters such as a motion to strike out the jury notice, some mid-trial ruling of sufficient significance to merit a reportable decision or a motion regarding some aspect of the jury's verdict, including a "threshold motion" under s. 267.5 of the *Insurance Act*, R.S.O. 1990, c. I.8. The absence of comprehensive institutionally-reported data therefore makes it difficult to deal empirically with questions of litigation policy and process, such as those that arise in this case.

[3] *CJA* s. 108(2)1 provides that the issues of fact and the assessment of damages in an action shall be tried without a jury where the action involves a claim for the following kinds of relief: i. injunction or mandatory order; ii. partition or sale of real property; iii. relief in proceedings referred to in the Schedule to *CJA* s. 21.8 [namely, most matrimonial and family law proceedings]; iv. dissolution of a partnership or taking of partnership or other accounts; v. foreclosure or redemption of a mortgage; vi. sale and distribution of the proceeds of property subject to any lien or charge; vii. execution of a trust; viii. rectification, setting aside or

[31] Where an action qualifies for a civil jury trial, party must elect a jury trial by filing a formal notice: *CJA*, s. 108(1)[4]. A court may set aside that election at the request of the other party, as *CJA* s. 108(3) provides that "[o]n motion, a court may order that issues of fact be tried or damages assessed, or both, without a jury." The test to set aside a jury notice is well-established. As put by this court in *Cowles v. Balac*, (2006), 83 O.R. (3d) 660 (C.A.), at para. 37, leave to appeal refused, [2006] S.C.C.A. No. 496:

> A party moving to strike a jury bears the onus of showing that there are features in the legal or factual issues to be resolved, in the evidence, or in the conduct of the trial which merit the discharge of the jury. In the end, a court must decide whether the moving party has shown that justice to the parties will be better served by the discharge of the jury.

[32] The limited and qualified "right" to a civil jury trial in Ontario was described by this court in *Louis v. Poitras*, 2021 ONCA 49, 456 D.L.R. (4th) 164, at para. 17:

> It is well settled in the jurisprudence that the substantive right to a civil jury trial is qualified because a party's entitlement to a jury trial is subject to the power of the court to order that the action proceed without a jury. While a court should not interfere with the right to a jury

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cancellation of a deed or other written instrument; ix. specific performance of a contract; x. declaratory relief; xi. other equitable relief; or xii. relief against a municipality.

[4] Rule 47.01 stipulates the form of notice a party must deliver to elect trial by a jury.

> trial in a civil case without just cause or compelling reasons, a judge considering a motion to strike a jury notice has a broad discretion to determine the mode of trial.

[33] As this court went on to observe in *Louis v. Poitras*, at para. 24, "the right to a jury trial is subject to the overriding interests of the administration of justice and issues of practicality."

Summary judgment motions in civil jury actions

[34] The appellants properly acknowledge that the delivery of a jury notice does not preclude a court from granting summary judgment in an action. Their acknowledgment is proper for two main reasons.

[35] First, the plain language of r. 20.01 permits either party in any civil action to move for summary judgment following the delivery of a statement of defence. The rule does not carve out from its reach actions in which a party has served a jury notice.

[36] Second, under Ontario law a court may interfere with a party's election of a jury trial for "just cause or compelling reasons." Rule 20 provides such a compelling reason. As explained in *Hryniak*, at para. 45, the amendments implemented to r. 20 in 2010 were designed to transform the rule "from a means to weed out unmeritorious claims to a significant alternative model of adjudication." A motion

under r. 20 prompts an evidence-focused assessment of the claims or defences raised in an action. Such a motion requires the judge to ask: Do the claims or defences give rise to a genuine issue requiring a trial? If, on a consideration of the evidentiary record, a court concludes that no genuine issue requiring a trial exists, the absence of such a genuine issue is a compelling reason why the action should not proceed to trial, including where one party has elected a jury trial.

[37] The critical examination of the evidentiary record conducted by a court on a r. 20 motion offers the prospect, but not the certainty, of a final adjudication of a claim or defence on the merits without going to trial. Where a genuine issue requiring a trial exists, the motion will be dismissed and a trial will ensue. Conversely, however, r. 20.04(2)(a) requires that a court "shall grant summary judgment if the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." (Emphasis added).

[38] One of the most significant amendments implemented to r. 20 in 2010 was the expansion of the motion judge's evidence-weighing and fact-finding powers as part of the assessment of whether a genuine issue requiring a trial exists. Rules 20.04(2.1) and (2.2) describe what are styled as the "enhanced powers" a judge may exercise in determining whether a genuine issue requiring a trial exists:

> (2.1) In determining under [r. 20.04(2)(a)] whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
>
> 2. Evaluating the credibility of a deponent.
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> 3. Drawing any reasonable inference from the evidence.
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

[39] *Hryniak* described how a judge should apply the amended r. 20. First, *Hryniak* identified the test, or criteria, a motion judge should apply to ascertain whether, on the evidentiary record, a genuine issue requiring a trial exists. Second, the decision set out the methodology a judge should follow to make such an assessment.

[40] As to the test to be applied, *Hryniak* stated, at para. 49:

> 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.

[41] As to the methodology a judge must follow when determining whether a genuine issue requiring a trial exists, *Hryniak* laid out a two-step approach.

First, judges should decide if there is a genuine issue requiring trial based only on the evidence before them, without using the enhanced fact-finding powers enumerated in rr. 20.04(2.1) and (2.2). If there appears to be a genuine issue requiring a trial, the judge should then determine if the need for a trial can be avoided by using the new powers under rr. 20.04(2.1) and (2.2). A judge may exercise those powers provided their use is not against the interest of justice. While analytically distinct, as a practical matter these two steps often blend together or follow closely upon each other during the hearing and adjudication of a summary judgment motion.

[42] At the conceptual level, r. 20 concerns itself with a simple question: Does a specific action require a trial for its fair and just determination on the merits? Rule 20 is not concerned with who should act as the trier of fact in the event it is found that a trial is required; its focus is on whether a trial is required.[5] In light of r. 20's focus on whether an action requires a trial for resolution, not on who should act as the trier of fact at a trial, *Hryniak*'s test and methodology apply equally to civil jury actions and to actions that contemplate a trial by judge alone.

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[5] While r. 20.05 authorizes a motion judge to give extensive directions regarding a trial should a genuine issue requiring a trial be found to exist, these directions do not include who the trier of fact should be. In a civil jury action, any determination of that issue would be left for a motion to strike out a jury notice.

[43] It follows that I do not accept the appellants' submission that summary judgment motions in a civil jury action should apply the special test spelled out in *Roy*, at para. 38, namely that summary judgment should only be granted in a civil jury action where the evidence is such that no reasonable jury properly instructed could find for the plaintiff. I am not persuaded by the appellants' submission for several reasons.

[44] First, adopting a special summary judgment test for civil jury actions would create two categories of summary judgment motions – those brought in civil jury actions and those brought in all others – a distinction that finds no support in the language of r. 20.

[45] Second, the creation of two categories of summary judgment motions would undermine the needed culture shift directed in *Hryniak* by impeding the development of adjudication models that offer timely and cost-effective alternatives to conventional trials, whether judge alone or with a judge and jury. As the Supreme Court made clear in *Hryniak*, at para. 43, the 2010 amendments implemented to r. 20 demonstrate that "a trial is not the default procedure" for adjudicating a civil dispute. The goal of *Hryniak*'s culture shift is to strike a proper balance between procedure and access in the civil justice system by recognizing that simplified and proportionate procedures for adjudication can be fair and just, without the expense and delay of a trial: at paras. 2 and 27. As the Supreme Court

confirmed, alternative models of adjudication are no less legitimate than the conventional trial.

[46] In *Cowles v. Balac*, this court stated, at para. 38, that "It makes sense that neither party should have an unfettered right to determine the mode of trial." So, too, neither party should have a right to carve-out its civil action from the application of *Hryniak*'s principles.

[47] Third, the appellants' proposed special test essentially would replace the *Hryniak* test and methodology with the much narrower test used for a directed verdict in a civil trial.[6] The appellants' proposed special test would eliminate the

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[6] The test for a directed verdict or non-suit in a civil trial was stated in *FL Receivables Trust 2002-A v. Cobrand Foods Ltd.*, 2007 ONCA 425, 85 O.R. (3d) 561, at paras. 35-36:

> On a non-suit motion, the trial judge undertakes a limited inquiry. Two relevant principles that guide this inquiry are these. First, if a plaintiff puts forward some evidence on all elements of its claim, the judge must dismiss the motion. Second, in assessing whether a plaintiff has made out a *prima facie* case, the judge must assume the evidence to be true and must assign "the most favourable meaning" to evidence capable of giving rise to competing inferences...
>
> In other words, on a non-suit motion the trial judge should not determine whether the competing inferences available to the defendant on the evidence rebut the plaintiff's *prima facie* case. The trial judge should make that determination at the end of the trial, not on the non-suit motion. [Citations omitted.]

See also: *Fiddler v. Chaivetti*, 2010 ONCA 210, 317 D.L.R. (4th) 385, at para. 66.

role of the broad fact-finding powers introduced into r. 20 in 2010 and throw out the proportionality factor that plays such a critical role in *Hryniak*'s r. 20 test. By so doing, the special test would effectively immunize actions with jury notices from the pre-trial scrutiny enacted by the 2010 amendments to r. 20.

C. APPLYING *HRYNIAK'S* TEST AND METHODOLOGY IN CIVIL JURY ACTIONS

[48] Over the past decade an extensive jurisprudence has developed around the application of *Hryniak*'s three-factor test and methodology. That jurisprudence applies with equal force to summary judgment motions brought in civil jury actions. There is no need to repeat the jurisprudence. However, motion judges should keep several points in mind when applying *Hryniak*'s test and methodology in a civil jury action.

[49] First, it must always be recalled that r. 20 has assigned to judges, not juries, the job of determining prior to a trial whether a genuine issue requiring a trial exists. For a judge to perform that task does not somehow undermine a party's "right" to a jury trial. On the contrary, performance of that task fosters the overarching goal of the civil justice system "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits": r. 1.04(1). As explained, the absence of a genuine issue requiring a trial constitutes a "compelling reason" for a court to interfere with a party's election of a jury trial. Any party who seeks a trial of their action must be prepared to have their claims or defences examined

under r. 20. Parties who have elected a jury trial do not enjoy immunity from such scrutiny.

[50] Second, the first and second factors in *Hryniak*'s summary judgment test require motion judges to determine whether the summary judgment process, including r. 20's enhanced fact-finding powers, allows them to make the necessary findings of fact and apply the law to the facts. The focus must be on whether the summary judgment process enables a fair determination on the merits in light of the record presented by the parties, not on who should be the trier of fact in the event it is determined there exists a genuine issue for trial. A motion judge must ask the same question whether faced with a summary judgment motion brought in a civil jury action or an action that would proceed to trial before a judge alone, namely: Is there something about the nature of the findings of fact and application of the law to the facts needed to decide the "live issues" in the action that would lead the judge to lack confidence that the summary judgment process would enable a fair and just determination of the action?[7]

[7] See *Hryniak*, at para. 50.

[51] At some point, the number of findings of material fact required to determine a case's "live issues", the number of witnesses needed to provide the evidence upon which those findings can be made, the centrality of issues of credibility and reliability to making those findings, and the presence or absence of a documentary record against which to measure affidavit or oral evidence may move the needle past the point where the summary judgment process could reach a fair and just determination on the merits. Such a conclusion would result from the motion judge's assessment about the fairness of the summary judgment process applied to the particular record presented, not from a consideration of who the ultimate trier of fact might be at a trial. Again, the issue on a summary judgment motion is whether a trial is required to determine the merits of the particular case, not who might act as the trier of fact in the event a trial is required.

[52] Third, summary judgment motion judges must take care not to conflate their r. 20 analysis with the analysis employed on a motion to strike out a jury notice. Take, for example, the issue of the complexity of a case. Complexity in regard to the facts and the applicable legal principles often is a consideration in whether a

jury notice should be struck.[8] In the context of a summary judgment motion, complexity of the evidentiary record may lead a motion judge to conclude that the r. 20 process cannot enable a fair and just determination on the merits which, instead, requires a more trial-like process. The factor of complexity operates differently in each circumstance. In a motion to strike out a jury notice, complexity concerns the ability of jurors to understand and analyze the evidence and the law. By contrast, complexity in a summary judgment motion concerns whether a more fulsome adjudicative process is required to elicit and test the evidence. The consideration of complexity in each situation must remain analytically distinct.

[53] Fourth, there has been some suggestion in the case law that on a summary judgment motion in a civil jury action, a motion judge should only use the enhanced fact-finding powers granted by rr. 20.04(2.1) and (2.) in an "exceptional case". To do otherwise, it is argued, would effectively usurp the fact-finding role of the jury.[9]

[54] I do not agree. *Hryniak* provides extensive guidance to motion judges on the use of their enhanced powers: at paras. 52-65. That guidance applies equally to

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[8] See *Kempf v. Nguyen*, 2015 ONCA 114, 124 O.R. (3d) 241, at para. 43(5); *Cowles*, at para. 48.
[9] For example, see *Mitusev v. General Motors*, 2014 ONSC 2342, at para. 91.

summary judgment motions brought in civil jury actions. The decision either to use the expanded fact-finding powers or to call oral evidence is discretionary: *Hryniak*, at para. 68. But, like all discretionary powers, the decision whether or not to use the enhanced fact-finding powers must be made in furtherance of the purpose of r. 20. Consequently, by using their enhanced fact-finding powers motion judges do not "usurp" the role of the jury. To conceive the matter in that fashion is to ignore *Hryniak*'s teaching that summary judgment is a different, alternative model of adjudication to a trial: at paras. 34 and 45. By exercising r. 20's enhanced fact-finding powers a motion judge does not usurp any function of the jury because a jury has no role to play under the *Rules* in determining, prior to trial, whether a genuine issue requiring a trial exists.

[55] Finally, the third element of the *Hryniak* test – whether the summary judgment process "is a proportionate, more expeditious and less expensive means to achieve a just result" – necessarily will require a motion judge to compare, in the circumstances of the particular case, the advantages and disadvantages, costs and benefits of using the summary judgment process to determine the case as compared to using the jury trial. This may include a consideration of the opportunity to fairly evaluate the evidence using each process: *Hryniak*, at para. 58.

[56] Not only will this aspect of the *Hryniak* test require a case-specific analysis, it most likely will also require a Region-specific analysis as the judicial resources

available for summary judgment motions and civil trials seem to vary from judicial region to region in this province.

[57] As noted in fn. 2 above, it is unfortunate that judges (and the public) lack access to published data about how the Superior Court of Justice manages its caseload. This lack of data makes it very difficult to determine with any accuracy the average time it takes for a civil jury action to proceed from its commencement to a verdict, a piece of information important to any proportionality analysis conducted under the *Hryniak* summary judgment test.[10]

[58] Of course, the judge managing a summary judgment motion should have access through counsel and the local court staff to some case-specific information for a *Hryniak* proportionality analysis: such as, the history of the specific piece of litigation; the local "time-out" times to hearing dates for a summary judgment

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[10] A brief insight into the issue was afforded by the slew of motions brought after the start of the COVID-19 pandemic when civil jury trials in Ontario were put on hold. The evaporation of civil jury trial dates prompted a number of motions to strike out jury notices so that actions could proceed instead by way of trials before a judge alone, which were being scheduled during the early stages of the pandemic using virtual access technologies.

In *Louis v. Poitras*, the panel's decision, as well as the earlier single judge stay decision (2020 ONCA 815, 59 C.P.C. (8th) 297), considered five of those strike jury notice cases. In four of the cases, the lapse of time between the accident or litigation event and the projected trial date was between 7.5 years and 10 years, 5 months; in the other, it was over five years. The panel in *Louis* viewed the delay involved in scheduling the jury trial in that case – over seven years had elapsed since the accident – as one factor which rendered the motion judge "entirely justified" in striking out the jury notice: at para. 33.

motion and a jury trial; the anticipated amount of pre-motion or pre-trial management time that the case will require; and estimates of the costs of conducting a summary judgment motion as compared to conducting a jury trial.

[59] While the results of a *Hryniak* proportionality analysis will turn on the specific facts of an action, I suspect that at the present time civil jury actions may not fare well in a proportionality analysis when they are compared to summary judgment motions; the delays in moving a civil jury action to trial and the length of such trials might work against them. Yet, the improved timeliness for criminal trials since the imposition in *R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, of a presumptive time ceiling of 30 months for cases in the superior courts demonstrates that it is possible to change litigation habits and achieve more expeditious justice, even where jury trials are involved. While civil cases are not subject to a constitutional ceiling such as that established in *Jordan*, I suspect that a better-resourced civil case management system could achieve a similar change in litigation habits so that the civil jury trial could compare more favourably to a summary judgment motion in a *Hryniak* proportionality analysis.

[60] That said, a motion judge must always recall that summary judgment motions can spawn their own delays and unduly increase costs. Proportionality of process is not achieved if the result of a summary judgment motion is to replace a

sprawling, lengthy, and very expensive jury trial with a sprawling, lengthy, and very expensive summary judgment motion.

D. APPLICATION OF THE PRINCIPLES TO THE PRESENT CASE

[61] The appellants' fundamental submission on this first ground of appeal is that the motion judge erred in law by failing to apply the *Roy* "directed verdict" test to the motion for summary judgment. As I have explained above, the *Hryniak* test and methodology apply to summary judgment motions brought in civil jury actions. Consequently, the motion judge did not commit legal error by applying the *Hryniak* test.

[62] Absent an error of law, the exercise of powers under r. 20 attracts deference: *Hryniak*, at paras. 81-84. Although in their submissions the appellants assert that a jury likely would weigh the evidence differently or more broadly than the motion judge did, they do not go so far as to argue that the motion judge made palpable and overriding errors in respect of questions of fact or mixed fact and law in concluding that no genuine issue requiring a trial exists on the issue of TD's liability.

[63] In the absence of an attack on the motion judge's factual findings and given my rejection of the appellants' contention the motion judge committed legal error, I am not persuaded by the appellants' first ground of appeal.

V. SECOND GROUND OF APPEAL: EXCLUDING THE OPINION EVIDENCE OF MR. FOSTER

[64] The appellants' second ground of appeal concerns the opinion evidence they sought to admit from Mr. Lance Foster, a security management consultant, but which the motion judge excluded from the motion.

THE LITIGATION CONTEXT

The evidence on the motion

[65] Evidence from both lay and expert witnesses was filed before the motion judge. Transcripts of the examinations for discovery and cross-examinations of some of the lay witnesses were filed. The transcript of the examination for discovery of the assailant, Ferdinand Pagan, was also filed.

[66] As well, each party tendered expert reports from security consultants. The appellants filed expert reports from: Mark Huhn; Lance Foster, who prepared an initial report dated March 25, 2019 and a report dated June 11, 2019 rebutting the reports filed by TD's expert witnesses; and Howard Wood, who filed an initial report dated March 28, 2019 and rebuttal reports to those filed by TD's expert witnesses. TD filed expert reports from Elgin Austen and Terry Hoffman.

The process for testing the expert evidence

[67] Although the hearing of the summary judgment motion was scheduled to proceed on September 9, 2019, the court ended up using that day to hear

submissions regarding the procedure for cross-examining the expert witnesses. The motion judge gave directions to hold a kind of blended *voir dire*: *Moffitt v. TD Canada Trust*, 2019 ONSC 5208.

[68] The motion judge correctly observed that he must first determine whether the expert reports were admissible on the motion, as a court hearing a summary judgment motion can only consider admissible evidence: see *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182, at para. 55. To that end, he directed that the cross-examination of the experts should extend beyond their qualifications to touch upon issues relevant to the necessity and reliability of their expert evidence. The motion judge also wanted to avoid the considerable expense that would be caused by requiring a re-attendance of the experts for additional cross-examination. As noted, the motion judge directed that the blended *voir dire* be held on March 10 and 11, 2020, to be followed by argument on the merits of the summary judgment motion on March 12, 2020.

[69] At the conclusion of the cross-examinations of the experts, the motion judge informed counsel that he wished to hear submissions on the issues of the admissibility of the expert evidence, as well as its necessity and reliability. He also gave counsel a head's-up that after hearing argument on the motion, he might later solicit further submissions from counsel as he reflected on the evidence and issues.

[70] At the argument of the motion, TD objected to the admissibility of the opinion evidence given by the appellants' experts. In the case of Mr. Foster, TD argued that the evidence of Mr. Foster should be excluded as it consisted of bald assertions and failed to explain the methodology upon which his opinion was based, thereby preventing a proper testing of his opinion. As a result, Mr. Foster's evidence did not meet the necessity criterion set out in *R. v. Mohan*, [1994] 2 S.C.R. 9.

[71] By endorsement dated January 5, 2021, the motion judge provided the parties with a list of questions upon which he sought further submissions. It was clear from the list that the motion judge was considering the admissibility of the expert evidence. Counsel made submissions to the motion judge at a virtual hearing on February 2, 2021. At that time, the motion judge apparently raised an issue about deficiencies in Mr. Foster's report.[11] The parties subsequently made further written submission to the motion judge.

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[11] A transcript of the February 2, 2021 hearing was not included in the appeal materials. Nor were the post-hearing written submissions of the parties.

The motion judge's reasons

[72] The motion judge assessed the admissibility of each expert's opinion evidence by applying the two-stage method – the four *Mohan* factors and the discretionary gate-keeping cost/benefit analysis – described in *White Burgess*, at paras. 23 and 24. The motion judge gave detailed, structured reasons explaining which portions of the opinion evidence from two of the appellants' experts – Messrs. Huhn and Wood – and the two respondent's experts – Messrs. Austen and Hoffman – he was admitting and why he was excluding other portions of their evidence. No issue is taken with his decisions in that regard.

[73] The motion judge excluded Mr. Foster's opinion evidence in its entirety. He provided a detailed analysis and explanation as to why. His reasoning is summarized at paras. 121-123 of his decision:

> In short, Mr. Foster's report is based on very thin data, including some information (such as YouTube videos and newspaper reports) that are not admissible in evidence before me and cannot be used to support an expert report. More importantly, Mr. Foster's report **does not** provide me with any ability to understand how (or even whether) he applied the IAPSC methodology. Mr. Foster has said, in his rebuttal reports, that this methodology (or the ASIS methodology) should have been used by the other experts and by TD in formulating their views. If that is the case, then Mr. Foster should have explained both the methodology and how it applied in his own reports. He did not.
>
> The Court has a gatekeeper function to exercise when it comes to the admissibility of expert evidence.

> Mr. Foster's failure to explain either the reasons for his conclusion or how he arrived at those conclusions raises significant issues as to both the necessity and relevance of Mr. Foster's report. The report is arguably not necessary as it does not explain the reasons for the opinion and would not give the trier of fact an understanding of how the conclusions were reached. The report is also arguably not relevant for the same reasons.
>
> However, regardless of whether Mr. Foster's report would pass the first stage of the *White Burgess* test, it fails at the second stage. That stage requires me to consider the potential risks and benefits of admitting this report. The risks are clear. The trier of fact would be provided with opinion evidence from someone who has taken a firm view that TD was negligent in this case without having explained how he reached that conclusion. The benefits of this report are much less obvious because it does not explain the methodologies, the basis for the conclusion, or the analytical framework that was arrived to reach the conclusion. [Emphasis in original.]

The appellants' grounds of appeal

[74] The appellants submit the motion judge erred in refusing to admit Mr. Foster's opinion evidence on the summary judgment motion for two main reasons:

- He erred in identifying Mr. Foster's failure to set out in his report the methodology he used to reach his opinion as a reason to exclude it. The appellants argue the methodology Mr. Foster used could be found elsewhere in the evidence filed on the motion; and

- The motion judge erred by failing to permit the appellants to remedy any defect in Mr. Foster's report by filing a further, correcting report. The motion judge should not have waited until releasing his reasons on the summary judgment motion to inform the parties of his ruling on the admissibility of expert evidence.

Analysis

[75] I am not persuaded that the appellants' have demonstrated any reversible error by the motion judge in his decision to exclude Mr. Foster's opinion evidence.

[76] At the hearing of the appeal, the appellants' conceded the motion judge applied the correct legal principles to his assessment of the expert evidence.

[77] The appellants do not suggest that the motion judge misapprehended Mr. Foster's opinion evidence. The appellants do not dispute that Mr. Foster's report did not explicitly deal with how he used the guidelines formulated by the International Association of Professional Security Consultants ("IAPSC") to reach his opinion. Indeed, the absence of such an explanation is patent on the face of Mr. Foster's reports. However, the appellants contend the lack of a methodological explanation was not a defect in Mr. Foster's report for two reasons: (i) in their 2021 submissions the appellants described how Mr. Foster's report, properly read, had used the IAPSC methodology; and (ii) another expert, Mr. Wood, attached the IAPSC guidelines to his report, so they were available for the court's consideration.

[78] The motion judge dealt with both submissions head-on. First, he pointed out that the explanation about how Mr. Foster may have used the IAPSC guidelines came not from the expert witness but from appellants' counsel. As the motion judge observed about the efforts to explain how Mr. Foster used those guidelines: "I only have Plaintiffs' counsel's submissions in this respect, which include the submission that '[u]pon careful analysis, the basis for Mr. Foster's opinion clearly aligns directly with the criteria in the [IAPSC methodology].' The Plaintiff's submissions go on to provide a detailed analysis of why they take this position." (Brackets in original). This led the motion judge to state the obvious, at para. 119:

> The problem with the Plaintiffs submissions is that none of this "careful analysis" came directly from Mr. Foster. It comes from the Plaintiff's counsel. The careful analysis (and explanation) is something that should have been included in Mr. Foster's report.

[79] As to the appellants' submission that any defect in Mr. Foster's report was cured by another expert attaching the IAPSC guidelines to his report, the motion judge quite understandably stated that that was of no assistance to him because he was left with an absence of evidence from Mr. Foster about which parts of the IAPSC methodology he applied and how the IAPSC methodology led him to his conclusions.

[80] In making his decision to exclude Mr. Foster's expert evidence, the motion judge properly exercised his gate-keeper function with respect to opinion evidence.

The record shows his decision was not based on an error in principle or misapprehension of the evidence.

[81] The appellants further submit the motion judge erred by failing to permit them to remedy any defect in Mr. Foster's report by filing a further, correcting report. I see no such error for several reasons.

[82] First, the motion judge gave the parties six months' advance notice of the process he planned to use to determine the admissibility of the expert evidence and the merits of the motion: a blended *voir dire* as the first part of the summary judgment motion using *viva voce* cross-examination of the expert witnesses; followed immediately by the argument of the summary judgment motion on the merits; with the likelihood that following the initial argument of the motion the motion judge would ask for further submissions, including submissions on the expert evidence, which he did. The parties had more than ample opportunity to put their "best foot forward" with their expert opinion evidence.

[83] Second, during Mr. Foster's brief examination-in-chief on the *voir dire*, he began to give evidence about "other bank litigation cases" in which he had been retained. TD's counsel objected that Mr. Foster was straying into an area not set

out in his report, which would be contrary to r. 53.03(3).[12] The motion judge provided the appellants with two options: if they wished to pursue that area of questioning, TD would be entitled to an adjournment at the appellants' expense or, alternatively, the appellants could forego further questioning in the area. The appellants elected to forego further questioning instead of filing a supplementary report detailing Mr. Foster's evidence on the issue.

[84] Third, the motion judge was under no obligation in the circumstances to afford the appellants' an opportunity to "cooper up" defective expert opinion evidence once it had been ruled inadmissible. Rule 53.03(2.1) sets out in detail the mandatory content required in an expert report, and the common law clearly identifies the content of the two-part test for the admission of opinion evidence. Parties must ensure the expert evidence they tender satisfies those requirements; they are not entitled, as a matter of course, to a mulligan if the evidence is ruled inadmissible.

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[12] Rule 53.03(3), in part, states "An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in, (a) a report served under this rule".

[85] Nor does the record disclose that r. 53.08(1) would apply in the circumstances of this case.[13] That rule provides that where an expert report has failed to set out the substance of an expert's proposed testimony on an issue, a court may grant leave to admit the evidence provided "there is a reasonable explanation for the failure." The record does not disclose any such reasonable explanation. As well, as the motion judge explained, in the part of his reasons extracted at para. 73 above, that the deficiencies in Mr. Foster's report went to the heart of his opinion, not some peripheral matter.

[86] For these reasons, I am not persuaded by the appellants' second ground of appeal.

VI. THIRD GROUND OF APPEAL: THE FAIRNESS OF THE PROCEEDING

[87] The appellants complain they did not receive a fair hearing. I see no merit to this ground of appeal.

[88] In their factum, the appellants break down their complaint into four parts.

[89] First, they suggest a certain unfairness arose because, by bringing a summary judgment motion, TD accelerated what the appellants' think would have

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[13] In its factum on appeal, TD notes that during their 2021 submissions the appellants did not ask for leave to file an amended report from Mr. Foster. [RF67]

been the normal timetable for the delivery of expert reports. As the appellants put it in their factum: “In the normal course, the Plaintiff’s investigation and delivery of reports would only be required once the matter was set down for trial.” In my view, this comment speaks volumes about the culture of delay that continues to surround Ontario civil jury actions rather than offering any insight into the fairness of the process employed by the motion judge.

[90] As well, the appellants acknowledge that a motion for summary judgment can be brought in a civil jury action. It follows that when such a motion is brought, effective case management, such as that attempted by the motion judge, will require the imposition and policing of timelines for the delivery of evidence. Accordingly, I see no merit in this part of their complaint.

[91] Second, the appellants complain the motion judge improperly criticized their conduct regarding the delivery of expert reports. A review of the numerous case management endorsements released by the motion judge belies this criticism. They reveal fair treatment of the parties during the motion judge’s case management efforts to move the motion along to a hearing, including his efforts to nail down the identity of the experts whose reports the appellants intended to file. Moreover, the process that the motion judge followed enabled the appellants to file reports from the three experts of their choice and the appellants were able to

cross-examination TD's experts. The motion judge did not impede the appellants from creating the record they sought on the motion.

[92] Third, in a three-sentence paragraph the appellants complain that the motion judge applied uneven scrutiny to their evidence as compared to his treatment of the respondent's evidence. The complaint lacks the particularity that would enable this court to even begin a serious uneven scrutiny analysis.[14]

[93] Finally, the appellants take issue with the motion judge "blaming" Mr. Moffitt for initiating the physical confrontation in the ATM lobby. In his reasons, the motion judge: held that Mr. Moffitt began the physical altercation by lunging at Mr. Pangan (at para. 283(b)); characterized the assault as a "random assault" (at paras. 285(e), 313); and ventured the view that the event might not have happened "if Mr. Moffitt

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[14] In the evidence portion of their factum, the appellants contend the motion judge misapprehended part of the evidence given by Ms. Graham, a TD bank employee. At para. 34 of his reasons, the motion judge wrote that Ms. Graham had attended meetings of a Security Specialists Group of the Canadian Bankers Association "and discussed security issues, including issues relating to ATMs." In her affidavit, Ms. Graham deposed, at para. 7, that at SSG meetings the attendees would discuss security measures or issues. At para. 8, she deposed that as "a result of my discussions with other financial institutions", she was not aware of other financial institutions employing various measures at ATMs that the appellants alleged they should have used. On her cross-examination, Ms. Graham acknowledged that the SSG did not directly address the issue of customer safety while using ATMS, although there were discussions about vagrancy and the impact on customers in terms of availability after hours. Although the motion judge misstated a portion of Ms. Graham's evidence, I do not read his standard of care analysis as relying on what may or may not have been discussed at SSG meetings. His analysis focused more specifically on evidence regarding security-related circumstances at the Warden Avenue Branch and its surrounding neighbourhood.

had not lunged towards Mr. Pangan with his fist closed" (at para. 313). It is clear from his reasons that the motion judge reviewed the security camera footage of the events that took place at the ATM. It was open to him to make findings of fact relying on that evidence. I do not read the appellants' notice of appeal or factum as asserting that the motion judge's comments amounted to a palpable and overriding error of fact or was based on a misapprehension of the evidence. That the appellants may disagree with those comments by the motion judge is not a sufficient basis for a complaint that the summary judgment process was unfair.

[94] I would give no effect to this ground of appeal.

VII. DISPOSITION

[95] For the reasons set out above, I would dismiss the appeal.

[96] Based on the agreement of the parties, I would award TD, as the successful party on the appeal, its costs of the appeal in the amount of $20,000, inclusive of disbursements and applicable taxes.

Released: May 17, 2023 "gs"

"J.A."

"I agree. Sossin J.A."

"I agree. Copyn J.A."