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## Searching for a Summary Judgment Equivalent in Quebec Procedural Law

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*The summary judgment is a procedural mechanism that is meant to improve the efficiency of civil litigation by allowing a judgment to be delivered in a summary way, and without the need for a full trial. It is seen as an important tool for dealing with the growing problem of access to justice in Canada. Reform to Ontario's summary judgment rules in 2010, and a liberal interpretation of the Ontario rules in the case of Hryniak v Mauldin, 2014, have led to a greater reliance by parties on summary judgment motions in Ontario. This trend is also apparent in other Canadian provinces, many of which have also liberalized their summary judgment rules in the past few decades. However, although a major reform of the Quebec Code of Civil Procedure took place and a new Code came into effect on 1 January 2016, the summary judgment was not introduced in the Quebec reform. In this paper, I explore whether there are other procedural tools in Quebec that approximate the summary judgment and argue that there are no functional equivalents. Quebec procedure, however, has its own tools to engage in the post-Hryniak cultural shift towards greater access to justice. These tools deal with access to justice uniquely and without some of the risks associated with summary judgment.*

*Le jugement sommaire est un mécanisme procédural qui vise à améliorer l'efficacité des poursuites au civil en permettant au juge de rendre un jugement de façon sommaire, sans qu'il soit nécessaire de procéder à un procès au complet. Il est considéré comme un outil important pour faire face au problème croissant d'accès à la justice qui existe au Canada. La réforme des règles de l'Ontario en matière de jugement sommaire en 2010, et une interprétation libérale des règles de l'Ontario dans l'affaire Hryniak c. Mauldin, 2014, ont eu pour résultat une plus grande confiance des parties dans les requêtes de jugement sommaire en Ontario. Cette tendance se manifeste également dans d'autres provinces canadiennes, dont beaucoup ont également libéralisé leurs règles relatives au jugement sommaire au cours des dernières décennies. Cependant, bien qu'une réforme majeure du Code de procédure civile du Québec ait eu lieu et qu'un nouveau Code soit entré en vigueur le 1er janvier 2016, le jugement sommaire n'a pas été introduit dans la réforme québécoise. Dans cet article, j'examine s'il existe d'autres outils procéduraux au Québec qui se rapprochent du jugement sommaire et je soutiens qu'il n'y a pas d'équivalents fonctionnels. La procédure québécoise, cependant, dispose de ses propres outils pour s'engager dans le changement de culture qui a suivi l'arrêt Hryniak vers un meilleur accès à la justice. Ces outils visent l'accès à la justice de façon unique et sans certains des risques associés au jugement sommaire.*

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*Introduction*

Summary judgment is a procedural mechanism meant to improve the efficiency of civil litigation. When a party brings a motion for summary judgment, the main inquiry is whether there is a dispute over a material fact that would require a full trial to be resolved. A court might find that it can deliver a judgment summarily on all, or part, of the claim.<sup>1</sup>

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1. *Access to Justice: Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales* (Great Britain: Lord Chancellor's Department, 1995) (Lord Harry Woolf) ch 12 para 35. Lord Woolf explains the idea of a summary judgment as follows:

[t]he procedure would be available from the beginning of the case: for example, a claimant could issue an application at the same time as he served his statement of case while a defendant could apply even before he had filed a defence in a suitable case. Although parties would be expected to make an appropriate application as early as they reasonably could, the procedure would be available throughout the proceedings, up to and including the trial. Whenever it had occasion to consider the case, the court would have to ask itself the question: "Can the case or part of it be disposed of without the full apparatus of trial?"

Summary judgment is often seen as a tool for increasing access to justice, a major problem in Canada. Justice Karakatsanis in *Hryniak v Mauldin* goes as far as to say that “ensuring access to justice is the greatest challenge to the rule of law in Canada today.”<sup>2</sup> Improving access to justice was cited as the primary goal of recent civil procedure reform efforts in Ontario and Quebec.<sup>3</sup> Reform to Ontario’s summary judgment rules in 2010, and a liberal interpretation of the Ontario rules in the case of *Hryniak*, has led to a greater reliance by parties on summary judgment motions in Ontario. This trend is also apparent in other Canadian provinces, many of which have liberalized their summary judgment rules in the past decades.<sup>4</sup> Although a major reform of the Quebec *Code of Civil Procedure* took place and a new Code came into effect on 1 January 2016, summary judgment was not introduced in the Quebec reform.

No summary judgment procedure exists in the Code, unlike the approach in other provinces. However, in *Hryniak*, Justice Karakatsanis points out two articles of the Quebec Code that have been likened to summary judgment.<sup>5</sup> In this paper, I explore whether there are other procedural tools in Quebec that approximate summary judgment. I argue that there are no functional equivalents, but Quebec procedure has its own tools that support the post-*Hryniak* cultural shift towards greater access to justice. These tools deal with access to justice uniquely and without some of the risks associated with summary judgment. In order to make this argument, I rely on a transsystemic approach to examine the effectiveness of the Ontario summary judgment Rule 20, in comparison to Quebec’s

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2. *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*]. Justice Karakatsanis is of course referring to the fact that law is in itself found in court decisions and cases so in order to have rule of law, people have to be able to bring their cases to court. This is explained by JA Jolowicz, “On the Nature and Purpose of Civil Procedural Law” in *On Civil Procedure* (Cambridge: Cambridge University Press, 2000) at 62.

3. See for instance the explanatory notes of the new *Code of Civil Procedure: Explanatory Notes and Preliminary Provision, Bill 28 (2014, c. 1): An Act to establish the new Code of Civil Procedure*. See also the letter of transmittal sent by the Honourable Coulter A. Osborne, who was tasked with making recommendations to improve the Ontario civil justice system in 2006. Osborne cites improving access to justice as his main goal for civil reform. See: The Honourable Coulter A Osborne, *Civil Justice Reform Project—Letter of Transmittal* (2007).

4. Alberta made recent reforms to its summary judgment rule, *Alberta Rules of Court, Alta Reg 124/2010* r 7.3(1). See *Alberta Rules of Court Project*, Final Report No 95 (Alberta: Alberta Law Reform Institute, 2008) for an overview of the changes. In British Columbia a summary trial (originally r 18A, now r 9-7) was introduced in 1983 because of concerns that motions for summary judgment were too easily defeated and so were ineffective. See British Columbia *Supreme Court Civil Rules, BC Reg 168/2009* r 9-7. For an overview of the development see CFCJ-FCJC, “BC Summary Trial (Rule 18A),” online: *Inventory of Reforms* <<http://cfcj-fcjc.org/inventory-of-reforms/bc-summary-trial-rule-18a/>> [<https://perma.cc/D984-AGT6>].

5. *Hryniak*, *supra* note 2 at para 20. These are articles 54.1 et seq. and 165(4) of the Quebec *Code of Civil Procedure* then in force.

procedural tools.<sup>6</sup> My focus on Ontario as a comparator province is due to the fact that the recent and major Supreme Court of Canada summary judgment decision of *Hryniak* examines the Ontario rules of procedure.

I begin by explaining the transsystemic approach and the concept of mixity, which are inherent in civil justice systems in Canada, particularly in Quebec, because of Canada's multiple legal traditions. In order to contextualize this discussion, I review the history of summary judgment, civil justice reform in Canada in the past decade and a half, and how this reform compares between Ontario and Quebec. I then assess whether there are procedural tools in Quebec that approximate summary judgment. I look at Quebec tools that have been suggested to be functional equivalents to Ontario's summary judgment. Concluding that those tools are not functional equivalents, I assess the benefits of Quebec's unique tools, when used to address access to justice, in comparison to summary judgment. The goal of this paper is to add to the discussion on civil procedure in Canada which, as W.A. Bogart points out, is sorrowfully overlooked.<sup>7</sup>

### I. *Mixity and a transsystemic approach*

Quebec has what has been called a mixed legal system. The concept of "mixity" refers to legal systems that have some degree of hybridity, meaning that there is a "mix of laws and judicial attributes that derive from multiple tradition-based sources."<sup>8</sup> While these sources are usually from the common law and civil law traditions,<sup>9</sup> they come from Indigenous and religious sources as well.<sup>10</sup> Professor Rosalie Jukier observes that Quebec is a mixed legal system in "its substantive law, its procedural rules, and its institutions of justice."<sup>11</sup> For instance, even though private law in the province of Quebec is dealt with in accordance with the civilian legal tradition, procedural law and its judicial system have been greatly influenced by the common law tradition.

Transsystemic thinking is a fresh approach to comparative analysis that involves an integrated examination of different legal traditions and

6. *Rules of Civil Procedure*, RRO 1990, Reg 194, R 20 [Ontario *Rules of Civil Procedure*].

7. WA Bogart, "Summary Judgment: A Comparative and Critical Analysis" (1981) 19 *Osgoode Hall L J* 552 at 553.

8. Rosalie Jukier, "The Untapped Potential of Transsystemic Thinking" in Yaëll Emerich & Marie-Andrée Plante, eds, *Repenser Les Paradigmes: Approches Transsystémiques Du Droit* (Cowansville: Yvon Blais, 2018) [Jukier, "Untapped Potential"].

9. William Tetley, "Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)" (2000) 60:3 *Louisiana Law Review* 667 at 679.

10. Rosalie Jukier, "Quebec Procedural Law as a Microcosm of Mixity: Implications for Legal Pedagogy, Judicial Decision-Making, and Law Reform Symposium" (2016) 62 *Loy L Rev* 691 at 692 [Jukier, "Microcosm of Mixity"].

11. *Ibid* at 694.

systems.<sup>12</sup> The approach is directed towards examining novel ways to deal with legal problems across jurisdictions and to encourage “cross-fertilization” of these ideas.<sup>13</sup>

The mixity of Quebec is particularly important in thinking about the role that the legal traditions underlying Quebec civil procedure might have played in the Quebec government’s decision not to introduce summary judgment in its procedural reform. A transsystemic analysis of Quebec and Ontario allows for an in-depth analysis of these two jurisdictions’ approaches to dealing with access to justice, with a view to learning from what is and is not working, in order to continue to improve access to justice.

## II. *History of the summary judgment and the summary procedure*

Summary judgment finds its origins in Roman Law and customs dating back to the medieval period.<sup>14</sup> This history has been summarized by scholars John Bauman, Edson R Sunderland, and Edward Greenbaume and LI Reade, among others.<sup>15</sup> In 1855, England introduced a summary judgment provision through the *Summary Procedure on Bills of Exchange Act 1855*, also known as the *Keating’s Act*.<sup>16</sup> This Act came about as a response to economic and social pressure from business merchants and is thought to be the basis for the modern summary judgment.<sup>17</sup> The summary judgment provision in the Act only applied to actions on bills of exchange and promissory notes.<sup>18</sup> It was meant to provide an economical and expeditious procedure to obtain judgments against debtors who tried to use false defences to delay paying back their debts.<sup>19</sup>

The *Judicature Act 1873*<sup>20</sup> and 1875,<sup>21</sup> and later the *Rules of the Supreme Court 1883*, further extended the summary judgment procedure to cover cases where the plaintiff tried to recover a debt or liquidated

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12. Shauna Van Praagh, “Palsgraf as ‘Transsystemic’ Tort Law” (2012) 6:2 *Journal of Comparative Law* 243.

13. Jukier, *supra* note 8.

14. Bogart, *supra* note 7 at 554.

15. John A Bauman, “The Evolution of the Summary Judgment Procedure: An Essay Commemorating the Centennial Anniversary of Keating” 31:3 *Indian Law Journal* 329; Edson R Sunderland, “The English Struggle for Procedural Reform” (1925) 5 *Or L Rev* 267; Edward S Greenbaum & LI Reade, *The King’s Bench Masters and English Interlocutory Practice* (Baltimore: John Hopkins Press, 1932).

16. *Summary Procedure on Bills of Exchange Act, 1855*, 18 & 19 VICT, c 67 (1855). For a detailed overview of how the *Keating Act* developed see: Bauman, *supra* note 15 at 334-339.

17. Bauman, *supra* note 15; Sunderland, *supra* note 15; Bogart, *supra* note 7.

18. Charles Clark & Charles U Samenow, “The Summary Judgment” (1929) 38 *Yale LJ* 423 at 424.

19. See the preamble of the *Summary Procedure on Bills of Exchange Act 1855* quoted in Clark & Samenow, *ibid* at 424.

20. 36 & 37 Vict, c 66, Rule 7 of the Schedule.

21. 38 & 39 Vict, c 77, Order III, r.6, and Order XIV.

demand in money, as long as it fell within one of six categories.<sup>22</sup> W.A. Bogart explains the procedure as one in which the plaintiff had to issue a specially endorsed writ (with a claim within one of a list of categories). The defendant had to appear to the writ.<sup>23</sup> After the defendant appeared, the plaintiff could apply to the judge, on affidavit, for a final judgment. The court would come to a judgment unless the defendant could show the court that they had a good defence.<sup>24</sup> In 1937, drastic changes were made to the procedure, and it was also made applicable in the Queen's Bench Division in all actions except a few that were specifically enumerated.<sup>25</sup>

England's model of summary judgment was very influential in the Canadian context, and a similar summary judgment procedure to what existed in England was adopted in a number of Canadian provinces, including Ontario, New Brunswick, Nova Scotia, British Columbia, Saskatchewan, Manitoba and Alberta.<sup>26</sup> Although beyond the scope of this paper, modern summary judgment rules in Canada also draw heavily from the United States. For example, Ontario's summary judgment Rule 20, of the *Rules of Civil Procedure*, as it was in 1984, was modeled after Rule 56 of the American *Federal Rules of Civil Procedure*, which had been adopted by the US Federal Courts in 1938.<sup>27</sup>

Quebec, on the other hand, did not have a summary judgment. It did have a summary procedure, but this was unlike the English summary judgment.<sup>28</sup> Quebec's summary procedure seems to have been based on the French civil summary procedure. In France, a summary procedure was first introduced in the 1200s, in the "Établissements de St. Louis."

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22. Bogart, *supra* note 7 at 554; Clark & Samenow, *supra* note 18 at 424.

23. Bogart, *supra* note 7 at 554.

24. *Ibid.*

25. *Ibid* at 556.

26. Bogart, *supra* note 7 at 556 footnote 19, observes that Ontario procedure seems to have been initiated in 1881. In 1927, following a number of revisions, Ontario Rule 33 resembled the procedure under the original English summary judgment rule that was borne out of the *Keating's Act* and extended by the *Judicature Act 1873* and *Rules of the Supreme Court 1883*. For information on the dates that the other provinces seem to have adopted summary judgment procedure, see: Clark & Samenow, *supra* note 18 at 439, footnotes 119-124. Evidence of summary judgment in the provinces can be found in New Brunswick as early as in 1912, in Nova Scotia in 1920, in British Columbia in 1912, in Saskatchewan as early as 1915, in Manitoba as early as 1891, in Alberta in 1914. For a discussion of the history of summary judgment in Alberta, see also Alberta Law Reform Institute. *Alberta Rules of Court Project—Summary Disposition of Actions*, Consultation Memorandum 12.12 (Edmonton, Alberta, 2004) at 25.

27. Rule 20 was the successor of Ontario's Rule 33. Kenneth J Kelertas, "The Evolution of Summary Judgment in Ontario" (1998) 21:3 *Advoc Q* 265 at 290. See also Kelertas at 322 for a reproduction of the version of Rule 20 referred to, as well as for a reproduction of the American Rule 56. For a detailed overview of the development of summary judgment in the American states, see Clark & Samenow, *supra* note 18 at 440-471.

28. Clark & Samenow, *supra* note 18 at 439-440.

It originated in the principle that minor causes of “trifling importance” should be decided through a brief form of procedure.<sup>29</sup> The Prévot would try to hear the plaintiff and defendant on the same day they were summoned.<sup>30</sup> If the defendant did not confess liability, then the defendant was allowed to produce witnesses. The Prévot examined these witnesses in secret and published their testimony. If the plaintiff objected to these witnesses, he was given only one day to produce his own witnesses and prove his objections. The whole process took only a few days and there was no appeal from the Prévot’s judgment. Summary procedure in France evolved and changed from the 1500s on, however, it consistently kept a few characterizing features: it was used for situations where only a small pecuniary value was involved, the process was compact, and the matter was resolved in just a few days.<sup>31</sup>

Quebec’s summary procedure was set out in the *Code of Civil Procedure 1922*.<sup>32</sup> Like the French summary procedure, it allowed for a judgment to be given more quickly in an enumerated list of matters (16 matters in total).<sup>33</sup> Among these enumerated matters were: “actions arising from the relation of lessor and lessee,”<sup>34</sup> “actions founded on bills of exchange, promissory notes, cheques, or orders for payment,”<sup>35</sup> and “actions by traders for the value of goods or articles sold, work done, materials furnished, or moneys disbursed.”<sup>36</sup> This summary procedure included short deadlines for matters such as how quickly a plaintiff served the summons after filing the application,<sup>37</sup> the time they had to alert the

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29. Arthur Engelmann, *A History of Continental Civil Procedure* (Boston: Little Brown and Company, 1927) at 692. At Book IV Part II, Chapter II page 706 Engelmann writes: “There can be little doubt that the summary procedure originated in the canonical principle requiring that minor causes be instituted and decided “sine figura et strepitu iudicii.” Engelmann cites Beaumanoir. “It is not good,” Beaumanoir says, “nor according to God, that there be long pleas and great costs in little causes.”

30. The Prévot was a person in government. In the context of civil justice, this person oversaw the court.

31. For an account of the summary procedure’s history in France see Engelmann, *supra* note 29. In particular, see Book IV, Part II, Chapter II at 706 for the 1300s to 1500s, Book IV, Part II, Chapter III at 745 for the 1500s to the Revolution, and Book IV, Part II, Chapter IV at 768 for the Revolution onwards.

32. Francis Joseph KC Curran, *The Code of Civil Procedure of the Province of Quebec and Rules of Practice of the Superior Court, Circuit Court, and Court of King’s Bench* (Montreal: Wilson & Lafleur, 1922).

33. *Ibid* at art 1150.

34. *Ibid* at art 1150(1).

35. *Ibid* at art 1150(2).

36. *Ibid* at art 1150(3).

37. Per *ibid* at art 1153 they had one intermediate day when the place of service was within a distance of 15 miles.

opposite party of motions for preliminary exceptions,<sup>38</sup> and how quickly defences had to be filed.<sup>39</sup> The case could be inscribed for proof and hearing quickly after the defence had been filed.<sup>40</sup> Only three days notice had to be given to the opposite party for the day fixed for proof and hearing.<sup>41</sup>

France and Quebec's summary procedures were different altogether from the United Kingdom's summary judgment. What defined the United Kingdom's summary judgment was that the court made its judgment based on less, and largely written, evidence (like affidavits). In France and Quebec's summary procedures, parties still gave oral evidence and questioned witnesses. What made these summary procedures "summary," as opposed to regular procedures, was that deadlines were shorter, and judges seemed to have a larger management role in proceedings.

### III. *Civil justice reform*

#### 1. *The Lord Woolf Report*

Summary judgment, and its possible role in improving access to justice, has received renewed interest in Canada in the past decade and a half. This interest was sparked by a series of reports on the crisis in access to justice and proposals for major civil justice reform that were published in various jurisdictions around the world. The first of these reports was the Lord Woolf Report in the United Kingdom, which was extremely influential in Canada.

In 1994, Lord Woolf was appointed by the Lord Chancellor to review the rules of civil procedure in the United Kingdom. He produced an interim, and then a final report on access to justice in the United Kingdom.<sup>42</sup> This 370-page report explored, in particular, what Lord Woolf saw as three critical issues affecting access to justice.<sup>43</sup> First, it takes too long to bring a case to its conclusion. The second is the high cost of litigation, which often exceeds the value of the claim.<sup>44</sup> Finally, Lord Woolf was concerned with the overly complex nature of the judicial process which is incomprehensible to many litigants.

38. Per *ibid* at art 1154, this was usually two days.

39. Per *ibid* at 1155, this was usually two days within the return of the action.

40. *Ibid* at 1157 and 158.

41. *Ibid* at 1159.

42. Woolf, *supra* note 1, online: <<https://webarchive.nationalarchives.gov.uk/20060213223540/http://www.dca.gov.uk/civil/final/contents.htm>> [<https://perma.cc/HAW6-PTZK>].

43. *Ibid* at Section I Overview.

44. For an in-depth examination of the cost issues in the United Kingdom system and assessment of Lord Woolf's proposal for dealing with this issue see: AAS Zuckerman, "Lord Woolf's Access to Justice: Plus ça Change..." (1996) 59:6 *The Mod L Rev* 773 at 774.

The Report provides a detailed set of recommendations for dealing with these issues. Accompanying the Report was a draft of general rules that would form the core of a new simpler procedural code. Among these recommendations was that the court should more frequently use its power of summary judgment. Lord Woolf recommended a new single procedure for summary judgment that, for simplicity sake, would merge several existing procedures into one. Under this new procedure, a plaintiff could apply for, and receive, summary judgment or summary determination on a point of law.<sup>45</sup> The test for summary judgment centered on whether the court considered that a party had no realistic prospect of succeeding at trial on the whole case, or on a particular issue. A party that resisted the order would have to show not just that they had an arguable case, but that they had a real prospect of winning. This test was encapsulated in rule 24.2 of the United Kingdom's *Civil Procedure Rules*.<sup>46</sup>

## 2. Ontario: Report of the Honourable Coulter A Osborne

Judicial reform was also occurring in Canada in the mid 1990s. At this time, the Canadian Bar Association (CBA) and a number of provincial task forces released recommendations on how to modernize Canada's civil justice system. In Ontario, the Ontario Civil Justice Review focused on strategies to increase access to justice in the Ontario justice system.<sup>47</sup> However, problems around access to justice, in particular cost and delay, persisted, and in the early 2000s, another wave of investigation began in order to improve civil justice in the provinces. As part of this wave of investigation, in 2006, the Attorney General of Ontario tasked the Honourable Coulter A. Osborne with assessing the Ontario civil justice system and identifying areas in need of reform. Justice Osborne consulted with the general public, bar associations, members of the judiciary, key litigant organizations, law firms, officials at the Ministry of Ontario and other users of the civil justice system.<sup>48</sup> His Report and recommendations ultimately took into account the following three issues: access, proportionality, and culture of litigation. The Report was published in 2007

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45. Woolf, *supra* note 1, chapter 12 at paras 31-36.

46. *United Kingdom Civil Procedural Rules 1998/3132*.

47. The CBA and Ontario Civil Justice Review recommendations sparked changes in Ontario that included the introduction of simplified procedures, case management, mandatory mediation, and an increase in the monetary jurisdiction of the Small Claims Court. See *Supplemental and Final Report of the Civil Justice Review* (Toronto: Ontario Civil Justice Review, 1996); *Report of the Task Force on Systems of Civil Justice* (Ottawa: Canadian Bar Association National Task force on Systems of Civil Justice, 1996).

48. Ontario Ministry of the Attorney General, "Civil Justice Reform Project," (29 October 2015), online: *Ontario Ministry of the Attorney General* <[https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/030\\_introduction.php](https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/030_introduction.php)> [<https://perma.cc/F3TQ-65C6>].

and the Ontario Attorney General's Civil Rules Committee took a number of steps to improve the civil justice system that began to take effect in January 2010.<sup>49</sup> These reforms included changes to Small Claims court,<sup>50</sup> simplified procedure,<sup>51</sup> discovery,<sup>52</sup> expert evidence,<sup>53</sup> case management,<sup>54</sup> mandatory mediation,<sup>55</sup> pre-trial conferences,<sup>56</sup> and deadlines for serving and filing motions.<sup>57</sup> A general principle of proportionality was added to the civil court rules. Changes were also made to summary judgments.

Prior to 2010, the former Ontario summary judgment rule had involved determining whether the claim or defence raised a "genuine issue for trial."<sup>58</sup> This was in line with provinces like Manitoba and Prince Edward Island that also had a "genuine issue" test.<sup>59</sup> The motion was decided on the basis of affidavits of witnesses and the transcripts of their cross-examinations, as well as transcripts of examinations for discovery. If the "genuine issue" was only a question of law, then the court could decide it. If a trial was needed, the court could order a trial, but in order to expedite the process, they could set out any material facts that were not in dispute, define what remaining issues needed to be tried, and order that the trial be heard in an accelerated way.<sup>60</sup>

During Justice Osborne's consultations on the Ontario civil justice system, a number of concerns about the existing summary judgment rule

49. For Osborne's final report, see The Honourable Coulter A Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ministry of the Attorney General of Ontario, 2007), online: <<https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/>> [<https://perma.cc/US3M-4QLH>] [Osborne, "Civil Justice Reform"].

50. The monetary limit was increased from \$10,000 to \$25,000. See "Reforming Civil Justice for Ontarians," online: *news.ontario.ca* <<https://news.ontario.ca/mag/en/2008/12/reforming-civil-justice-for-ontarians.html>> [<https://perma.cc/H55E-7V3E>].

51. *Ibid.* The monetary limit was raised and parties can now find out more about the opposing case before trial.

52. *Ibid.* For instance, parties have to agree on a discovery plan.

53. *Ibid.* Expert witnesses have to certify, in writing, their duty to the court to be fair.

54. *Ibid.* Case management was no longer automatic.

55. *Ibid.* Parties were given more time for mandatory mediation.

56. *Ibid.* Pre-trial conferences were made mandatory.

57. *Ibid.* These were shortened.

58. For an overview of the development of the summary judgment rules in Ontario see: *Hryniak*, *supra* note 2 at paras 37-41; Janet Walker, "Summary Judgment Has its Day in Court" (2012) 37:2 *Queen's Law Journal* 695 at 696-701; T Walsh & L Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?" in TL Archibald & RS Echlin, eds, *Annual Review of Civil Litigation* (Carswell Thomson Reuters, 2013) at 422. Past rules included: Ontario, *Rules of Court*, Rules 14 and 15; Ontario, *Rules of Practice and Procedure*, Rule 33; *The Supreme Court of Ontario Rules of Practice*, Rule 33. Bogart, *supra* note 7 at 557 provides a critical evaluation of the former Rule 33.

59. See Manitoba, *Court of Queen's Bench Rules*, Man Reg 553/88 r 20.03(1)-(4); Prince Edward Island *Rules of Civil Procedure* R 20.

60. Walker, *supra* note 58.

were raised.<sup>61</sup> First, there were concerns that the “no genuine issue for trial” test was too hard to make out or was being interpreted by judges too narrowly. This meant that it was too difficult to succeed on a summary judgment claim.<sup>62</sup> Second, there was a concern that the summary judgment was all-or-nothing, meaning that either a summary motion was granted, or the parties were on their way to a full trial. It was suggested that the power of a judge on a motion for summary judgment needed to be expanded so that they could quickly resolve straightforward disputed facts—similar to a mini-trial. Third, there was concern over the presumptive cost sanctions for an unsuccessful summary judgment motion. If a summary judgment motion was unsuccessful, the moving party had to pay substantial indemnity costs unless they could convince the court that, even though their motion had not been successful, it had still been reasonable. Justice Osborne’s consultations revealed that the presumption that substantial indemnity costs would be imposed deterred people from bringing a summary judgment motion because it created too big a financial risk.<sup>63</sup>

Finally, there was debate about whether a new summary trial mechanism, such as BC’s Rule 18A, should be introduced.<sup>64</sup> The BC rule allows the court to grant judgment in cases where there is an issue on the merits, except if the court is unable “to find the facts necessary to decide the issues of fact or law”<sup>65</sup> or “the court is of the opinion that it would be unjust to decide the issues on the application.”<sup>66</sup> The court can use affidavit and other documentary evidence, such as evidence taken on examination for discovery, and written statements of an expert’s opinion. The court can even order cross-examination on affidavit evidence. The court can also make a variety of orders to expedite the trial. The summary trial option has been highly lauded in BC as having changed the practice of civil litigation in the province for good.<sup>67</sup>

After the release of the Osborne Report, the Ontario Attorney General’s Civil Rules Committee changed the language of the summary judgment rule from asking whether a case presented “a genuine issue *for* trial” to

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61. Osborne, “Civil Justice Reform,” *supra* note 49.

62. In *Canada (Attorney General) v Lameman*, [2008] 1 SCR 372 [*Lameman*] for example, even though the Supreme Court of Canada finds that there is “no genuine issue for trial,” the Court nonetheless makes it clear that the bar is high to dismiss on summary judgment.

63. Osborne, “Civil Justice Reform,” *supra* note 49.

64. *BC Supreme Court Rules*, BC Reg 221/90, R 18A. The summary trial is now rule 9-7 in the *Supreme Court Civil Rules*, BC Reg 168/2009.

65. BC Reg 221/90, *supra* note 64 at R 18A(11).

66. *Ibid.*

67. *Streamlining the Ontario Civil Justice System: A Policy Forum* (Toronto, Ontario: Advocates’ Society, 2006) quoting Madam Justice Koenigsberg at 6.

“a genuine issue *requiring* trial.”<sup>68</sup> Judges were also given enhanced fact-finding powers.<sup>69</sup> Judges can now weigh evidence, evaluate the credibility of a deponent, and draw a reasonable inference from the evidence.<sup>70</sup> A mini-trial power allows the judge to order the hearing of oral evidence on a motion for summary judgment where, in the interests of justice, a brief trial is required to dispose of the summary judgment motion.<sup>71</sup> However, this is different from the mini-trial recommended by the Osborne Report because, first, only judges (and not masters) can order this oral evidence. Second, the Report had recommended a “mini-trial” as an alternative to dismissing the motion. The idea was that witnesses would be called to testify, if needed for the interests of justice, in order for the court to decide the matter by way of a summary judgment motion. It should be noted, however, that the hearing of oral evidence is just to decide whether there is a genuine issue requiring trial (i.e. to dispose of a summary motion). Thus, as Janet Walker points out, summary judgment has essentially remained a “paper hearing.”<sup>72</sup>

The revised rule on “where trial is necessary” also gives the court greater powers.<sup>73</sup> It permits these cases to enter a form of case management. Additionally, the presumption that the moving party would have to pay substantial indemnity costs if they were unsuccessful in obtaining summary judgment was eliminated. The wording of the rule was changed to make it clear that a court “may fix” substantial indemnity costs when any party has acted unreasonably in making or responding to a summary judgment or has acted in bad faith.<sup>74</sup>

The Committee did not adopt the recommendation that a rule for summary trial, like in BC, be introduced, but in many ways the fact-finding powers that allow judges to weigh evidence and hear oral evidence come close to a summary trial.

The initial interpretations of the 2010 amendments were unclear. The Ontario Court of Appeal in *Combined Air Mechanical Services*, 2011, argued that the amended Rule 20 added a third category of cases that are appropriate for summary judgment—cases where the motion judge is satisfied that a full trial is not necessary to serve the “interests of justice.”<sup>75</sup> This interpretation was still relatively conservative and did not seem to

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68. Ontario *Rules of Civil Procedure*, *supra* note 6 at R 20.04(2)(a).

69. *Ibid*, R 20.04(2.1) and (2.2).

70. *Ibid*, R 20.04(2.1).

71. *Ibid*, R 20.04(2.2).

72. Walker, *supra* note 58 at 713.

73. Ontario *Rules of Civil Procedure*, *supra* note 6 at R 20.05(1).

74. Ontario *Rules of Civil Procedure*, *supra* note 6 at R 20.06(a) and (b).

75. *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764 [*Combined Air*].

widen the possibility of more cases being decided by summary judgment.<sup>76</sup> Three years later in *Hryniak*, however, the Supreme Court of Canada, in a unanimous decision written by Justice Karakatsanis, called for a shift in the legal culture and a much broader interpretation of the summary judgment amendments.<sup>77</sup> Karakatsanis writes that a culture shift is required. Judges need to manage the legal process in line with the principle of proportionality.<sup>78</sup> The decision suggests that it was incorrect to assume that the only thing a summary judgment does is dismiss an unmeritorious case. Instead, judges should see this as “a significant alternative model of adjudication.”<sup>79</sup> The decision opened the doors for a much wider use of the summary judgment.<sup>80</sup> Justice Karakatsanis wrote that the changes to rule 20 following the Osborne Report demonstrate that a trial is not the default procedure, hence why the rule now asks whether there is “a genuine issue requiring trial.”<sup>81</sup> Judges also received new fact-finding powers that they should exercise unless it is in the interest of justice to exercise these only at trial.<sup>82</sup>

*Hryniak* created a roadmap of steps for judges to take in summary judgment motions.<sup>83</sup> The court must first decide whether there is enough evidence to adjudicate the dispute fairly and justly and in a timely, affordable and proportionate way. Second, the court determines if it can decide the case in this manner by exercising its discretion to weigh evidence, evaluate the credibility of witnesses and draw reasonable inferences from the evidence available rather than evidence that would be produced at trial. Third, the court can consider ordering the presentation of limited oral evidence. Fourth, the court can decide to dismiss the summary judgment motion but craft a trial process while remaining seized of the matter, and fifth, in exceptional cases, a judge can dismiss the case without remaining seized.<sup>84</sup>

Summary judgment was described by the Osborne Report as a tool to increase proportionality, reduce delays and costs, bring about a final early disposition, allow for greater access for unrepresented litigants, and

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76. Walker, *supra* note 58.

77. *Hryniak*, *supra* note 2 at para 32.

78. *Ibid.*

79. *Ibid* at para 45.

80. Barbara Billingsley, “Hryniak v. Mauldin Comes to Alberta: Summary Judgment, Culture Shift, and the Future of Civil Trials” (2017) 55:1 Alta L Rev 1.

81. *Hryniak*, *supra* note 2, at para 43 [emphasis added].

82. *Ibid* at para 45.

83. *Ibid* at paras 66-78. See application of these steps in *ThyssenKrupp Elevator (Canada) Limited v Amos*, 2014 ONSC 3910.

84. *Hryniak*, *supra* note 2 at paras 66-78.

provide flexibility.<sup>85</sup> Many of these goals, such as proportionality, were cited by Justice Karakatsanis in *Hryniak*, as justifications for widening the availability of summary judgment. One year after its release, *Hryniak* had been cited in 460 Canadian cases, 299 in Ontario alone.<sup>86</sup> Of the 299 Ontario cases, 217 involved summary judgment motions and full or partial summary judgment was granted 74.2% of the time.<sup>87</sup> That represents a ten per cent increase in success rates from 2009–2012. Even though this may seem small, this is a notable change given that the 2010 changes, prior to the *Hryniak* decision, did not lead to a noticeable increase in success rates.<sup>88</sup> A study by Brooke MacKenzie evaluated whether the changes to the Ontario *Rules of Civil Procedure* are actually achieving their desired effects. MacKenzie empirically analyzed all reported summary judgment decisions (2960 decisions) in Ontario between 2004 and 2015 and asked whether efficiency and affordability were improved.<sup>89</sup> She found that the number of summary judgment motions decided in Ontario in 2015 represented a seventy per cent increase over the number decided in 2009.<sup>90</sup> She argues that the changes to Ontario’s summary judgment rules are achieving their desired effect and that the cultural shift called for in *Hryniak* is underway.<sup>91</sup>

In determining whether there is no genuine issue requiring trial, judges are weighing evidence, evaluating the credibility of a deponent, and drawing inferences. Sometimes judges are dismissing issues, or judges are setting out the findings that they are able to make based on the written evidence that they have. They are relying on their powers to order a mini-trial on all or some of the issues. In making their decisions about whether the issues require a full trial they are asking “will the addition of a mini-trial, with whatever processes and procedures it will

85. Osborne, “Civil Justice Reform,” *supra* note 49.

86. Matthew Karabus & Ted Tjaden, “The Impact of *Hryniak v Mauldin* on Summary Judgments in Canada One Year Later” (2015) 44:1 *The Advocates’ Quarterly* 85 at 95. These numbers are also an increase in comparison to a study on success rates of summary judgments conducted pre-*Hryniak* by Peter Wells and Adrienne Boudreau. Wells and Boudreau found that the combined success rates on summary judgment motions between 2009–2012 was only about 65% (a 55.7% probability of full summary judgment, and 9.4% chance of a partial summary judgment being granted). See Peter EJ Wells & Adrienne Boudreau, “It was Deja Vu All Over Again” (2013) 42 *The Advocates’ Quarterly* 86.

87. Karabus & Tjaden, *supra* note 86 at 95. In 140 of these decisions full summary judgment was granted and in 21 decisions partial summary judgment was granted.

88. Richard Foot, “*Hryniak* Two Years On,” (4 January 2016), online: *Canadian Lawyer Mag* <<https://www.canadianlawyermag.com/author/sandra-shutt/hryniak-two-years-on-3133/>> [<https://perma.cc/25CY-8Y87>].

89. Brooke MacKenzie, “Effecting a Culture Shift—An Empirical Review of Ontario’s Summary Judgment Reforms” 54:4 *Osgoode Hall LJ* 1275 at 1290.

90. *Ibid* at 1294-1299.

91. *Ibid* at 1290.

entail make the resolution of the overall case more efficient, affordable, timely or proportionate?<sup>92</sup> Sometimes they still require a full trial on other issues.<sup>93</sup> Courts are setting out what material facts are not in dispute and defining the issues to be tried, and ordering that the action proceed to trial expeditiously.<sup>94</sup> A study conducted by Matthew Karabus and Ted Tjaden on the summary judgments at the Ontario Superior Court of Justice, however, illustrates that judges do seem less interested in taking up the Supreme Court of Canada's call for judges to remain seized of proceedings when summary judgment motions fail.<sup>95</sup> They found that in sixty per cent of cases where a summary judgment motion failed, the trial judge had decided not to remain seized of the matter.<sup>96</sup>

There are a number of concerns that have been raised regarding summary judgments. The traditional argument is that only a trial with oral evidence will allow a full appreciation of the record.<sup>97</sup> As a result, meritorious claims or defenses might be disposed of too early. In a trial, the judge is exposed to the totality of the evidence but parties also get the opportunity to present the evidence in the way that they want.<sup>98</sup> In a summary judgment, the court bases the decision largely on a paper record.<sup>99</sup> This evidence is not presented in a particular order and there are not the same opportunities for asking questions from witnesses to make any clarifications.<sup>100</sup> In *Hryniak*, Justice Karakatsanis stated that the process needs to be just and fair but weighed this with the fact that individuals are being denied the opportunity for adjudication at all.<sup>101</sup> Justice Karakatsanis suggested that the process can still be just and fair while also being more proportionate.<sup>102</sup>

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92. *Pinto v Kaur et al*, 2014 ONSC 5329 at para 30; *Pinto v Kaur et al*, 2015 ONSC 1356. See also *Dr Thomas Dentistry v Bank of Nova Scotia*, 2010 ONSC 1227.

93. *Premier Dry Cleaning v Burnford*, 2017 ONSC 2 at para 68. Justice Corthorn set out the findings she was able to make based on the written evidence for the first issue, ordered a mini-trial on parts of issues one and two, ordered a full trial on parts of issues one and two, and dismissed issue three.

94. *Ibid.*

95. *Hryniak*, *supra* note 2 at para 6. The Court wrote that where a motion judge dismisses a motion for summary judgment, they should, if possible, also seize themselves of the proceedings as the trial judge.

96. Karabus & Tjaden, *supra* note 86.

97. Walker, *supra* note 58 at 711.

98. *Combined Air*, *supra* note 75 at para 48.

99. This paper record includes affidavits and any other relevant evidence. In *Irving Ungerman Ltd v Galanis (CA)*, 1991 4 OR (3d) 545, 83 DLR (4th) 734 for instance, the parties had placed extensive affidavit and transcript evidence before the court. Although now of course the judge can also call oral evidence through the mini trial per R 20.04(2.2).

100. Walker, *supra* note 58 at 711.

101. *Hryniak*, *supra* note 2 at para 29.

102. *Ibid.*

Frédéric Bachand, in his article on Quebec's 2016 civil reform, writes that part of the reason for the existing crisis in civil litigation has to do with the overly large emphasis that we place in civil litigation on searching for truth.<sup>103</sup> This search for truth is thought to be the cornerstone of the civil justice system. However, Bachand argues that if a principle deserves to be the cornerstone of the justice system, it should not be the search for truth, but rather the principle of accessibility.<sup>104</sup> In the article, Bachand applauds the emphasis on access to justice in the new Code (at the time), which differed from the previous Code's emphasis on truth. Bachand also references summary judgment, and Justice Karakstanis' argument in *Hryniak*, that we need a change in culture, as a good example for how to find an equilibrium between searching for truth and ensuring that the civil justice system is accessible.<sup>105</sup>

A second related concern is that parties will bring forward new causes of action and these will be disposed of by way of summary judgment.<sup>106</sup> This concern is perhaps warranted. In *Wilk v Arbour 2017*, for instance, Justice Faieta found that it is possible to determine a novel question of law on a summary judgment motion.<sup>107</sup> If these claims had the chance to go to a full trial, then these new causes of actions would be explored in more depth. This deeper exploration allows greater development of the common law on these questions.<sup>108</sup> Additionally, summary judgments have less precedential value because they are not based on a full trial. However, Justice Karakatsanis in *Hryniak* observes that if Canadians are not able to go to trial because of costs and delays, they will be forced to settle. It is possible that this would stunt the common law to a greater extent since in a settlement there is no public adjudication and no judgment to be used as precedent at all.<sup>109</sup>

A third concern is that sometimes a summary judgment does not save, and in fact may increase, costs or time since there is always a risk that a summary judgment motion will be denied or reversed on appeal.<sup>110</sup> In *Baywood Homes 2014*, for instance, Justices Rouleau, Lauwers and van Rensburg note that preparing summary judgment motion materials and

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103. Frédéric Bachand, "Les Principes Généraux de la Justice Civile et le Nouveau Code de Procédure Civile" (2015) 61 McGill L J at 450. At the time of giving this speech Bachand was an associate professor in the Faculty of Law at McGill. He is now a judge of the Superior Court of Quebec.

104. *Ibid.*

105. *Ibid* at 454.

106. Osborne, "Civil Justice Reform," *supra* note 49.

107. *Wilk v Arbour*, 2017 ONCA 21.

108. Osborne, "Civil Justice Reform," *supra* note 49.

109. *Hryniak*, *supra* note 2 at para 1.

110. Osborne, "Civil Justice Reform," *supra* note 49.

cross-examinations might not provide savings over an ordinary discovery process and trial, especially if the summary judgment motion is dismissed and a trial occurs anyway.<sup>111</sup> Sometimes nothing can be salvaged from the expensive and time-consuming summary judgment process.<sup>112</sup> For summary judgments to operate fairly this is a necessary sacrifice. However, this additional time defeats the purpose of the summary judgment.<sup>113</sup> Another concern is that people will use summary judgment as a litigation tactic to unduly delay the final resolution of a case. As Justice Karakstanis notes in *Hryniak*, judges can and should try and control these risks, through such avenues as trial management powers<sup>114</sup> and inherent jurisdiction, and lawyers should act in a way that facilitates access to justice.<sup>115</sup>

Despite these concerns, however, evidence seems to suggest the positive potential for summary judgments and an increase in summary judgments being granted in the province of Ontario.

### 3. *Quebec's new Code of Civil Procedure 2016*

In Quebec, Bill 28, *An Act to Establish the New Code of Civil Procedure*, was introduced in 2013, received assent 21 February 2014, and came into force on 1 January 2016.<sup>116</sup> The Bill led to 330 amendments and five sub-amendments to Quebec's *Code of Civil Procedure*. Previous amendments had been made to the Code in 2002 and 2009. This was, however, the first major reform of the Code since 1965. The Preliminary Provision of Bill 28 explains what the reformed Code was designed to ensure.<sup>117</sup> This includes the accessibility and promptness of justice, the proportionate and economical application of procedural rules, and the inculcation of a spirit of cooperation in the exercise of parties' rights.<sup>118</sup>

The reform recommendations made in Quebec and Ontario were specific to each province, but in comparing Quebec and Ontario, there are a number of reform changes that cut across both jurisdictions.<sup>119</sup> For example, both Quebec and Ontario legislated reforms to ensure proportionality in

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111. *Baywood Homes Partnership v Haditaghi*, 2014 ONCA 450 at 44-45.

112. *Ibid* at 44-45.

113. *Ibid* at 45.

114. *Ontario Rules of Civil Procedure*, *supra* note 6 at R 20.05.

115. *Hryniak*, *supra* note 2 at paras 32 and 74.

116. *Bill n°28: An Act to establish the new Code of Civil Procedure—National Assembly of Quebec*, 21 February 2014 [*Bill n°28*].

117. *Explanatory Notes and Preliminary Provision, Bill 28 (2014, c. 1): An Act to establish the new Code of Civil Procedure* at para 2.

118. *Ibid*.

119. Jukier, "Microcosm of Mixity," *supra* note 10 at 719.

procedures,<sup>120</sup> encourage out of court settlement<sup>121</sup> and put in place case management by judges.<sup>122</sup> One major difference between the reforms in the two jurisdictions was that summary judgment rules in Ontario were expanded, while in Quebec summary judgment was not introduced.

#### IV. *Summary judgment equivalents in Quebec?*

As was mentioned at the outset of this paper, the Court in *Hryniak*, asserts in a footnote that Quebec has procedural devices that could be likened to summary judgment.<sup>123</sup> In this section, I explore the accuracy of that claim. I illustrate that there is no historical basis for summary judgment in Quebec and that it was not even contemplated by the Quebec legislature in drafting the new Code. I then look at four articles—articles 219, 54.1 et seq. (now 51 et seq.), 165 (now 168), and 154 et seq.—that have been suggested as possible equivalents to summary judgment. I demonstrate that when examined carefully, it is evident that these are not functional equivalents to summary judgment as it exists in Ontario. Furthermore, two Quebec judgments affirm that there is no equivalent to summary judgment in Quebec.

##### 1. *No history of summary judgment in Quebec*

The first indicator that there are no functional equivalents to summary judgment in Quebec is that, as mentioned in the history of summary procedure section of this paper, there is no historical record of summary judgment in Quebec in any civil procedure prior to the version of the *Code of Civil Procedure* referred to in *Hryniak*.<sup>124</sup> Instead, Quebec had a summary procedure that was based on the summary procedure that existed in France, and is different from summary judgment altogether.

While there has been no summary judgment in Quebec, or in France's history, this does not mean that there are no summary judgment equivalents now, especially given the fact that Quebec's legal system has been characterized as a mixed system and has been influenced by the Common Law legal tradition. Professor Rosalie Jukier remarks in her

120. In Quebec the principle of proportionality is reinforced in art 18(1) and (2) CCP. In Ontario it appears in R 1.04(1), R 29.2 (in the context of discovery) and R 76 (in the context of simplified procedure).

121. In Quebec see e.g. arts 1(3), and generally arts 1-7, 9(2), 148 para 1 (parties have to indicate that they considered private dispute prevention and resolution processes), and 161 et seq. of CCP. In Ontario see e.g. R 24.1 and R 49.10.

122. In Quebec see e.g. arts 9(2), 9, and 158 CCP. In Ontario see e.g. R 77.

123. *Hryniak*, *supra* note 2 at para 20.

124. Curran, *supra* note 32; Clark & Samenow, *supra* note 18 at 439-440. Clark and Samenow cite two cases at 439 footnote 125 that exemplify this procedure in practice. See *Davis v Chauvette* 27 Que PR 207; *Riddell v Vipond* 27 Que PR 308 (1924).

article on the 2016 *Code of Civil Procedure* Reforms that the judge's role in the recent Code seems to move Quebec's civil justice system closer to a civilian approach to civil procedure.<sup>125</sup> By this, she means that judges have increased power in the civil process. Even though she argues that this shift pertains only to the judge's role, it could be argued that changing the judge's role is indicative of a larger conceptual shift in Quebec civil procedure back to a more civilian conception. It seems likely, therefore, that given that summary judgment has not been part of the civilian tradition, a functional equivalent does not exist in the Quebec *Code of Civil Procedure*.

## 2. *No summary judgment introduced by the Quebec Legislature*

Additionally, the Quebec legislator did not consider summary judgment in drafting the new Code. There is no mention of summary judgment in the draft bill tabled in September 2011,<sup>126</sup> or in the second draft bill, Bill 28, tabled in April 2013,<sup>127</sup> which eventually became the basis for the new *Code of Civil Procedure*. In the transcripts from the public consultations on the first bill and the public consultations on Bill 28, there is no mention of summary judgment.<sup>128</sup> Starting in October 2013 and ending in February 2014 when Bill 28 was passed, the Parliamentary Committee on Institutions conducted a detailed examination of the bill for 30 sittings.<sup>129</sup> Again, summary judgment is not discussed in the transcripts from these sittings. In the early drafts of the new *Code of Civil Procedure*, in the transcripts from the public consultations for both bills, and in the detailed examination of Bill 28, allowing summary judgments is not discussed as a goal of any of the articles. Summary judgments in other provinces are also not referenced. It is very unlikely that the Quebec legislature would have created a functional equivalent to summary judgment without discussing summary judgment as it exists in other provinces.

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125. Jukier, "Microcosm of Mixity," *supra* note 10 at 699.

126. The draft bill was tabled by the Minister of Justice at the time Jean-Marc Fournier.

127. *Bill n°28* was tabled by Minister of Justice at the time Bertrand St-Arnaud.

128. For the first bill, public consultations were conducted in January and February 2012. Forty-nine briefs were submitted by the public. A final report gives an overview of who came forward at the public hearing. For *Bill n°28*, *supra* note 116, there was a special consultation and public hearings in September 2013. Twenty-one briefs were submitted by the public, and as with the prior bill a final report was published.

129. A list of amendments taken out, a list of amendments adopted, and a report that gives an overview of the examination are all available.

### 3. *No functional equivalents to the summary judgment in principle and in practice*

Third, there are four articles, 209, 51 et seq. (previously 54.1), 168 (previously 165) and 154, that, on the surface, look like they might function like summary judgment. When these articles are examined more closely in terms of how they operate in practice, it becomes evident that these are not functional equivalents of the summary judgment.

#### a. *Article 209*

The first of these articles that looks similar to part of Rule 20 is Article 209. Article 209 allows the parties to jointly submit a controversy on an issue of law to the court. A court will decide the issue in the course of the proceedings if it believes that that will be useful for the “orderly progress of the proceeding.” Article 209 looks somewhat similar to Rule 20.04(4), which sets out that when the court finds that the only genuine issue requiring trial is a question of law then a judge can grant judgment accordingly. Article 209, however, applies only when there is an issue of law. The other sections of Rule 20 allow for summary judgment on issues of fact, and mixed fact and law, in addition to issues of law. This would make Article 209 only a partial equivalent to summary judgment.

A more convincing reason why Article 209 is not a functional equivalent to summary judgment is that summary judgment in Ontario is an adversarial procedure, whereas Article 209 is not. Unlike with Rule 20,<sup>130</sup> when invoking Article 209 both parties have to agree to submit the issue to the court. Article 209 finds a much closer equivalent in Rule 21.<sup>131</sup> Rule 21 provides that a party can ask a judge to rule on a question of law prior to trial. In Article 209 a court will determine the issue if it is “useful for the orderly progress of the proceeding.” This is similar to Rule 21.01(1) (a) where a party can move for the determination of a question of law, before trial, “where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.” It is worth noting, however, that Rule 21 might still be potentially more adversarial than Article 209.

#### b. *Articles 51 et seq. (previously 54.1) and Article 168 (previously 165)*

Articles 51 et seq. (previously 54.1)<sup>132</sup> and Article 168 (previously 165)<sup>133</sup> are the articles in the Quebec Code that were raised by the Court in *Hryniak*

130. See specifically Ontario *Rules of Civil Procedure*, *supra* note 6 at R 20.01.

131. *Ibid* at R 21.01(1)(a).

132. *Bill n°28* Arts 54.1 to 56.6 were introduced on 4 June 2009 as part of a small set of amendments to the Code made prior to the changes introduced in January of 2016.

133. Specifically, the court in *Hryniak* compared article 165(4) to the summary judgment.

as possible equivalents to summary judgment.<sup>134</sup> Articles 54.1 et seq., now 51 et seq., give the court the power, either on request or on its own initiative, to declare a judicial application or pleading abusive by assessing the pleadings and exhibits in the record, and the transcripts of any pre-trial examinations.<sup>135</sup> The use of procedure is considered improper if a claim or pleading is “clearly unfounded, frivolous or dilatory” or if the conduct is “vexatious or quarrelsome.” Procedural impropriety can also “consist in bad faith, in a use of procedure that is excessive or unreasonable or causes prejudice to another person, or in an attempt to defeat the ends of justice, in particular if it restricts freedom of expression in public debate.” Pursuant to former Article 54.2, now Article 52, a party is only required to establish summarily that an action or pleading is an improper use of procedure; then the onus shifts to the party initiating the action or pleading to show that it is not excessive or unreasonable.

The court is given a variety of powers if it finds an improper use of procedure including: dismissing the judicial application or rejecting a pleading, refusing to allow an examination, or cancelling a subpoena. The court can also impose conditions on any further steps, require undertakings from the party concerned, stay the proceeding, recommend special case management or order a provision for costs.<sup>136</sup> Article 54.4, now Article 54, gives the court the power to order a provision for costs to be reimbursed or even to condemn a party to pay damages, including punitive damages, for the prejudice suffered by another party.<sup>137</sup> Article 54.1 et seq. has since been replaced by Article 51 et seq. which operate similarly to their predecessors. Whereas Article 54.1 et seq. were concerned with “improper” actions or pleadings, the wording of 51 et seq. has changed to “abusive” applications or pleadings. However, “abuse of procedure” is defined in the same way that “improper” was; it refers to applications or pleadings that are unfounded or frivolous. Thus, the new Code continues, in principle, the upshot of the previous provisions.

Former Article 165 allowed a defendant to ask for an action to be dismissed for various reasons including “if the suit is unfounded in law even if the facts alleged are true.”<sup>138</sup> This has since become Article 168, which allows a party to ask that an application or defence be dismissed on a number of grounds such as *lis pendens*, *res judicata*, if one of the

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134. It was noted in particular that article 54.1 looked narrower than a summary judgment on its face but is nonetheless like a summary judgment. See *Hryniak*, *supra* note 2 at footnote 4.

135. *Bill n°28* Art 52 para 2 CCP.

136. *Bill n°28* Art 53 para 2 (1)(2)(3)(4) and (5) CCP.

137. *Ibid* at Art 54.4. E.g. Damages can be for fees and extrajudicial costs incurred by that party.

138. *Ibid* at Art 165(4).

parties is incapable, or one of the parties has no interest. Most relevant here is paragraph 2 where a party can ask to dismiss an application if it is unfounded in law (e.g. because it is prescribed), even if the facts alleged are true. Unlike previous Article 165, this is not limited to the defendant.

The only similarity that articles 51 et seq. and 168 share with summary judgment is that both articles allow a judge to make a pre-trial assessment based on the evidence submitted by the parties. While it was not clear under 54.1 et seq. what powers the court had in terms of evidence, and on what basis they made their decision, the new articles (51 et seq.), that replaced 54.1, bring increased clarity.<sup>139</sup> Under the new Article 52 paragraph 2, the court has to make its decision based on the following: the pleadings themselves, exhibits in the record, transcripts of any pre-trial examinations and the initiator's oral arguments that the application or pleading is not excessive or unreasonable. Paragraph 2 then goes on to say that "no other evidence is presented, unless the court considers it necessary." This seems to suggest that the court has the authority to order other evidence. Since this provision does not set out the extent of the other evidence that the court could ask to be presented, this might give the court similar powers under Article 52 as they get through rules 20.04(2.1 and 2.2).

Despite these small similarities, the argument that Article 51 et seq., and Article 168 are functional equivalents to Ontario's summary judgment is unpersuasive for several reasons. First, under Article 51 et seq. a judge looks for abuse of process, and under article 168 a judge looks for whether the claim discloses no cause of action. Abuse of process and decisions on cause of action are not the chief function of summary judgment. Under Rule 20, a judge looks to see whether there is a "genuine issue requiring trial." It is possible that there may be no genuine issue requiring trial because a pleading is simply an attempt to abuse the system. Similarly, a judge might find that there is no genuine issue for trial because the application is unfounded in law. Determining whether an application is abusive or unfounded in law is a different investigation than determining whether there is a genuine issue requiring trial. Summary judgment would not be the obvious mechanism for dismissal for abuse of process or because an application is unfounded in law. There are situations where there is no

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139. *Bill n°28*, *supra* note 116, Art 54.1 only says that "the onus is on the initiator of the action or pleading to show that it is not excessive or unreasonable and is justified in law." However, in *Wood Gundy*, *supra* note 170 at para 4, the evidence that the court relies on includes: transcripts from interrogations of two provincial trustees who oversaw the material goods of the Dominicans, and a number of exhibits.

issue requiring trial where the pleading is not abusive, and/or unfounded in law.

Second, Article 51 et seq. and Article 168 are pre-trial motions to dismiss.<sup>140</sup> In looking at the older interpretation of summary judgment prior to *Hryniak*, in cases like *Lameman 2008*<sup>141</sup> and *Combined Air 2010*,<sup>142</sup> it is more evident why articles 54.1 and 165(4) might have been likened to summary judgment.<sup>143</sup> In *Lameman*, for instance, the Supreme Court of Canada makes it clear that the bar to dismiss a case on summary judgment is high. The purpose of summary judgment is described as weeding out claims that were bound to fail at the preliminary stage.<sup>144</sup> This bore a much closer resemblance to a motion to dismiss. As the summary judgment rules and their interpretation have expanded, it is clear that summary judgment is meant to allow parties to receive a judgment without a full trial, where a full trial is not required. This is a different goal than that of articles 54.1 and 165(4).

Further evidence that these articles are not equivalents to Rule 20 is that Ontario has direct functional equivalents to both 51 et seq. and 168. Rules 2.1.01 and 25.11(c) of the Ontario *Rules of Civil Procedure* deal specifically with abuse of process, as do the recently revived Strategic Lawsuits Against Public Participation (SLAPP) rules, 137.1 et seq., in the Courts of Justice Act.<sup>145</sup> Article 21.01(1)(b) of the Ontario *Rules of Civil Procedure* allows a party to move before a judge to strike out a pleading that discloses no reasonable cause of action or defense, similar to Article 168. The fact that Ontario has these other rules makes it clear that Rule 20 was meant to fulfill a different purpose.

### c. *Article 154*

A final article that has not been suggested as a functional equivalent to summary judgment, and yet looks like summary judgment, is Article 154. Article 154 is found under the Case Management Conference section

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140. Although *Bill n°28* Art 53 allows the court to do more than just dismiss the judicial application. The court is given a whole range of powers including rejecting a pleading, striking out a conclusion, imposing conditions on further steps in the judicial application, recommending that special case management be ordered, etc.

141. A case arising out of Alberta. See *Lameman*, *supra* note 62.

142. *Combined Air*, *supra* note 75.

143. *Hryniak*, *supra* note 2 at footnote 4.

144. *Lameman*, *supra* note 62 at para 10.

145. *Courts of Justice Act*, RSO 1990, c 43 at 137.1ff [CJA]. SLAPP lawsuits are suits that are brought by people in order to try to censor or intimidate critics. Section 137.1 gives defendants of SLAPP suits a mechanism to get those suits dismissed in a faster and less costly way. See Kevin O'Brien, & Louis Tsilivis, "Ontario Court of Appeal clarifies test under 'anti-SLAPP' legislation," (31 August 2018), online: *Osler* <<http://www.osler.com/en/resources/regulations/2018/ontario-court-of-appeal-clarifies-test-under-anti-slapp-legislation>> [<https://perma.cc/P983-3GDN>].

of the Code. Following the 2016 changes to the Code, parties have to establish a case protocol after a judicial demand has been filed.<sup>146</sup> The case protocol has to be approved, and if it is not the parties will be called to a case management conference within 20 days.<sup>147</sup> The case management conference is convened at the court's initiative, but also can be convened on request of the parties.<sup>148</sup> During the case management conference, the court "acquaints itself with the issues of fact or law in dispute, examines the case protocol, discusses it with the parties and takes the appropriate case management measures."<sup>149</sup> Case management protocols include taking measures to simplify or expedite proceedings, imposing joint expert evidence, and determining the terms for how pre-trial examinations should be conducted.<sup>150</sup> The court can issue case management orders at any point, not just at the case management conference, to ensure that the case is progressing adequately and in conformity with the principle of proportionality.<sup>151</sup>

With that context in mind, Article 154 states:

At the case management conference, the court may decide to hold a hearing of the parties, on the preliminary exceptions, or to hear the defendant on the grounds of defence, which are recorded in the minutes of the hearing or in a brief statement. The court may try the case immediately if the defence is to be oral and the parties are ready to proceed, postpone the hearing to a specified later date or leave it to the court clerk to set the case down for trial.

Preliminary exceptions are presented and contested orally, but the court may authorize the parties to submit the relevant evidence.

This article suggests first, that the court may decide to hold a hearing on the preliminary exceptions or hear the defendant on the grounds of defence. A preliminary exception might include, for instance, a party asking that an application, or defence, be dismissed on the basis of *lis pendens* (a pending legal action) or *res judicata* (the matter already having been adjudicated by a competent court).<sup>152</sup> Paragraph one further provides that the court can decide to try the case immediately if the defence is going to be oral and the parties are ready to proceed, or they can postpone the hearing to a specified later date, or let the court clerk set the case down

146. *Bill n°28* Art 148 CCP.

147. *Ibid.*, Art 150 CCP.

148. *Ibid.*, Art 153 CCP.

149. *Ibid.*, Art 153 CCP.

150. *Ibid.*, Art 158 CCP.

151. *Ibid.*, Art 18 CCP.

152. *Ibid.*, Arts 168 and 169 CCP.

for trial. Paragraph two clarifies that preliminary exceptions are presented and contested orally, however, it gives the court the power to authorize the parties to submit the relevant evidence.

The second part of paragraph one is potentially similar to summary judgment. It is possible that it could be interpreted as a further explanation of the first part of the article dealing with preliminary exceptions. It might simply indicate that the court can immediately hear the parties on the preliminary exceptions if the defence will be oral and the parties are ready to proceed, or it can postpone this to a later date, or set the case down for trial. However, the latter element regarding setting the case down for trial does not fit, since the parties would not proceed to trial without hearing the preliminary exceptions. Additionally, Article 155 continues from 154. It explains how the parties can prove their cases “if the court tries the application on the same day as the case management conference.”<sup>153</sup> This further suggests that the court is trying the case.

Another interpretation is that Article 154 and seq. are functional equivalents to summary judgment. Article 154 and seq. are similar to summary judgment because, first, they give the court the power to decide that the case should be tried in an expedited way, much like summary judgment in Ontario. As Article 154 indicates, the court can try the case immediately, if the parties are ready and the defence is to be oral.<sup>154</sup> Second, Article 155 suggests that the judgment is rendered based on the same kinds of evidence that the court relies on to come to a summary judgment in Ontario. Article 155 explains that if the court tries the application on the same day as the case management conference “the parties prove their cases by means of affidavits” and they can also present other evidence, such as testimonial or documentary evidence. The use, by parties, of affidavits to prove their case parallels the use of affidavits on a motion for summary judgment under the Ontario *Rules of Civil Procedure*.<sup>155</sup> The ability to present testimonial or documentary evidence in addition to affidavits is also similar to the Ontario rules such as the ability of a judge to order oral evidence.<sup>156</sup>

Existing case law is not especially helpful in illuminating whether Article 154 et seq. functions like summary judgment in practice. Eighteen Quebec cases cite Article 154. Most of these cases deal with preliminary

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153. *Ibid.*, Art 155 CCP.

154. *Ibid.*, Art 154(1) CCP. The court can also postpone the hearing to a specified later date.

155. Ontario *Rules of Civil Procedure*, *supra* note 6 at R 20.02.

156. *Ibid.*, R 20.04(2.2).

exceptions<sup>157</sup> and issues with the case management process.<sup>158</sup> Other cases simply cite Article 154 in passing.<sup>159</sup> Two cases mention the power of the court, under article 154(1), to try the case immediately or postpone the hearing to a specified later date. The first case, *Desjardins du Bassin-de-Chambly 2018*, is not particularly helpful in illustrating whether Article 154 et seq. function like summary judgment in practice.<sup>160</sup> In *Desjardins*, the main issue had to do with whether the court could proceed directly to a hearing or postpone a hearing (Article 154) without a case protocol. The court held that the proceedings could not go forward without a case protocol.<sup>161</sup>

A second case, *Ville de Montréal c. Giammarella*, 2019<sup>162</sup> is an illustration of the court proceeding immediately to a hearing at a case management conference, when there was no defence to request, and the parties were ready to proceed.<sup>163</sup> Here, the court reviewed the affidavit for amounts that were owed by the defendant to the City of Montreal. The

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157. 9361-1606 *Quebec inc c Gracia*, 2018 QCCS 2923 (defendant argued that the plaintiff lacked capacity to bring the case); *Curateur public du Québec c NV*, 2019 QCCQ 1120 (dealt with a variety of preliminary exceptions).

158. 9268-9579 *Quebec inc c 9222-0797 Quebec inc*, 2017 QCCA 129 (did not file the case protocol in time); *Innovtech Construction Inc. c. Simtec Group 3000 Inc*, 2017 QCCQ 14879 [9268-9579 *Quebec*] (plaintiff was supposed to have applied for registration for trial and judgment no later than 6 months from the date of service of the originating motion but did not); *Family Law - 171995* 2017 QCCS 3859, 2017 QCCS 3859 (defendant argued impossibility to act); *Sherbrooke (City of) c Pierre-Louis*, 2016 QCCS 4936 (plaintiff had filed a draft protocol which was sent to the respondent who did not respond and did not attend a case management session); *Sigmasanté c Crane Canada Co*, 2017 QCCQ 1190 (dealt with a request to reject a second expert report); *Bank of Montreal c Bannerpen inc* 2016 QCCQ 4569 (defendants were absent without reason at the case management conference); *Nadeau c Surprising* 2018 QCCS 1093 (defendant had not sought leave to file a written defence under Arts 154 and 170 CCP); *Crête c Centre hospitalier de l'Université de Montréal*, 2018 QCCS 1097 (again, defendant had not sought leave to file a written defence under arts 154 and 170 CCP); *Groupe Anderson inc. c. CGAO*, 2017 QCCS 4940 (dealt with rules about the summary statement provided for in Arts 154 and 170 being a maximum of 30 lines); *Corporation Investissements IIC / Individual Investment Corporation c Kayemba Kasuku*, 2017 QCCS 4210 (Art 154 CCP quoted in discussion of the fact that defence must be oral).

159. 9279-2092 *Quebec inc (LG4 Isolation) c Investissements St-Patrick inc*, 2018 QCCS 1753 (article was referenced but not applied); 9118-3186 *Quebec inc c Moneris Solutions Corporation*, 2017 QCCS 2657 (again, article was referenced but not applied); *KSA Avocats c Ri P* 2016 QCCQ 14756 [*KSA Avocats*] (dealt with a default judgment).

160. *Caisse populaire Desjardins du Bassin-de-Chambly c The Squire*, 2018 QCCS 5145 [*Desjardins*].

161. *Ibid* at para 1: « Considérant que l'article 154 C.p.c., premier alinéa, invoqué par l'avocat de la demanderesse qui permet au tribunal d'entendre le défendeur sur les motifs de sa contestation puis de procéder immédiatement à l'instruction ou de reporter l'audience à une autre date ne s'applique qu'à la conférence de gestion pour l'examen du protocole de l'instance convoquée par le tribunal en vertu de l'article 153 C.p.c. ».

162. *Ville de Montréal c. Giammarella*, 2019 QCCQ 67 [*Giammarella*].

163. *Ibid* at para 4: « Vu l'article 154 du Code de procédure civile (C.p.c.) qui permet au Tribunal de procéder immédiatement à l'instruction lors d'une Conférence de gestion si, notamment, il n'y a aucun moyen de défense à la demande introductive et les parties sont prêtes à procéder ».

defendant (Giammarella) acknowledged that she would not contest the application, and so the court welcomed the request to proceed directly to a hearing and condemned Giammarella to pay the sum (\$34,680.27) with interest to the City of Montreal, and an additional indemnity.<sup>164</sup> The use of Article 154 et seq. resembles a summary judgment in that the court decided that there was no reason to proceed to trial (i.e. “no genuine issue for trial”), expedited the trial, and came to a judgment based on the affidavits. This case, however, was particularly simple to decide since the defendant did not contest the application. If cases can only be decided summarily in Quebec when they are this straightforward, then this is much more limited than summary judgment in Ontario.

Finally, *KSA Avocats c Ri P* 2017 is one of the cases that cited Article 154 in passing.<sup>165</sup> This case did not deal with proceeding directly to a hearing. However, in the context of discussing the legal consequences of a case management conference, Justice Brunelle comments on articles 154 and 155. He explains that the point of a case management conference is to manage the case, and that articles 154 and 155 allow the court to manage the case by trying it immediately,<sup>166</sup> on the same day as the case management conference.<sup>167</sup>

At this point, although Article 154 et seq. resemble summary judgment, the case law is so limited that it does not give us a sense of whether these articles operate like summary judgment in practice. *Desjardins*, *Giammarella*, and the comments made as an aside by Justice Brunelle in *KSA Avocats* confirm that the court can decide to try a case expediently, but this is already stated in the text of Article 154. The cases also do not give any indication of whether there are other factors that the court might consider in deciding to proceed to trial right away, other than that the defence must be oral and the parties must be ready to proceed.<sup>168</sup> It is unclear, for instance, what makes the parties “ready to proceed.”<sup>169</sup> While, *Giammarella* is a largely paper hearing like the Ontario summary judgment, this is only one case that was particularly straightforward (since *Giammarella* did not contest the application). It is impossible to draw any

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164. *Ibid* at para 9.

165. *Ibid*.

166. *KSA Avocats*, *supra* note 159 at para 62.

167. *Ibid* at para 63: « L'article 155 C.p.c. mentionne clairement que le tribunal peut instruire « la demande le jour même de la conférence », que les parties peuvent y faire leur preuve « au moyen de déclarations sous serment lorsque la loi l'exige ou le permet », de même que « présenter toute autre preuve, par témoignage ou par présentation d'un document ».

168. *Bill n°28* Art 154(1) CCP.

169. *Ibid*.

conclusions about whether Article 154 looks like summary judgment in practice.

4. *Quebec judgments on summary judgment post-Hryniak affirm that there is no functional equivalent*

Two Quebec cases post-*Hryniak* have further explored the question of whether summary judgment exists in Quebec. In the first case, *Ordre des Dominicains c. CIBC Wood Gundy 2014*, Ordre des Dominicains argued that CIBC Wood Gundy had mismanaged their securities portfolio and did not meet their investment objectives. CIBC tried to have the action dismissed on the ground of prescription by using former Article 54.1 (and former Article 165). They also relied on *Hryniak* and asked the judge for a summary judgment in their favour. Yergeau J argues that articles like 54.1 do not seem to be born from the will of the legislator to endow Quebec justices with the power to grant a summary judgment.<sup>170</sup> Justice Yergeau states that one only has to read Rule 20 of the Ontario *Rules of Civil Procedure* to be convinced that there is no equivalent in Quebec. The provisions in other provinces that allow for summary judgment were developed with the express goal of putting in place a system of summary judgment in those provinces.<sup>171</sup> Affirming earlier arguments, Yergeau, J asserts that, instead, this article seems to have been created with the goal of preventing gag lawsuits and SLAPP suits.<sup>172</sup>

Justice Yergeau further explains that Rule 20 provides an elaborate procedure and is a summary determination of whether there is a real contentious issue requiring trial.<sup>173</sup> He notes that while the court can be fully committed to *Hryniak*'s objective that a cultural shift is required to create an environment conducive to expeditious and affordable access to the justice system, this does not permit the judge to turn Article 54.1 into a summary judgment clause.<sup>174</sup>

Justice Yergeau also mentions the case that is used in *Hryniak* to support the idea that summary judgment exists in Quebec. This case is *Bal Global Finance Canada Corporation c. Aliments Breton (Canada) Inc. 2010*, in which Justice La Rosa conducted a thorough analysis of the

170. *Ordre des dominicains ou frères prêcheurs au Canada (ODD) c CIBC Wood Gundy inc (WG)*, 2014 QCCS 367 at para 42 [*Wood Gundy*].

171. For example, as previously discussed, the Osborne Report which prompted civil reform in Ontario, was expressly trying to create a summary judgment mechanism that would be used more often.

172. Similar to *CJA*, *supra* note 145 at 137.1ff.

173. *Wood Gundy*, *supra* note 170 at para 32.

174. *Ibid* at para 44.

evidence on a motion under Article 54.1 before granting the motion.<sup>175</sup> This is similar to summary judgment, as this analysis of evidence was used in coming to a decision about whether to grant the motion. What the footnote fails to mention, however, is that this judgment was subsequently overturned by the Quebec Court of Appeal, which emphasized that the analysis should have been undertaken at trial.<sup>176</sup>

The second Quebec case that has explored the issue of whether summary judgment exists in Quebec is *Struthers c. Régie des marchés agricoles et alimentaires du Québec* 2015.<sup>177</sup> Struthers was a cattle producer in Quebec. In four files they contested a series of decisions made by the Régie des marchés agricoles et alimentaire du Québec (the “Régie”) and special contribution payment orders made by the Quebec Federation of Cattle Producers (the “Federation”). A few months after serving the applications for review on the Régie and the Federation, they submitted an application for review to the Attorney General of Quebec accompanied by a notice that they planned to contest *le Règlement sur les contributions des producteurs de bovins* on constitutional grounds. The Federation and the Attorney General of Quebec sought the dismissal of the applications for review. Among the articles they cited were articles 54.1 and 165 of the *Code of Civil Procedure*.<sup>178</sup> Ultimately Justice Brian Riordan found that Struthers’ behaviour constituted an abuse of procedure and rejected the applications for review in the four files. On the topic of summary judgment, Justice Riordan remarks that he recognizes that the decision in *Hryniak* is based on a procedural rule that does not exist in Quebec.<sup>179</sup> He notes, however, that this is not an obstacle to embracing the cultural shift referred to by the Supreme Court in *Hryniak*. He remarks that the principles of proportionality and the active management of cases have been facets of Quebec legal culture for a long time.<sup>180</sup> Alongside the duty of Quebec courts to hear the merits of a case is the duty of judges to also actively manage the files before them. This case provides a perfect example where the cultural shift discussed in *Hryniak* forces the court to intervene.<sup>181</sup>

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175. *Bal Global Finance Canada Corporation c Aliments Breton (Canada) Inc*, 2010 QCCS 325.

176. *Aliments Breton (Canada) inc c Bal Global Finance Canada Corporation*, 2010 QCCA 1369 [*Bal Global*]. For further discussion of *Hryniak*, overlooking the problems with *Bal Global* as a source for summary judgment in Quebec, see also *Wood Gundy*, *supra* note 170 at para 39.

177. *Struthers c Régie des marchés agricoles et alimentaires du Québec*, 2015 QCCS 5992 [*Struthers*].

178. In addition to Arts 54.1 and 165, they cited Arts 20, 33, and 846 Old CCP.

179. *Wood Gundy*, *supra* note 170 at para 71.

180. *Ibid*. Justice Riordan observes in footnote 29 that article 54.1 serves as an example of that.

181. *Ibid* at para 72.

There are several possible interpretations of this judgment. It could be interpreted to mean that even though summary judgment does not exist in Quebec, judges in Quebec can use existing procedural tools, like Article 54.1, to essentially create a summary judgment procedure in order to embrace the cultural shift called for by the Supreme Court of Canada. Justice Riordan's observation that active management is a long-recognized facet of Quebec's legal system supports the belief that summary judgment fits well into Quebec civil procedure, and so it might well exist, but under the guise of something else, like Article 54.1 et seq. Another interpretation, and the one that seems most likely, is that Justice Riordan was stating that judges can use Quebec's civil procedural tools to embrace the cultural shift through tools unique to Quebec. This is supported by the fact that when he wrote that Quebec legal culture embodies the principles of active case management, he seemed to be discussing the culture in a broad way. He did not seem to suggest that this can be achieved through manipulating an existing article to act like summary judgment, or that there is an equivalent. He was simply suggesting that Quebec law embodies this principle. Thus, both *Wood Gundy* and *Struthers*, ultimately seem to posit that Quebec does not have functional equivalents of summary judgment, but that Quebec approaches the issue in a different way.

#### V. *Quebec's unique procedural tools*

While Ontario has focused on summary judgment as a means of achieving access to justice, the 2016 Quebec *Code of Civil Procedure* introduced its own unique tools to deal with the problem. Many of these tools do not have an equivalent in Ontario, or the Ontario rules have a variation in their approach. As Justice Riordan writes in *Struthers*, the court can embrace the cultural shift referred to in *Hryniak* through these tools.<sup>182</sup> These tools can achieve some of the same goals as summary judgment without some of the disadvantages that have been noted. Some examples that give judges more control over the case and streamline the process include the introduction of the case protocol, case management powers, and encouragement of joint experts.

As mentioned, the parties have to cooperate to create a case protocol within 45 days from service of the summons.<sup>183</sup> In the case protocol, parties have to set out their agreements and undertakings, the issues in dispute, and the steps they plan to take to ensure the proceeding operates smoothly. If they plan to seek separate rather than joint expert opinions, they need to

182. *Struthers*, *supra* note 177 at paras 71-72.

183. *Bill n°28* Art 149 CCP. Unless the case deals with family matters in which case it must be filed within three months after service of the summons per Art 149 para 2 CCP.

explain why.<sup>184</sup> They must also create deadlines to be ready for trial within the 6-month timeline.<sup>185</sup> Parties also have to illustrate that they considered alternative dispute resolution processes. The court examines the case protocol and if the court does not approve it, the parties are called, within 20 days, to a case management conference.<sup>186</sup> The court also possesses case management powers, as discussed in the previous section, which it can use at any stage of the proceedings whether by its own initiative, or on request.<sup>187</sup>

Ontario's only similar mechanism to the case protocol is the province's discovery plan, which requires parties to agree to and set out in writing the scope of what the discovery will entail.<sup>188</sup> This includes when each party will serve their affidavit of documents, the timing and manner for delivering documents, and the names of people who will give oral examinations.<sup>189</sup> Unlike the case protocol, which deals with the entire case, the discovery plan only deals with when discovery will take place and its form.

Ontario has pre-trial conferences, which are somewhat similar to Quebec's case management conferences. Unlike Quebec's case management conferences, however, these are mandatory and occur within 180 days after an action is set down for trial, which is considerably later in time than case management conferences in Quebec.<sup>190</sup> At pre-trial conferences, the court can consider matters such as the possibility of settlement on any, or all, of the issues, simplifying the issues, the estimated duration of the trial, and whether the court should appoint an expert.<sup>191</sup> This provides an opportunity to settle issues without a hearing. For those issues that are not settled, the court will provide orders to assist in resolving the case in the most expeditious and cost-effective way possible.<sup>192</sup> Quebec also has pre-trial conferences that can be called by the judge's initiative, or on request, in order to bring together the lawyers to discuss ways of "simplifying and shortening the trial."<sup>193</sup>

Ontario has a case management system that gives courts an expansive set of powers over cases in this track.<sup>194</sup> The expansiveness of these powers

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184. *Ibid*, Art 148(4) CCP.

185. *Ibid*, Art 173 CCP.

186. *Ibid*, Art 150 CCP.

187. *Ibid*, Art 158 CCP.

188. *Ontario Rules of Civil Procedure*, *supra* note 6 at R 29.1.03(2).

189. *Ibid*, R 29.1.03(3).

190. *Ibid*, R 50.02(1).

191. *Ibid*, R 50.06.

192. *Ibid*, R 50.01; R 50.07(1).

193. *Bill n°28* Art 179 CCP.

194. *Ontario Rules of Civil Procedure*, *supra* note 6 at R 77.

resemble, in some ways, the case management powers given to Quebec courts.<sup>195</sup> However, in Quebec all cases are managed by the court,<sup>196</sup> while the Ontario case management system only applies to civil actions commenced in Toronto, Ottawa, and Essex county (Windsor).<sup>197</sup> The system provides for case management only when it is demonstrated that the proceedings need the court's intervention, and the case is only managed "to the degree that is appropriate."<sup>198</sup> A judge or case management master has to assign a civil case to this track. A case will be assigned to this track if the parties agree to it and a judge or case manager decides that the case is suitable for it,<sup>199</sup> if a judge or case manager assigns it on his or her own initiative,<sup>200</sup> or if a party requests it and a judge or case manager decides it is appropriate.<sup>201</sup> Also, certain cases, such as family law actions, class proceedings, and estate matters are exempt from this rule.<sup>202</sup>

In Quebec, the court, under its case management powers, has the power to impose joint expert evidence in some circumstances, in order to uphold the principles of proportionality and efficiency.<sup>203</sup> This new power to impose joint expert evidence resembles the rules around expert evidence that came into place in the United Kingdom after the Woolf report.<sup>204</sup> In the United Kingdom, the court can direct that evidence be given by a single joint expert.<sup>205</sup> This was a move towards the model in mainland European countries (e.g. France), where expert evidence is provided by a neutral expert appointed by the court.<sup>206</sup> No such equivalent exists in Ontario, but Osborne's Civil Justice Reform Project report made a number of recommendations regarding expert evidence.<sup>207</sup> On the subject of joint experts, the report did not propose that the use of joint experts be mandatory. Osborne instead suggested that "early in the litigation process,

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195. Ontario *Rules of Civil Procedure*, *supra* note 6 at R 77.04(1) compared with *Bill n°28* Art 158 CCP. The list of powers granted to the judge or case management master under Ontario rule 77.04(1) are described in broad language. E.g. per R 77.04(1)(e) a judge or case management master may "make orders, impose terms, give directions and award costs as necessary..." The powers granted to the court in Quebec are very expansive, and are also described in much more detailed language.

196. *Bill n°28* Art 9(2) CCP. Case management is described as a mission of the courts.

197. Ontario *Rules of Civil Procedure*, *supra* note 6 at R 77.02(1).

198. *Ibid*, R 77.01(1).

199. *Ibid*, R 77.05(1).

200. *Ibid*, R 77.05(2)(a).

201. *Ibid*, R 77.05(2)(b).

202. *Ibid*, R 77.02(2).

203. *Bill n°28* Art 158(2) CCP.

204. Lord Woolf, *supra* note 1.

205. See *Civil Procedural Rules*, *supra* note 46, rule 35.7.

206. Eric Barbier de la Serre & Anne-Lise Sibony, "Expert Evidence Before the EC Courts" (2008) 45 *Common Market Law Review* 941 at 942.

207. Osborne, "Civil Justice Reform," *supra* note 49.

parties should discuss jointly retaining a single expert to reduce costs and avoid unnecessary competing expert reports...” Since the possibility for the court to impose joint expert evidence was introduced in the 2016 Code, it has been the subject of much controversy. It is argued that it might interfere with the adversarial nature of a case, by impeding the parties’ abilities to assert their contentions,<sup>208</sup> and that it might give the expert a quasi-decision-making role.<sup>209</sup> Commentary by practitioners suggest that joint experts are rarely used.<sup>210</sup> Thus, in practice, there appears to be little difference between Ontario and Quebec when it comes to joint expert evidence.

These Quebec tools, in many ways, have the potential to make trials more proportional, minimize delays and reduce costs, and meet the goal of creating greater access for unrepresented litigants. They do not carry the same concerns as summary judgment. Case protocol, case management, and limits on expert joint witnesses are simply ways of streamlining the process, catching issues early, and shortening trial. Like summary judgment, the court can control the amount of evidence and the way that it is presented to some extent, for instance through not approving a case protocol and working with parties to adapt it, and through case management options such as limiting parties to having a joint expert. Judges, however, still receive a full account of the record unlike in summary judgment proceedings. The balance between searching for truth and creating access to the justice system may still lean towards the search for truth, as it might not sufficiently bring down procedural time and costs. The concern about losing precedent and not advancing the law is less of a concern in Quebec than in the common law provinces, as cases have less precedential value in the civil system. Since full trials still occur, however, these judgments can be referenced in future cases.

It is possible that, as with summary judgments, the case protocol, case management conference, and case management measures might not save, or could even add time. For instance, a party might not collaborate on making the case protocol within the appropriate time frame, in which case they may have to appear before a judge who could grant more time to

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208. See e.g. David-Emmanuel Roberge, “Class Actions and Joint Expert Evidence: Guidelines From the Quebec Court of Appeal” (6 March 2019), online: *Lexology* <<https://www.lexology.com/library/detail.aspx?g=45c541f7-5210-4d10-9cdb-8ac0b942fa29>> [<https://perma.cc/2K8Z-Q7GK>].

209. Alexandra Teasdale & Dominic Naud, “Quebec’s New Code of Civil Procedure and Expert Evidence: Five Key Changes” (25 November 2015), online: *mondaq* <<http://www.mondaq.com/canada/x/445922/Civil+Law/Quebecs+New+Code+Of+Civil+Procedure+And+Expert+Evidence+Five+Key+Changes>> [<https://perma.cc/HG8D-RLNH>].

210. E.g. Roberge, *supra* note 208. Roberge asserts that courts will be reluctant to impose joint expert evidence because of not wanting to interfere with the adversarial nature of lawsuits.

put together the case protocol. In such a scenario, the process would be delayed because of the tools designed to streamline the process.<sup>211</sup> Finally, there is a concern that summary judgment will be used as a litigation tactic. This concern does not apply to the Quebec tools, as the case protocol is mandated by the court, and while parties can request case management measures, these measures were designed to help the trial move smoothly. It seems unlikely that the court would apply these measures if they were going to slow down the proceedings or make it costlier.

### *Conclusion*

These observations highlight the ways that Quebec, through its own tools, and without a summary judgment equivalent, is embracing the post-*Hryniak* cultural shift towards improving access to justice. As access to justice remains a problem in Canada, and around the world, transsystemic analysis will help the legal community implement new procedural tools from other jurisdictions, and other legal traditions, assess how these tools work, and think about how these tools can be implanted into new jurisdictions. Knowing what tools Quebec uses to improve access to justice allows us to think about where summary judgment might fit into Quebec procedural law, and whether it would be a useful addition to the province's procedural law. Summary judgment is a natural fit with the principle of proportionality and the active management of cases—both of which are fundamental to Quebec procedural law. Quebec's case management, however, already allows the court to expedite proceedings and shorten trials.<sup>212</sup> As discussed, Article 154 seems to allow the court to proceed immediately to trial from the case management conference, and to decide the case largely based on affidavits. Expedited trials fulfill many of the goals of summary judgment. There are two aspects of summary judgment that could be implanted in Quebec. First, in Ontario, there has been an increase in the number of summary judgment motions and in the number of full, or partial, summary judgments being granted. This enthusiasm for trying to expedite trials, that has grown alongside the widening of the summary judgment rule, should be fostered in Quebec so that the Quebec courts use their case management powers to expedite and simplify more proceedings, where possible. Second, when a Quebec court is making an assessment under Article 154 on whether to try a case immediately, it might be instructive for the court to consider Ontario's "genuine issue requiring trial" test, and case law, as a guide in making this decision. If a

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211. See e.g. 9268-9579 *Quebec*, *supra* note 155 where the respondent did not file the case protocol within the 45 days.

212. *Bill n°28*, *supra* note 116, Art 158 CCP.

Quebec case appears to have no genuine issue requiring trial, this could mean that the case should proceed immediately to trial. This suggestion is made tentatively, because how this part of Article 154 is meant to work in practice is still not completely clear.

Learning about Quebec tools to improve access to justice, and how these compare with the summary judgment, allows one to consider whether, and how, these might be applied in other Canadian provinces. For instance, some Ontario cases in Ottawa, Toronto, and Windsor are set on a case management track.<sup>213</sup> It might be prudent for Ontario to move towards Quebec's approach of managing all cases in order to expedite and simplify proceedings.

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213. Ontario *Rules of Civil Procedure*, *supra* note 6 at R 77.02(1).