

Hryniak Comes to Manitoba¹: The Evolution of Manitoba Civil Procedure in the 2010s

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ABSTRACT

This article investigates whether the Supreme Court of Canada's 2014 decision *Hryniak v Mauldin* has led to changes in Manitoba procedural law, largely in the summary judgment context. After introducing *Hryniak* and civil procedure reform's place in the context of Canada's access to justice crisis, the author turns to Manitoba. In addition to exploring the regulatory history of explicit changes to Manitoba's *Court of Queen's Bench Rules*, the author delves into Manitoba case law to determine their jurisprudential consequences and whether they have had effects in terms of the frequency that particular rules are used. Ultimately, it is concluded that, despite some potential to be bolder, by and large, Manitoba has prudently charted its own path in this important area of facilitating access to justice.

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¹ Inspired by Barbara Billingsley's "*Hryniak v. Mauldin* Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials" (2017) 55:1 *Alta L Rev* 1.

I. INTRODUCTION

In the 2010s, most Canadian provinces sought to amend their civil procedure to facilitate access to justice, partially based on guidance from the Supreme Court of Canada in the 2014 decision *Hryniak v Mauldin*.² This article explores how this has played out in Manitoba and the extent to which Manitoba has heeded *Hryniak*'s spirit.

The goal is multifold. First, there will be a historical examination of precisely how Manitoba's procedural law has changed in the past decade from a regulatory perspective. Second, there will be an analysis of how Manitoba judges have interpreted particular amended areas of Manitoba civil procedure. Third, in light of the foregoing, there will be an assessment of whether Manitoba civil procedure has been employed in recent years with a view to facilitating access to justice in the actual prosecution of cases.

Part II of this article briefly introduces Canada's access to justice crisis, Ontario's related reforms to procedural law, the *Hryniak* decision, and its applicability beyond Ontario and the summary judgment context. Part III introduces explicit amendments to Manitoba civil procedure that have arisen in *Hryniak*'s aftermath. Part IV comprehensively analyzes Manitoba case law to assess the extent to which *Hryniak*'s spirit and related amendments to Manitoba civil procedure have had effects on reported case law. Part V suggests that there may be some excessive reticence to employ new aspects of procedural law. Mostly, however, there should be recognition of a "made-in-Manitoba" approach that has learned from other jurisdictions' experiences and which seems tailored to the conduct of litigation in the province.

II. BACKGROUND

A. Access to Justice in Canada

Access to justice is usually described as Canada's justice system's greatest shortcoming. Numerous articles and reports have attempted to address this issue.³ Most Canadians cannot afford to retain counsel for

² *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*].

³ See e.g. Honourable Coulter A Osborne, QC, *Civil Justice Reform Project: Findings & Recommendations* (Ontario Ministry of the Attorney General, November 2007), online:

complex matters.⁴ Unresolved legal issues tend to result in problems multiplying and can manifest in numerous negative social and health consequences.⁵

The meaning of the phrase “access to justice” does vary. It can include broad philosophical questions about defining and delivering “justice,”⁶ delivering legal services more accessibly,⁷ preventing legal problems from arising,⁸ and alternatives to litigation such as mediation and arbitration.⁹

Simultaneously, resolving civil cases in the public court system matters for many reasons, including ensuring that parties can avail themselves of a system with basic procedural protections¹⁰ and that the common law and associated democratic norms are developed.¹¹ The Supreme Court noted the problematic results of an undeveloped common law and one’s legal fate being dependant not on the law but on economic status, not only in

<attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/> [perma.cc/G4ZF-BBC7]; Action Committee on Access to Justice in Civil and Family Matters, “Access to Civil & Family Justice: A Roadmap for Change” (October 2013) at 7-8, online (pdf): *Canadian Forum on Civil Justice* <cfcj-fcj.org> [perma.cc/7W5K-BCU6] [“Roadmap for Change”]; Trevor CW Farrow, “What is Access to Justice?” (2014) 51:3 *Osgoode Hall LJ* 957 at fn 1 [Farrow, “Access to Justice”].

⁴ Farrow, “Access to Justice”, *ibid.* at 964, citing Beverley McLachlin, “Forward” in Michael Trebilcock, Anthony Duggan & Lorne Sossin, eds, *Middle Income Access to Justice* (Toronto: University of Toronto Press, 2012) at ix.

⁵ Farrow, “Access to Justice”, *ibid.* at 963-64; Trevor CW Farrow, “A New Wave of Access to Justice Reform in Canada” in Adam Dodek & Alice Woolley, eds, *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (Vancouver: UBC Press, 2016) at 166-67 [Farrow, “A New Wave”].

⁶ See e.g. Farrow, “Access to Justice”, *ibid.* at 968-69; Patricia Hughes, “Law Commissions and Access to Justice: What Justice Should We Be Talking About?” (2008) 46:4 *Osgoode Hall LJ* 773.

⁷ See e.g. Gillian K Hadfield, “The Cost of Law: Promoting Access to Justice Through the (un)Corporate Practice of Law” (2014) 38 *Supplement Intl Rev L & Econ* 43.

⁸ Farrow, “Access to Justice”, *supra* note 3 at 979-80; “Roadmap for Change”, *supra* note 3 at 7-8.

⁹ See e.g. Jeffrey S Leon & Gannon G Beaulne, “Making Up Your Mind: Trial Litigation vs. Arbitration in the Commercial World” (2015) 34:1 *Adv J* 10.

¹⁰ Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) at 232-51.

¹¹ *Ibid* at 251-58.

*Hryniak*¹² but also in *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*.¹³ This element of access to justice is improved if parties are assured that the civil justice system will process their claims promptly and with minimal financial expense. Even those arguing that access to justice should be interpreted more broadly agree that simple and efficient civil procedure is an important tool for achieving access to justice.¹⁴

B. Ontario's 2010 Amendments and *Hryniak*

In the face of the *status quo* on access to justice, the Ontario government retained Coulter Osborne, retired Associate Chief Justice of Ontario, to prepare a report recommending reforms to the justice system to facilitate access to justice. Many recommendations in his 2007 report were enacted in Ontario's *Rules of Civil Procedure* as a series of amendments that came into force on January 1, 2010.¹⁵ Perhaps the most notable of these concerned the expanded ability of Superior Court judges to grant "summary judgment": disposing of all or part of a case on a motion, with affidavit evidence, and without a full trial.¹⁶ Also notable was enacting the proportionality principle as applicable to all civil procedures.¹⁷

The 2010 Amendments were subject to criticism in some circles, whether due to theoretical criticisms of the proportionality principle¹⁸ or

¹² *Hryniak*, *supra* note 2 at paras 1, 26.

¹³ *Trial Lawyers Association of British Columbia v British Columbia (Attorney General)*, 2014 SCC 59.

¹⁴ See e.g. Farrow, "A New Wave", *supra* note 5 at 166: "There is no doubt that, if a matter needs to go to court, and if a client needs to pay for a lawyer in order to get advice on that matter, access to the system will have been improved if the system and the people providing the services are available more efficiently and cost effectively, allowing more people access to those services."

¹⁵ See Brooke MacKenzie, "Effecting a Culture Shift - An Empirical Review of Ontario's Summary Judgment Reforms" (2017) 54:4 *Osgoode Hall LJ* 1275 at 1288-89; Janet Walker, "Summary Judgment Has its Day in Court" (2012) 37:2 *Queen's LJ* 697 at 707-09.

¹⁶ Rule 20 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 [*Ontario Rules*], analyzed in *Hryniak*, *supra* note 2.

¹⁷ The subject of *Hryniak*, *ibid*.

¹⁸ Colleen M Hanych, "More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform" (2008) 27:1 *CJQ* 98.

the apparent acceptance of the “vanishing trial.”¹⁹ But most commentators viewed the 2010 Amendments as positive.²⁰

The 2010 Amendments’ expanding the availability of summary judgment came before the Supreme Court in *Hryniak*. Writing for a unanimous Court, Karakatsanis J. viewed the proportionality principle, as well as the expanded ability to seek summary judgment, as positive. She did not dispute that inappropriately sought summary judgment could itself impede access to justice but held that there were ways to minimize this risk, including having a judge who hears a summary judgment motion remaining seized of the matter if it is unsuccessful.²¹ She also noted that excessive reliance on traditional methods of litigation could frustrate access to justice and boldly called for a “culture shift” in how litigation is prosecuted.²²

The spirit of *Hryniak* and the 2010 Amendments applies beyond the summary judgment context.²³ For instance, Rule 2.1 of Ontario’s *Rules*, which came into effect after *Hryniak*, allows a court to dismiss potentially abusive actions through a very summary written procedure. Rule 2.1 was clearly influenced by *Hryniak*’s spirit.²⁴ Stephen Pitel and Matthew Lerner

¹⁹ Jonathan Lisus, “*Hryniak*: Requiem for the vanishing trial, or brave new world?” (2014) 33:1 Adv J 6.

²⁰ See e.g. MacKenzie, *supra* note 15; Shantona Chaudhury, “*Hryniak v. Mauldin*: The Supreme Court issues a clarion call for civil justice reform” (2014) 33:3 Adv J 8; Gerard Joseph Kennedy, *Hryniak, the 2010 Amendments, and the First Stages of a Culture Shift?: The Evolution of Ontario Civil Procedure in the 2010s* (PhD Dissertation, Faculty of Graduate Studies, York University, 2020), online (pdf): <yorkspace.library.yorku.ca> [perma.cc/M2WK-TLTJ] [Kennedy Dissertation].

²¹ *Hryniak*, *supra* note 2 at paras 6, 71, 78.

²² *Ibid* at paras 23-33.

²³ See e.g. *Iannarella v Corbett*, 2015 ONCA 110 at para 53, concerning discovery; *Canadian Natural Resources Limited v ShawCor Ltd*, 2014 ABCA 289 at para 5, concerning the intersection between discovery and claims of privilege; Stephen GA Pitel & Matthew B Lerner, “Resolving Questions of Law: A Modern Approach to Rule 21” (2014) 43:3 Adv Q 344; Gerard J Kennedy, “Rule 2.1 of Ontario’s *Rules of Civil Procedure*: Responding to Vexatious Litigation While Advancing Access to Justice?” (2018) 35:1 Windsor YB Access Just 243 at 246 [Kennedy, “Rule 2.1”]; Gerard J Kennedy, “Jurisdiction Motions and Access to Justice: An Ontario Tale” (2018) 55:1 Osgoode Hall LJ 79 at 85-86 [Kennedy, “Jurisdiction Motions”].

²⁴ Described in depth in Kennedy, “Rule 2.1”, *supra* note 23.

have also argued that *Hryniak* should permeate how motions to determine questions of law are considered.²⁵ The majority of the Supreme Court of Canada accepted this in *Atlantic Lottery Corp Inc v Babstock*, where Brown J. held that “Where possible, [...] courts should resolve legal disputes promptly, rather than referring them to a full trial [including through] resolving questions of law by striking claims that have no reasonable chance of success.”²⁶

Nor is *Hryniak*’s spirit confined to Ontario. Barbara Billingsley has comprehensively studied how it has affected procedural law in Alberta.²⁷ There are also numerous appellate decisions in all common law provinces invoking *Hryniak*, even though parts of the decision are only binding in Ontario.²⁸

III. AMENDMENTS TO MANITOBA CIVIL PROCEDURE

Pursuant to *The Court of Queen’s Bench Act*, Manitoba Civil Procedure is made by a twelve-person committee (the “Committee”) chaired by the Chief Justice of Manitoba or his designate.²⁹ The rules have the legal force of regulations made under *The Statutes and Regulations Act*.³⁰

The Committee made several notable amendments to the *Court of Queen’s Bench Rules*³¹ in the 2010s. The four earliest ones most germane to this article are:

- Manitoba Regulation 28/2010 prescribed appellate practice and jurisdiction for appeals from orders of masters, registrars, and assessment officers;

²⁵ Pitel & Lerner, *supra* note 23.

²⁶ *Atlantic Lottery Corp Inc v Babstock*, 2020 SCC 19 at para 18, citing Pitel & Lerner, *ibid*.

²⁷ Billingsley, *supra* note 1.

²⁸ *Rubens v Sansome*, 2017 NLCA 32 at paras 29-35; *Li v Macnutt & Dumont and Walters*, 2019 PECA 30; *Russell et al v Northumberland Co-Operative Limited*, 2019 NBCA 70; *Canadian Elevator Industry Education Program (Trustees of) v Nova Scotia (Elevators and Lifts Act)*, 2016 NSCA 80 at paras 72-73; *Aquila v Aquila*, 2016 MBCA 33; *Hess v Thomas Estate*, 2019 SKCA 26; *Condominium Corporation No 0321365 v Cuthbert*, 2016 ABCA 46; *Allard v The Owners, Strata Plan VIS 962*, 2019 BCCA 45.

²⁹ *The Court of Queen’s Bench Act*, CCSM c C280, ss 91-93.

³⁰ *The Statutes and Regulations Act*, CCSM c S207.

³¹ *Court of Queen’s Bench Rules*, Man Reg 553/88 [QB Rules].

- Manitoba Regulation 215/2011 added a procedure for expedited actions;
- Manitoba Regulation 54/2014 restricted the ability to grant summary judgment to judges (rather than masters);³² and
- Manitoba Regulation 23/2016 states that judges and masters who hear motions to expunge portions of affidavits must hear the motions for which the affidavits were sworn.

These amendments mix proactive judging and ensuring efficient use of judicial resources to advance access to justice, such as not requiring a judge to “get up to speed” if another judge has already heard another portion of the action. This accords with *Hryniak*’s encouraging judges who hear unsuccessful summary judgment motions to remain seized of matters.

The rubber really hit the road with Manitoba Regulation 130/2017, which came into effect on January 1, 2018,³³ and included many amendments, ten of which bear emphasis, and many of which have clear analogues in Ontario.

First, as in Ontario,³⁴ the principle of proportionality was enshrined in Rule 1.04(1.1). Second, with similarities to Rule 2.1 of Ontario’s *Rules*, Rule 2.04 prescribed an ability to dispense with the *QB Rules* to address instances where a person acts in a vexatious and/or abusive manner.³⁵ Third, a revised summary judgment process was prescribed.³⁶ Fourth, dismissal for delay rules were amended, by presuming significant prejudice at a certain point, and mandating dismissal after three years or more of delay subject to narrow exceptions.³⁷ These four changes are the subject of and will be discussed in more depth below in Part IV.

Fifth, a third party required to disclose documents is entitled to be compensated for that unless the court orders otherwise.³⁸ This

³² For the implications of powers of “the court” being inclusive of masters but powers of “judges” being exclusive of masters, see Karen Busby, *Manitoba Queen’s Bench Rules 2019* (Toronto: Carswell, 2018) at 2-137.

³³ Hereafter, the “2018 Amendments”.

³⁴ Ontario *Rules*, *supra* note 16, Rule 1.04(1.1).

³⁵ *QB Rules*, *supra* note 31, Rule 2.04; Man Reg 130/2017.

³⁶ *Ibid*, Rule 20; Man Reg 130/2017.

³⁷ *Ibid*, Rule 24; Man Reg 130/2017.

³⁸ *Ibid*, Rule 30.10(5); Man Reg 130/2017.

disincentivizes seeking third-party disclosure and its associated costs and delay. Sixth, the powers of masters on contested motions were expanded, preventing expense and delay of bifurcating matters when a master could not grant all sought relief.³⁹ Seventh, as in Ontario, contested motions should have a scheduling agreement, facilitating their progress.⁴⁰ Eighth, contested applications now have a more detailed process to be followed,⁴¹ encouraging predictability and efficiency. Efficiency runs throughout these four changes.

Ninth, major changes revised pre-trial management, ensuring efficiency by mandating that the same judge manage all pre-trial steps and hear all pre-trial motions except summary judgment motions, including making orders “to facilitate the just, most expeditious and least expensive determination or disposition of an action.”⁴² Examples of such interlocutory orders are given, and without prejudice, settlement discussions must be held.⁴³

Tenth, new case management procedure was prescribed.⁴⁴ Case management is an important topic but is generally outside the scope of this article, which analyzes how civil procedure doctrine is used to progress contested actions. Less than three years into its enshrinement into the *QB Rules*, it is difficult to assess how it has “changed” Manitoba civil procedure.

The 2018 Amendments did not apply the new summary judgment rules in their full gamut to family law proceedings. But Manitoba Regulation 170/2018 clarified much of family law procedure. This included noting that the general rules for summary judgment do not apply to family law proceedings, while still giving guidance on summary judgment procedure in the family context, including having a judge who hears a summary judgment motion in family law also presiding at the trial. Rigorous case management and triage was also introduced. Manitoba Regulation 109/2019 further clarified appellate procedure from a master’s order in the family context. Procedure in this regard has been further

³⁹ *Ibid*, Rules 37.08(1), 37.08(2); Man Reg 130/2017.

⁴⁰ *Ibid*, Rule 37.08.1; Man Reg 130/2017.

⁴¹ *Ibid*, Rule 38.07.1; Man Reg 130/2017.

⁴² *Ibid*, Rule 50, specifically Rule 50.01(2); Man Reg 130/2017.

⁴³ For more information, see Busby, *supra* note 32 at 2-179.

⁴⁴ *QB Rules*, *supra* note 31, Rule 50.1; Man Reg 130/2017.

amended as *The Family Law Modernization Act*⁴⁵ has gradually come into force.

Finally, Manitoba Regulation 121/2019 prescribed that a summary judgment motion must be heard by the pre-trial judge and “may only be scheduled after a pre-trial conference for the action has been held.” Clearly, this is motivated to conserve and efficiently use judicial resources. It is too soon to determine whether this has had any effects. It is discussed somewhat below, but trends about its effects on the case law cannot yet be determined.

IV. CHANGES IN DOCTRINE AND USE OF PROCEDURAL LAW

A. Summary Judgment

1. Methodology

Following preliminary searches in October 2019, comprehensive searches were undertaken in QuickLaw and WestLaw in April and May of 2020, attempting to isolate all reported cases where summary judgment was sought in Manitoba between January 1, 2010, and December 31, 2019. There are limitations to this methodology – notably, unreported endorsements could not be captured by it; notwithstanding this, however, quantitative analysis of case law frequently proceeds on the use of QuickLaw and WestLaw.⁴⁶ Moreover, this methodology cannot capture the large number of matters that settle.⁴⁷ This is a real limitation, but it does not affect the ability of the analysis to reflect trends as settlement would be a factor both prior to and after the relevant amendments.

The goals of this analysis were to determine:

- the state of the law of summary judgment in Manitoba;

⁴⁵ *The Family Law Modernization Act*, SM 2019, c 8.

⁴⁶ See e.g. Craig E Jones & Micah B Rankin, “Justice as a Rounding Error? Evidence of Subconscious Bias in Second-Degree Murder Sentences in Canada” (2014) 52:1 *Osgoode Hall LJ* 109 at 121, fn 58.

⁴⁷ Though the number of cases that “settle” is actually uncertain: see e.g. Kennedy Dissertation, *supra* note 20 at 19, fn 108; see also “Civil Non-Family Cases Filed in the Supreme Court of BC: Research Results and Lessons Learned” (September 2015), online (pdf): *Canadian Forum on Civil Justice* <cfcj-fcjc.org> [perma.cc/4RU8-TLFH].

- how many motions were brought, and whether *Hryniak* and the 2018 Amendments had any impact on this;
- how many motions were successful;
- how interventionist appellate courts were in this regard; and
- whether any of the foregoing were affected by:
 - a case's arising in the family law context; or
 - a master being the first-instance decision-maker.

Some cases are relevant for the number of motions brought but not their resolution. For instance, another issue (such as a failure to answer interrogatories⁴⁸ or the action's resolution⁴⁹) could have rendered the summary judgment motion moot. Similarly, the motion may not have been pursued.⁵⁰ If competing summary judgment motions were brought and one was successful, the motion was considered granted as it had the practical effect of ending the action, even though the other motion was technically dismissed.⁵¹ One other case was counted as dismissed even though it was dismissed for being brought too soon, with the judge indicating summary judgment could have been appropriate after a statement of defence was filed.⁵² Overall, cases were categorized to determine the effect of the motion on the proceeding, rather than technical dispositions. One case was excluded from the analysis as, even though a party was essentially seeking "a form of summary judgment," this was the judge's terminology, not the moving party's.⁵³

2. The Jurisprudence

The law of summary judgment in Manitoba has changed through regulation twice in the past ten years. It also had the potential to be affected by the *Hryniak* decision in 2014. The following history illustrates the jurisprudence's evolution.

⁴⁸ *Schultz v Schultz*, 2012 MBQB 140.

⁴⁹ *Bell v Leclair*, 2019 MBQB 26 at paras 4, 6-7.

⁵⁰ See e.g. *Hupe v Hupe*, 2013 MBQB 19.

⁵¹ See e.g. *Raymond v Manitoba Public Insurance Corp*, 2016 MBQB 117, aff'd 2017 MBCA 32; *Northpoint Commercial Finance Canada Inc v Murray et al*, 2018 MBQB 157.

⁵² *Fawley v Mosleneko*, 2016 MBQB 59.

⁵³ *Stuart Olson Construction Ltd v Structural Heavy Steel, a division of Canam Group Inc*, 2016 MBQB 56 at para 27.

a. Pre-*Hryniak* Jurisprudence

In the pre-*Hryniak* era, the leading case on summary judgment was 2007's *Homestead Properties (Canada) Ltd v Sekhri*.⁵⁴ Freedman JA summarized previous case law on how a judge should determine whether to grant summary judgment. He explained what was frequently known as the “two-part test”:

[14] The test for summary judgment is well established, and no further detailed explanation is needed. The test is to the same effect regardless of whether the moving party is the plaintiff or the defendant. When the defendant moves, as here, he must prove, on a *prima facie* basis, that the plaintiff's action must fail. If he meets that burden, then the plaintiff has the burden to establish that there is a genuine issue for determination. He must show that his claim is “one with a real chance of success” [references omitted]. If he fails to do so, summary judgment dismissing the claim will follow.

This process obligated both sides to take an active role in a summary judgment motion, making it clear that it was a motion on which a party must “lead trump.”⁵⁵ The gravity of the result (resolving the proceeding) mandated a comparably serious process.

Also telling was Martin J.'s decision in *Fegol v St Clements*,⁵⁶ where he paraphrased another Court of Appeal decision on the appropriateness of summary judgment, *Blanco v Canada Trust Co*:⁵⁷

- A motion for summary judgment is not decided on the assumption that the facts alleged in the pleadings are true. The motion is decided on evidence.
- The moving party in a summary judgment application must begin by establishing with evidence a *prima facie* case for the entering of summary judgment, i.e. that the responding party's case must fail.
- If the moving party meets this onus of proof, then the responding party has the burden of showing there is a genuine issue for trial.
- The motions judge must take a “hard look at the merits of an action” and decide whether there is a “real chance” that the action will be successful, but before doing so, he or she must first be satisfied that the moving party has met the burden upon it.

⁵⁴ *Homestead Properties (Canada) Ltd v Sekhri*, 2007 MBCA 61 [*Homestead Properties*].

⁵⁵ Osborne JA (as he then was) made this oft-quoted observation in *1061590 Ontario Ltd v Ontario Jockey Club* (1995), 21 OR (3d) 547 (CA) at 557.

⁵⁶ *Fegol v St Clements (Rural Municipality) et al*, 2010 MBQB 52, aff'd 2010 MBCA 87 [*Fegol*]. As the master's decision was decided prior to 2010, this was not included in the analysis of case law.

⁵⁷ *Blanco v Canada Trust Co*, 2003 MBCA 64.

- The “real” chance of success means there is a triable issue which realistically could result in a judgment. The claim must have an “air of reality” to it and there must be, on the evidence, more than a theoretical possibility of success.⁵⁸

Summary judgment in Manitoba was (and, as we are coming to, still is) thus to be based on evidence. In this sense, it is significantly different from motions to strike, which are decided on pleadings. Based on the evidence, a summary judgment motion judge had significant ability to assess a claim or defence’s likelihood of success. But the benefit of the doubt was to be given to a party arguing that summary judgment was inappropriate, in line with the historical view that denial of a trial was the quintessential example of procedural injustice.⁵⁹ To illustrate an extreme example of where summary judgment was deemed appropriate in this period, *Sydorenko v Manitoba*⁶⁰ granted summary judgment in 2012 when a party made pseudolegal claims in a style reminiscent of the infamous “freemen-on-the-land.”⁶¹ At the other end of the “reticent to grant summary judgment” spectrum, at least one case declined to grant summary judgment despite both sides seeking it.⁶²

Despite some reluctance to grant summary judgment, it was noted as the way to dispose of actions of questionable merit as opposed to other motions. For instance, Master Cooper emphasized in 2014 that a security for costs motion ought not to be used as a backdoor mechanism to stop unmeritorious litigation.⁶³

b. Immediate Jurisprudential Effects of *Hryniak*

Hryniak was, of course, not binding in Manitoba in all respects. But as a high-profile Supreme Court of Canada decision, one might still have imagined it having effects. In *Lenko v Manitoba*,⁶⁴ for a unanimous Court

⁵⁸ *Fegol*, *supra* note 56 at para 34.

⁵⁹ *Walker*, *supra* note 15 at 701, citing *Irving Ungerman Ltd v Galanis* (1991), 4 OR (3d) 545 at 550-51 [*Irving Ungerman*].

⁶⁰ *Sydorenko v Manitoba*, 2012 MBQB 42 (Master).

⁶¹ See e.g. *Meads v Meads*, 2012 ABQB 571; Donald J Netolitzky, “The History of the Organized Pseudolegal Commercial Argument Phenomenon in Canada” (2016) 53:3 *Alta L Rev* 609.

⁶² *NB Petro Inc v Manto Sipi Fuels Ltd et al*, 2010 MBQB 275.

⁶³ *Kalo v The Law Society of Manitoba*, 2014 MBQB 24 at para 44, citing *Gray et al v Webster* (1998), 129 Man R (2d) 87 (CA).

⁶⁴ *Lenko v Manitoba*, 2016 MBCA 52 [*Lenko*].

of Appeal, Beard JA acknowledged that *Hryniak* should be heeded “in the spirit of increasing access to justice.”⁶⁵ She nonetheless held that:

[71] *Hryniak* did not, however, change the test to be applied on a motion for summary judgment in Manitoba. The test remains whether the claim or defence raises a genuine issue for trial [...] If there is a genuine issue for trial, it is not for the motion court to resolve that issue; rather, the motion should be dismissed and the matter should proceed to trial. The situation is different in Ontario, where the summary judgment rules have been substantially amended to expand the role of the court in resolving claims without a trial. This difference must be kept in mind when applying *Hryniak* to a motion for summary judgment under the Manitoba rules.

[72] Many motions for summary judgment raise issues of credibility. In this case, the motion judge was of the view that he was “required to make credibility findings as to the evidence of the parties” [...] He repeated this proposition, stating “findings of credibility must be made” [...] and “I must determine credibility” [...] That is not the correct test for summary judgment in Manitoba.

Lenko was repeatedly cited on this point by the Court of Queen’s Bench,⁶⁶ even when a judge limited its application to determining credibility on the basis of affidavit evidence.⁶⁷

The costs of inappropriately sought summary judgment were front and centre to Steel JA’s decision in *Berscheid v Federated Co-operatives et al*,⁶⁸ where defendants admitted liability but disputed damages. The motion judge dismissed the farmer-plaintiff’s summary judgment motion. Steel JA succinctly noted how the case was a paradigm of what Karakatsanis J. warned about regarding summary judgment gone awry in *Hryniak*:

[15] Despite Berscheid’s claims with regard to the straightforward nature of this matter, the volume of materials attest [sic] to its complexity. To Berscheid, his lengthy affidavits speak for themselves. They do not.

[16] In fact, his factum, written in sentence fragments, is very difficult to understand. His affidavit sworn April 2015 is 140 pages long and contains six pages of defined terms. In an exhibit to his affidavit sworn November 3, 2015, it

⁶⁵ *Ibid* at para 70.

⁶⁶ See e.g. *Diduck v Simpson*, 2018 MBQB 76 at paras 9, 11; *Green v Bush*, 2017 MBQB 83 at paras 33, 65.

⁶⁷ *3746292 Manitoba Ltd v Intact Insurance Co*, 2016 MBQB 210 at para 17, aff’d 2018 MBCA 59.

⁶⁸ *Berscheid v Federated Co-operatives et al*, 2018 MBCA 27.

sets out ten factors that describe various losses or increased variable operating costs including, but not limited to, reduced rate of weight gain in each animal, delays in pregnancy of each cow, premature death and burial costs.

[17] Again, the damage calculations provided by Berscheid are anything but straightforward. They call for the analysis of massive amounts of data. Berscheid made numerous assumptions in calculating his losses, assumptions with respect to fluctuations in past and future fertility rates, delays in pregnancies and the future price of beef in the market place. These assumptions need to be supported by expert evidence. [This] cries out to be tested by *viva voce* evidence and cross-examination.

[18] I agree with the motion judge when he commented, “To say these calculations are complex is a considerable understatement....”

Relying on *Lenko*, she unsurprisingly went on to dismiss the summary judgment motion.

Despite *Hryniak*'s limits on summary judgment in Manitoba, the Court of Appeal nonetheless would suggest that parties seek summary judgment when considered appropriate.⁶⁹

c. 2018 Amendments

Lenko makes sense as a matter of statutory interpretation. But evidently believing that expanded summary judgment could advance access to justice, the Committee expanded summary judgment's availability effective January 1, 2018. Now, following a triage process, a “judge *must* grant summary judgment if he or she is satisfied that there is no genuine issue *requiring a trial* with respect to a claim or defence.”⁷⁰ And unlike before, judges are allowed to weigh evidence, evaluate credibility, and draw reasonable inferences based on evidence. The judge may grant summary judgment based on these powers unless “it is in the interests of justice for these powers to be exercised only at trial.”⁷¹ This clearly is meant to move away from assuming that the trial is a default procedure.

How did courts respond to this? Greenberg J.'s decision in *Free Enterprise Bus Lines Inc et al v Winnipeg Exclusive Bus Tours Inc et al* emerged as a leading Court of Queen's Bench case, explicitly holding that *Homestead Properties*'s two-step process no longer fit.⁷² She noted that, as in

⁶⁹ See e.g. *Abas Auto Inc v Superior General Partner Inc*, 2015 MBCA 104.

⁷⁰ *QB Rules*, *supra* note 31, Rule 20.03(1) [emphases added].

⁷¹ *Ibid*, Rule 20.03(2).

⁷² *Free Enterprise Bus Lines Inc et al v Winnipeg Exclusive Bus Tours Inc et al*, 2018 MBQB 64

Ontario, summary judgment reforms came into force in conjunction with reforms enshrining proportionality. She also observed that Manitoba's new summary judgment rules were similar to the Ontario procedure analyzed in *Hryniak*, with the traditional trial no longer being the default procedure.⁷³

Greenberg J. nonetheless noted that there are important differences between the regimes in Manitoba, even post-2018, and Ontario. For instance, in *Hryniak*'s companion case, *Bruno Appliance and Furniture, Inc v Hryniak*,⁷⁴ Karakatsanis J. held that a judge should first ask whether she can decide the case on affidavit evidence, and, if not, then ask whether she would be able to do so if weighing of evidence, evaluations of credibility, drawing inferences, and/or oral evidence complemented the documentary record. But under the 2017 Manitoba regime, a summary judgment case conference was mandatory to decide how the motion should proceed, including whether there should be *viva voce* evidence. This differs from the motion for directions contemplated in *Hryniak* to ensure the proper progress of a summary judgment motion. The Manitoba regime thus triages cases to minimize the risk of inappropriate summary judgment motions, which can be more expensive than a short trial. Moreover, the case conference judge, if he or she concludes that a summary judgment motion is not appropriate, can restrict the evidence to be presented at trial, and will remain seized of the matter. This accords with *Hryniak*'s encouragement for judges to remain seized when summary judgment motions are unsuccessful and does not put the onus on a party to bring a motion for directions. This results in a type of case management, even if not called that. This could slow down very straightforward summary judgment motions, such as those arguing that a limitations defence is evident upon minimal facts. But Manitoba has evidently viewed the delay and costs of case conferences in such marginal cases as being worth the benefits of triaging marginal cases.

Did this overrule *Homestead Properties*'s two-step process? It certainly seemed to, especially as it also appeared to confine discussion of "onus"

at para 39 [*Free Enterprise*].

⁷³ *Ibid* at para 28.

⁷⁴ *Bruno Appliance and Furniture, Inc v Hryniak*, 2014 SCC 8 at para 22.

to substantive rather than procedural issues.⁷⁵ But this was uncertain until the Court of Appeal addressed the issue in *Dakota Ojibway Child and Family Services et al v MBH*.⁷⁶ There, Burnett JA summarized the process on a summary judgment motion:

[108] [a] moving party must first satisfy the motion judge that there can be a fair and just determination on the merits [...]. In so doing, the moving party bears the evidential burden of establishing that there is no genuine issue requiring a trial.

[109] If those requirements are met, the responding party must meet its evidential burden of establishing “that the record, the facts, or the law preclude a fair disposition” or that there is a genuine issue requiring a trial (e.g., by raising a defence). In other words, the responding party must establish why a trial is required. [...]

[111] There is no shifting onus; the standard of proof is proof on a balance of probabilities; and the persuasive burden of proof remains at all times with the moving party to establish that a fair and just adjudication is possible on a summary basis and that there is no genuine issue requiring a trial.

[112] In my view, the approach described in *Hryniak* and the two-step process described in *Homestead* are consistent with the new rules in Manitoba; to the extent that *Free Enterprise* suggests otherwise, it should not be followed.

[citations omitted]

Essentially, *Dakota Ojibway CFS* re-asserted *Homestead* and the importance of parties moving for summary judgment, satisfying that there is no genuine issue requiring a trial. Then, the two-step process means that responding parties have the opportunity to dispute the appropriateness of summary judgment.

Despite this, it is clear that the ability to seek summary judgment broadened post-2018. As Bond J. wrote in *Berscheid v Government of Manitoba*:

A motion for summary judgment is not merely a means to weed out unmeritorious claims but is an alternative means of adjudication. In considering the motion, I am permitted to weigh evidence, evaluate credibility of deponents, and draw reasonable inferences. As long as I am confident in making necessary

⁷⁵ *Free Enterprise*, *supra* note 72 at paras 40-41.

⁷⁶ *Dakota Ojibway Child and Family Services et al v MBH*, 2019 MBCA 91 [*Dakota Ojibway CFS*].

findings of fact based on the evidence presented, I may finally decide the claim on summary judgment.⁷⁷

d. Final Amendments

Manitoba Regulation 121/2019 sought to increase judicial efficiency in the summary judgment context by mandating that pre-trial judges hear summary judgment motions, with such motions only being allowed to be scheduled after a pre-trial conference.⁷⁸ In doing so, the previous practice of summary judgment case conferences was dispensed with. As this amendment dates from September 2019, it is too soon to determine its real-world effects.

3. The Numbers from the Case Law

a. Number of motions brought, by year

204 summary judgment motions were analyzed, if decided at first instance in the 2010s: 27 in 2010; 21 in 2011; 23 in 2012; 26 in 2013; 17 in 2014; 12 in 2015; 20 in 2016; 19 in 2017; 26 in 2018; and 13 in 2019. The average number of cases per year was 20.4. Every case is treated as part of the “year” in which the motion was decided, even if an appeal was decided subsequently. Despite zig-zagging, it seems difficult to assess whether the number of cases per year is a true “trend” or random variance on a year-by-year basis.

b. Number of motions successful, by year

More than half of the motions brought were ultimately (after appeals, if they were heard) successful. The following chart expresses the results:

Year	Granted	Partially Granted	Dismissed	Abandoned	Became Moot	Unknown	Success Rate	Total
2010	17	2	6	0	0	2	76%	27
2011	8	6	6	0	0	1	70%	21
2012	6	0	11	1	1	4	31.6%	23
2013	11	2	9	0	1	3	56.5%	26
2014	9	3	3	0	0	2	80%	17
2015	8	0	4	0	0	0	66.7%	12
2016	11	1	7	0	1	0	60%	20
2017	12	2	3	0	1	1	77.8%	19
2018	13	7	4	0	0	2	83.3%	26
2019	9	1	1	0	2	0	76.9%	13

⁷⁷ *Berscheid v Government of Manitoba*, 2019 MBQB 79 at para 11.

⁷⁸ *QB Rules*, *supra* note 31, Rule 20.01(2).

The rate of success (granted or partially granted) for cases with known results increased, albeit slightly, over the years. The rate of success remains high, with the significant majority of motions being granted every year except 2012. A benefit of high rates of success is that parties are not wasting time and expense on fruitless motions that do not advance a case's merits. Rather, they promptly resolve cases on their merits as quickly as possible. Admittedly, if one views expanded use of summary judgment as negative – especially given its lesser procedural protections – increased prevalence may not be viewed as warmly.

c. Appellate intervention

35.3% of summary judgment motion decisions (72 of 204) were appealed in the 2010-2019 period: 40.7% in 2010; 14.3% in 2011; 30.4% in 2012; 30.8% in 2013; 47.1% in 2014; 41.7% in 2015; 40.0% in 2016; 57.9% in 2017; 38.5% in 2018; and 7.7% in 2019. There were second appeals (where the first instance decision-maker was a master) in 17 cases or 26.2% of cases where a master was the first instance decision-maker. The appeal process for 2019 may not yet be complete, and the number of appeals for that year may thus be underestimated.

This is not a small number of appeals. But it is not altogether surprising that summary judgment motions may lead to many appeals, considering:

- there is an appeal as of right;⁷⁹
- if the first instance decision-maker is a master, the appeal is a hearing *de novo* with deference not being due to the master;⁸⁰
- summary judgment motions have the potential to finally dispose of an action; and
- the law in the aftermath of *Hryniak* and the 2018 Amendments was uncertain, thus making appeals arguably particularly appropriate.

On the other hand, appeals from summary judgment motions are only reviewed on a correctness standard for questions of law. Questions of fact

⁷⁹ *The Court of Appeal Act*, CCSM c C240, s 25; John Sopinka, Mark A Gelowitz & W David Rankin, *The Conduct of an Appeal*, 4th ed (Toronto: LexisNexis, 2018), §1.114.

⁸⁰ See e.g. *Gorecki v Linehan*, 2014 MBQB 120 at para 10; *Payne v R Litz & Sons Co Ltd*, 2013 MBQB 121 at para 8. These decisions note that respectful consideration of masters' decisions is nonetheless possible.

and questions of mixed fact and law are reviewed on a standard of palpable and overriding error, unless a question of law can be extricated. Moreover, the decision to actually grant the summary judgment motion is an exercise of discretion entitled to deference “unless the judge has misdirected himself or his decision is so clearly wrong as to amount to an injustice.”⁸¹ This standard of review may be seen to disincentivize appeals.

Of the 72 cases involving appeals, 16 were brought from dismissals of summary judgment motions compared to 56 from their being granted. This is unsurprising, given that most motions were granted and, moreover, someone whose claim or defence has been dismissed on a summary judgment motion “lost” more than a party who was merely told that summary judgment was inappropriate.

14 appellate decisions overturned or varied the motion judge: 2 in 2010; 1 in 2011; 1 in 2012; 2 in 2013; 2 in 2014; 1 in 2015; 2 in 2016; 2 in 2017; 1 in 2018; and 0 in 2019. This leaves an “appeal success rate” of 19.4% (14 of 72 decisions). This excludes cases where appeals were allowed but not on the appropriateness of summary judgment motion.⁸² There were 14 unsuccessful applications for leave to appeal to the Supreme Court of Canada.

The successful appeals were proportionally more likely to result in granting summary judgment as opposed to ruling that it was inappropriate. Of the 14 successful appeals, six ruled that summary judgment should have been granted while eight held that granting summary judgment was inappropriate. This is almost even despite there being 3.5 times the number of appeals from grantings rather than dismissals of summary judgment motions. This suggests that the Manitoba Court of Appeal is not shy about holding that summary judgment is appropriate, while the Ontario Court of Appeal has been noted as curtailing summary judgment’s availability.⁸³

⁸¹ *Joyce et al v Government of Manitoba*, 2018 MBCA 80 at para 23 [Joyce], per Beard JA, cited in, *inter alia*, *Shirritt-Beaumont v Frontier School Division*, 2020 MBCA 31 at para 17, per Simonsen JA.

⁸² See e.g. *Nash v Nash*, 2019 MBCA 31.

⁸³ See e.g. Walker, *supra* note 15 at 697-98; MacKenzie, *supra* note 15 at 1294; Kennedy Dissertation, *supra* note 20 at 269-70; these sources rely on cases such as *Butera v Chown*, *Cairns LLP*, 2017 ONCA 783 at para 26; *Irving Ungerman*, *supra* note 59 at 550-51; *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764.

d. Masters' role

65 cases were decided at first instance before a master, while 123 were decided before a judge. In the other 16 cases, it was unclear whether the initial decision-maker was a judge or a master. Unsurprisingly, the period after 2015 had almost no cases decided by masters as the power of a master to grant summary judgment had been restricted. 60.9% of masters granted or partially granted summary judgment at first instance, compared to 71.3% of Court of Queen's Bench judges. Appeals were more common when the first-instance decision-maker was a master: 43.1% of decisions where the first-instance decision-maker was a master led to an appeal, compared to 35.8% of decisions where the first instance decision-maker was a judge. Appellate courts were more interventionist: the Court of Appeal only overturned or varied 13.6% of cases where the first-instance decision-maker was a judge, but 28.6% of cases where the first-instance decision-maker was a master led to successful appeals.⁸⁴

e. Family Law Context

25 cases were decided in the family context. Summary judgment was less likely to be granted or partially granted in this regard: 32%. Appeals were less common than for non-family cases, with only 5 (20%) of 25 family law decisions being appealed. But of those five appeals, three (60%) were successful, a much higher than typical rate of success for appeals from summary judgment motions.

B. Rule 2.04

Rule 2.04 of the *QB Rules* reads:

If a person acts in a vexatious, evasive, abusive or improper manner or if the expense, delay or difficulty in complying with a rule would be disproportionate to the likely benefit, a judge may, on motion by any party or on his or her own motion, without materials being filed, do one or more of the following:

- (a) modify or waive compliance with any rule;
- (b) make a costs award or require an advance payment against costs payable, or both;
- (c) make any other order respecting a proceeding that the judge considers appropriate in the circumstances.

⁸⁴ In *Finley v Times*, a master's decision was affirmed by a judge but overturned by the Court of Appeal: 2010 MBQB 166, aff'd unreported, rev'd 2012 MBCA 33.

This bears similarity to Rule 2.1 of the Ontario *Rules*, which also provides a very summary procedure to dispose of an action or motion that “on its face” appears frivolous, vexatious, or abusive.⁸⁵ This combats the phenomenon of parties using the *Rules* to act in an abusive and wasteful matter, and where a traditional motion (to cure the inappropriate action) would cause “a fresh outbreak of the disease”⁸⁶ that is vexatious behaviour.

As of May 19, 2020,⁸⁷ only one case has considered using Rule 2.04: *Stambuski v Stambuski*, in which Thomson J. held that he would have considered using the rule had there been evidence (which there was not) that a party was evading service.⁸⁸ Steel JA did stall an appeal in *Green v University of Winnipeg et al* for vexatious proceedings; however, she declined to use Rule 2.04 despite its potential aptness, instead disposing of it as she could have prior to Rule 2.04’s enactment.⁸⁹ The lack of use of Rule 2.04 will be returned to in Part V.

C. Proportionality

1. Background

The proportionality principle was added to Rule 1.04 of the *QB Rules* effective January 1, 2018. The principle seeks to ensure that the conduct of litigation is “proportional” to what is at stake therein.⁹⁰ Proportionality has similarities with efficiency, but they differ in important respects.⁹¹ Proportionality asks whether particular expense and delay increases the likelihood of achieving a just result, bearing in mind what is at stake. An expensive procedure in a piece of litigation with modest sums at stake can be proportionate in certain circumstances, especially when it may be

⁸⁵ Kennedy, “Rule 2.1”, *supra* note 23.

⁸⁶ See Kennedy, “Rule 2.1”, *ibid* at 247, citing *Raji v Borden Ladner Gervais LLP*, 2015 ONSC 801 at para 8.

⁸⁷ The following was searched (confined to Manitoba) in May 2020: “Rule 2.04” OR “R. 2.04” OR “R 2.04” in WestLaw and QuickLaw; and cases that reference Rule 2.04 in WestLaw.

⁸⁸ *Stambuski v Stambuski*, 2018 MBQB 141 at para 58.

⁸⁹ *Green v University of Winnipeg et al*, 2018 MBCA 137 [*Green*].

⁹⁰ Trevor Farrow, “Proportionality: A Cultural Revolution” (2012) 1 J Civ Litigation & Practice 151 at 154.

⁹¹ *Ibid* at 153-54; *Hryniak*, *supra* note 2 at para 33.

dispositive of the case or the issues have broader import.⁹² Nor should parties be given a blank cheque to spend inordinate time and resources on peripheral matters that only marginally increase the likelihood of a case's fair disposition, even when vast sums are at stake.⁹³

2. Usage – Frequency

In May 2020, “1.04!” and “proportion!” were searched for in WestLaw and QuickLaw to determine how many civil cases invoked the principle and the rule in its new formulation. Excluded from recorded results were instances where the idea of “proportionality” came up in another context, such as proportionality in tort damages, criminal sentencing, or family law expenditures.

What did the results show? Cases citing the proportionality principle increased as the decade went on, reflecting both the January 2014 *Hryniak* decision and the 2018 Amendments. The number of reported decisions per year were:

Pre-Hryniak

- 2010: 4
- 2011: 2
- 2012: 6
- 2013: 8

Post-Hryniak

- 2014: 9
- 2015: 10
- 2016: 12
- 2017: 15

Post-Amendments

- 2018: 17
- 2019: 16

This demonstrates a clear uptick, with the final two years having the most cited cases. This suggests that the Supreme Court's encouragement in *Hryniak*, and the 2018 Amendments, indeed affected Manitoba case law.

⁹² See e.g. Gerard J Kennedy & Lorne Sossin, “Justiciability, Access to Justice and Summary Procedures in Public Interest Litigation” (2019) 90 SCLR (2d) 119.

⁹³ See Kennedy Dissertation, *supra* note 20 at 16-18.

3. Jurisprudence

Attempting to comprehensively explain how proportionality applies throughout civil procedure is, to some extent, impossible, as the principle is meant to permeate all of civil procedure. As Beard JA wrote in *Janz v Janz*:

the principle of proportionality applies to the entire civil justice system. The goal is to improve access to the civil justice system and [...] make civil proceedings more timely and less expensive. In order to achieve that goal, each step in the civil justice procedure must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.⁹⁴

Janz was concerned about whether to order a trial of an issue. Other instances where proportionality has been invoked include:

- dismissing a motion to extend the time to file an appeal book and factum;⁹⁵
- holding that there is no need for a party to seek leave to bring a claim that may be outside a limitation period;⁹⁶
- deciding when to terminate cross-examination;⁹⁷ and
- ordering security for costs.⁹⁸

The principle arises in family law litigation as well. In fact, it can be especially germane. As Johnston J. observed in *Evans v Evans*:

This is family law litigation, not historical civil cases that invariably involve insurance companies with great resources. The costs of litigation and the principles of “proportionality” require our court to take a “good, hard look” at the merits of the case and probabilities of the ultimate outcomes. The necessary “culture change” requires that “fishing expeditions” must be discouraged.⁹⁹

Specifically, the principle has been cited as a reason to bar experts from valuating a divorcing couple’s assets¹⁰⁰ and to issue an order hoping to

⁹⁴ 2016 MBCA 39 at para 47 [*Janz*].

⁹⁵ *Silver v Silver*, 2019 MBCA 32 at para 39.

⁹⁶ *St Boniface General Hospital v PCL Constructors of Canada Inc et al*, 2019 MBCA 57 at para 42.

⁹⁷ *Manitoba (Child and Family Services, Director) v REM et al*, 2018 MBQB 192 at para 54.

⁹⁸ *Vitacea Co v Winning Combination Inc*, 2016 MBQB 180 at paras 95-96, 103, 107-108.

⁹⁹ *Evans v Evans*, 2016 MBQB 168 at para 23.

¹⁰⁰ See e.g., *Siwak v Siwak*, 2019 MBCA 60 at para 109.

conclude family law litigation despite hundreds of filings in the matter.¹⁰¹ In contrast to these cases, Thomson J. praised parties in family law litigation for how they conducted a two-day trial in *Skulason v Crackle*.¹⁰²

Proportionality has been invoked in even more procedural contexts, such as child protection,¹⁰³ bankruptcy,¹⁰⁴ and administrative law.¹⁰⁵ Despite the principle's wide-ranging implications, its reach is not unlimited. Notably, it cannot be used to contradict statutory language. Mainella JA lamented in *Nerbas v Manitoba*¹⁰⁶ that language of *The Public Officers Act*¹⁰⁷ mandated disproportionate procedure.

D. Dismissal for Delay

1. Amendments to *QB Rules*

As noted, amendments to Rule 24.01 of the *QB Rules* allow for an assumption of significant prejudice if there is delay “in excess of what is reasonable having regard to the nature of the issues in the action and the particular circumstances of the case.” The Court “may” dismiss a case in these circumstances. Moreover, pursuant to Rule 24.02, the Court “must,” on a motion, dismiss the action if “three or more years have passed without a significant advance in an action” subject to narrow exceptions such as the parties expressly agreeing to the delay, or the delay being the product of a court order, case conference, case management conference, or pre-trial conference. Amendments allowing a party to bring a claim based on three years having passed only became effective on January 1, 2019, allowing a transitional period.¹⁰⁸

2. Changes in Number of Cases

In May 2020, WestLaw and QuickLaw were searched to see how many cases applied these rules in the two years prior to their amendment (2016,

¹⁰¹ *England v Nguyen*, 2015 MBQB 139 at para 69.

¹⁰² *Skulason v Crackle*, 2017 MBQB 103 at para 8.

¹⁰³ See e.g. *Dakota Ojibway CFS*, *supra* note 76 at para 96, *inter alia*.

¹⁰⁴ *BDO Canada Limited v Elias*, 2019 MBQB 86 at para 15.

¹⁰⁵ *Harder v Director Fort Garry-River Heights*, 2017 MBCA 11 at para 34.

¹⁰⁶ *Nerbas v Manitoba*, 2019 MBCA 85 at para 31.

¹⁰⁷ *The Public Officers Act*, CCSM c P230, s 21(1).

¹⁰⁸ *QB Rules*, *supra* note 31, Rule 24.02(4).

2017) compared to the two years after (2018, 2019). The 2019 results are particularly important as amendments to dismissal for delay only became fully effective then.

There appeared to be (when notices of motions were filed cannot be known for certain) more instances of seeking dismissal for delay post-amendments. Cases were classified by the year of first decision, unless there was evidence that the motion was brought in a different year. This suggests that four motions were brought in 2016,¹⁰⁹ two in 2017,¹¹⁰ five in 2018,¹¹¹ and four in 2019.¹¹² However, there was little change to rates of success. Of the six decisions in 2016 and 2017, three were successful (50%), two were unsuccessful (33%), and one was successful only against one defendant who appealed a master's order (17%).¹¹³ But in 2018 and 2019, four of nine were successful (44%), four of nine were unsuccessful (44%), and the final motion was granted only vis-à-vis a third party claim (11%).¹¹⁴ Slightly lower rates of success post-2018 could suggest that the liberalization in the availability of motions to dismiss for delay is having the effect of defendants moving to "take a chance" at winning an action on procedural grounds, rather than incentivizing plaintiffs to progress

¹⁰⁹ *Glenwood Label & Box Mfg Ltd v Brunswick Label Systems Inc et al*, November 9, 2016 (unreported), rev'd 2017 MBQB 177 [Glenwood], aff'd 2019 MBCA 12; *MAHCP v Manitoba (Labour Board)*, 2016 MBQB 158; *Ian Dmytriw et al v Jonah NK Odim et al*, January 17, 2019 (unreported), rev'd 2019 MBQB 143, noting at para 33 that the motion was brought in 2016; *Joyce*, *supra* note 81, rev'g unreported September 29, 2016 decision.

¹¹⁰ *Reid v McLennan*, 2017 MBQB 200; *Austen v Austen*, 2017 MBQB 110.

¹¹¹ *Halwas v Halwas et al*, 2018 MBQB 66; *Aguiar v 5026113 et al*, 2018 MBQB 70, aff'd 2019 MBCA 47; *Beardy et al v Merrill Lynch et al*, unreported, aff'd 2018 MBCA 111 (decided in October 2018, so lower court decision is likely from early 2018); *Oliver v The Government of Manitoba et al*, unreported, aff'd 2019 MBCA 62, leave to appeal ref'd 2020 CanLII 22071 (SCC) [Oliver] (given that the appeal was decided in May 2019, it appears likely that the motion was brought in 2018); *Storm et al v 4724438 Manitoba Ltd et al*, 2019 MBQB 20 (being decided in January, it seems highly likely that this was brought in 2018).

¹¹² *DL et al v CP et al*, 2019 MBQB 42 [DL]; *Widmer Thrush v Selby*, 2019 MBQB 156; *Fehr et al v Manitoba Public Insurance Corporation et al*, 2019 MBQB 64 [Fehr]; *Tataskweyak Cree Nation v Intact Insurance Company*, 2019 MBQB 169.

¹¹³ *Glenwood*, *supra* note 109.

¹¹⁴ *DL*, *supra* note 112.

actions. Nor have the changes been immense, and the small sample size renders drawing lessons on year-by-year variances unsafe. The fact is that more actions, in absolute numbers, were dismissed in the face of inordinate delay post-2018, providing warranted incentives and freeing up court resources.¹¹⁵ This seems to be a positive development. And a plausible alternative explanation for the greater number of unsuccessful motions is that one would expect an immediate “spike” in cases immediately after a regulatory change to test the rule’s meaning.¹¹⁶ In any event, this is hardly a common issue, despite its importance when it arises.

3. The Jurisprudence

What does the new jurisprudence say? Martin J. explains in *DL* that there are now two avenues for an action to be dismissed for delay even within Rule 24.01:

The first route is similar but not identical to the old Rule; the moving party proves some delay and proves that that delay resulted in significant prejudice. In other words, delay plus serious prejudice. The second route requires proving inordinate and inexcusable delay only, thus invoking a presumption of significant prejudice. In other words, statutorily, inordinate and inexcusable delay equates to significant prejudice.¹¹⁷

Fehr illustrates Rule 24.02, where a defendant relied upon three years having passed without progress. Edmond J. noted that the first question a court should ask is whether there has been a passage of three years’ time without significant advance in the action. In *Fehr*, five years had occurred since examinations for discovery. There was a gap of over three years before an appraisal process. Given the three-year gap, Edmond J. considered the exceptions to the requirement that he “must” dismiss the action due to delay. The exception relevant in this case was post-delay steps taken in the action: in this case, an appraisal process. Edmond J. explained:

[...] the Alberta courts in applying a similar rule have stated that an application for dismissal will be refused where the delaying party has done a “thing” to

¹¹⁵ MacKenzie, *supra* note 15 at 1302-03 observed that increased summary judgment in Ontario occurred in similar circumstances, which would have similarly freed up court resources.

¹¹⁶ Kennedy, “Jurisdiction Motions”, *supra* note 23 at 93 observed this phenomenon in a different context.

¹¹⁷ *DL*, *supra* note 112 at para 33.

materially advance the action after the delay and the defendants agreed or participated in that advance in the action and thus acquiesced in the delay. The courts have found that where significant advances have been made and the parties have participated, it would be unfair and inequitable to strike the action for delay.¹¹⁸

In *Fehr*, Edmond J. was “satisfied that advancing the appraisal process was a proceeding that was taken by the plaintiffs since the delay occurred and the defendants participated in the proceeding for a purpose and to the extent that warrants the action continuing.”¹¹⁹ He nonetheless ordered costs of the motion in the cause, given that the plaintiffs did cause a delay of over three years. The case is a reminder of mandatory dismissal and the narrowness, if importance, of exceptions to it.

Edmond J.’s extensive reliance on Alberta case law in *Fehr* is unsurprising, given that Alberta’s *Rules of Court*¹²⁰ largely inspired the amendments to Manitoba’s dismissal for delay rules. These Alberta rules had been subject to significant interpretation in Alberta, leading to extensive case law¹²¹ that Manitoba judges can rely upon.

Finally, it should be remembered that decisions of Court of Queen’s Bench judges on dismissals for delay are entitled to deference: the Court of Appeal noted in *Oliver* that it “will not intervene unless [a trial judge’s decision] is so clearly wrong as to amount to an injustice.”¹²² However, *Glenwood* reminds that this does not apply to a master’s decision.¹²³

E. Other Cases Invoking *Hryniak*

These are perhaps the most obvious areas where Manitoba civil procedure has evolved in recent years. At least, they are the instances where regulations have clearly changed procedural law in Manitoba, with

¹¹⁸ *Fehr*, *supra* note 112 at para 27.

¹¹⁹ *Ibid* at para 31.

¹²⁰ Alta Reg 124/2010, Rule 4.33.

¹²¹ See e.g. the decisions cited in *Fehr*, *supra* note 112 at paras 17-20, 27: *Preston v Bent Developments Co Limited*, 2018 ABQB 89; *Ro-Dar Contracting Ltd v Verbeek Sand & Gravel Inc*, 2016 ABCA 123; *St Jean Estate v Edmonton (City)*, 2014 ABQB 47; *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259; *Morasch v Alberta*, 2000 ABCA 24; *Krieter v Alberta*, 2014 ABQB 349.

¹²² *Supra* note 111 at para 4.

¹²³ *Glenwood*, *supra* note 109 at para 7.

the potential to affect how civil procedure is used in practice. But there remain other cases where judges encouraged novel use of civil procedure within the spirit of *Hryniak*. For example, Toews J. permitted a “trial by affidavit evidence” in *Moffatt v Canadian National Railway*,¹²⁴ where the parties felt that this would be preferable to a traditional summary judgment motion. In *Olfman v University of Manitoba*,¹²⁵ Martin J. struck the claim for having unacceptable pleadings but suggested that a new claim based on the same facts would be doomed on a summary judgment motion. There were also instances of judges remaining seized of matters after deciding interlocutory motions that did not resolve the action,¹²⁶ keeping in line with Karakatsanis J.’s recommendations on this front.

This is not meant to be a scientific analysis of other cases that touched upon *Hryniak* or novel uses of civil procedure motivated to advance access to justice. But they hopefully provide a flavour of uses of *Hryniak* and similar principles outside the four areas discussed above.

V. WHERE TO GO FROM HERE

Manitoba civil procedure has clearly evolved over the past decade. Amendments to the *QB Rules* have had jurisprudential effects, and several have been highlighted in this article: notably, the law of summary judgment, dismissal for delay, and proportionality have all been reconceptualized. Moreover, changes to the law regarding proportionality and dismissal for delay have resulted in more cases considering these issues. Insofar as this has resulted in quicker, fairer and less expensive dispositions, these are positive developments.

However, the effects have also been limited in important ways. For instance, the increased availability of summary judgment appears lacking in practice, even if it is available in theory. This is to say nothing of Rule 2.04, which has not been invoked. This differs from analogous rule changes in Ontario, both on summary judgment¹²⁷ and dismissals of facially abusive proceedings.¹²⁸

¹²⁴ *Moffatt v Canadian National Railway*, 2015 MBQB 26.

¹²⁵ *Olfman v University of Manitoba*, 2014 MBQB 128 at para 28.

¹²⁶ See e.g. *Hamilton v Knight*, 2015 MBQB 171 at para 34.

¹²⁷ See e.g. MacKenzie, *supra* note 15.

¹²⁸ Kennedy, “Rule 2.1”, *supra* note 23.

This caution may be warranted. The triaging process for summary judgment motions in Manitoba hopefully weeds out cases where summary judgment would be inappropriate, which, as discussed earlier, can be an access to justice impediment. Moreover, the need for Rule 2.04 may not be great – vexatious litigants do not appear plentiful in Manitoba, and the ones who exist appear to have been dealt with appropriately by the courts.¹²⁹

But just as caution is sometimes appropriate, boldness can also be helpful at times. The Manitoba judiciary did not narrowly interpret the 2018 Amendments. This has not been the case in Ontario, where it has been suggested that the Court of Appeal has narrowly interpreted amendments to procedural law designed to increase the use of summary procedures.¹³⁰ Rather, it would appear that the bar is more reluctant to use summary procedures, or is being discouraged by pre-trial (previously summary judgment) conferences. Insofar as summary procedures are accompanied by dangers, this is understandable. But summary procedures can also advance access to justice in particular instances. So hopefully, appropriate restraint does not become inappropriate fear of novelty. It can be a fine line between the two.

Access to justice issues in the civil courts are genuinely difficult to solve,¹³¹ and have been present since the time of Dickens.¹³² Moreover, some proposed solutions – such as expanded discovery – have been

¹²⁹ See e.g. *Green*, *supra* note 89.

¹³⁰ *Supra* note 83.

¹³¹ Leonid Sirota, “One Does Not Simply” (26 April 2020), online (blog): *Double Aspect* <doubleaspect.blog/2020/04/26/one-does-not-simply/> [perma.cc/NA79-4CF6].

¹³² Charles Dickens, *Bleak House* (London: Oxford University Press, 1971) [originally published in 1853] at 4, discussed in, e.g., *Jimenez v Romeo*, 2009 CarswellOnt 7677 (SCJ), [2009] O.J. No. 5248 at para 1; The Honourable J Roderick Barr, QC, “The Cost of Litigation: *Bleak House* in the 1990s” (1993) 12:1 Adv J 12; William Kaplan, QC & Bruce Elwood, “The Derivative Action: A Shareholder’s ‘Bleak House?’” (2003) 36:3 UBC L Rev 443; Gerard J Kennedy, “Justice for Some” in *The Walrus* (November 2017) 47 at 48; Judge (as he then was) Neil Gorsuch, “13th Annual Barbara K. Olson Memorial Lecture” (Address delivered at the Federalist Society for Law and Public Policy Studies’ 2013 National Lawyers Convention, The Mayflower Hotel, Washington, DC, 15 November 2013) at 3m:45s-4m:33s, online (video): <youtube.com/watch?v=VI_c-5S4S6Y> [perma.cc/22KC-EFW3].

counterproductive.¹³³ As such, perfection should not be the standard that we are held to. Ultimately, therefore, it is difficult to be too critical of Manitoba civil procedure's recent developments.

VI. CONCLUSION

This article has had several purposes, including to: place the evolution of Manitoba civil procedure in the context of broader Canadian trends; explain the history of amendments to Manitoba civil procedure; analyze the jurisprudential and empirical effects of those amendments; and ask about the amendments' effectiveness from a normative perspective. Judges, lawyers, legal scholars, and law students will hopefully find the doctrinal work useful. Policymakers can hopefully learn lessons about where regulatory change has or has not been consequential in terms of number of cases brought. But there is also a call to stop and reflect on how Manitoba – a relatively small province – has charted its own course in seeking to amend its procedural law to facilitate access to justice.

¹³³ See e.g. extrajudicial comments of Cromwell J while still serving on the Supreme Court: Beverley Spencer, "The Road to Justice Reform: An Interview with Supreme Court of Canada Justice Thomas Cromwell" (July-August 2013), online: *National* <web.archive.org/web/20130911174140/http://nationalmagazine.ca/Articles/Recent4/The-road-to-justice-reform.aspx>. This is also discussed in the United States: see e.g. Gorsuch, *ibid*, at 6m:15s-10m:30s.