

**SEVEN YEARS OF ACCESSIBLE JUSTICE:
A CRITICAL ASSESSMENT OF
HRYNIAK V. MAULDIN'S CULTURE SHIFT**

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In 2014, the Supreme Court of Canada sought to address the inaccessibility of public adjudication for "ordinary Canadians" by introducing a culture shift to civil litigation. This culture shift required participants in the civil justice system to stop viewing trial as the default adjudication method and expand use of summary judgment. In this article, I critically evaluate the Supreme Court's reasoning for the culture shift from a jurisprudential perspective and quantitatively evaluate the endeavour's success. I find that Alberta courts have misapplied the culture shift contrary to the Supreme Court's intentions, that the culture shift is being implemented only on a limited basis, that summary judgment is no more accessible for ordinary Canadians, and that fairness and justice are not being preserved. I provide recommendations for alternate methods to address the accessibility problem.

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I. INTRODUCTION

Hryniak v. Mauldin was an Ontario civil fraud claim about a \$1.2 million USD investment that disappeared.¹ The plaintiffs applied for summary judgment. The motions judge granted the application.² The Ontario Court of Appeal disagreed that the dispute was appropriate for summary judgment but upheld the decision anyway.³ The defendants appealed to the Supreme Court of Canada.

Though the immediate issue was whether summary judgment should be granted in the plaintiffs' favour, the Supreme Court used the opportunity to lay out a plan for addressing the inaccessibility of the Canadian civil justice system for what it called "ordinary Canadians."⁴ In a unanimous decision by seven justices, the Supreme Court set out its

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¹ 2014 SCC 7 [*Hryniak*].

² *Bruno Appliance v Cassels Brock & Blackwell LLP*, 2010 ONSC 5490.

³ *Combined Air Mechanical Services Inc v Flesch*, 2011 ONCA 764.

⁴ *Hryniak*, supra note 1 at paras 23–24.

reasoning for broadening the use of summary judgment to improve that access. There are two aspects to this plan:

- (1) a mandated “culture shift” toward “simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case”;⁵ and
- (2) the implementation of that culture shift in a more generous test for the availability of summary judgment.⁶

In this article, I assess whether this approach to improving access to justice is effective. From a theoretical standpoint, the logical inference that expanded availability of summary judgment will give ordinary Canadians greater access to public adjudication is speculative. The evidence suggests expanded summary judgment is more beneficial for *non-ordinary* Canadians than for ordinary Canadians. This is likely why efforts in both Alberta and Ontario have only marginally improved accessibility for ordinary Canadians. Further, analysis of reported decisions indicate that Alberta’s courts have misinterpreted the culture shift, resulting in applications contrary to the Supreme Court’s underlying justification. Finally, there are legitimate concerns about whether expanded summary judgment preserves fairness and justice.

Part II reviews the preceding literature relating to the *Hryniak* decision. Part III maps out the Supreme Court’s reasoning in *Hryniak* from a philosophical perspective, emphasizing the value statements used by the Supreme Court to justify the culture shift and expanded use of summary judgment. I then pose four potential problems with the approach as stated by the Supreme Court. Parts IV through VII analyse the evidence, primarily from Alberta, on the validity of each posed problem. The conclusion summarizes my findings and proposes an alternative for moving forward.

II. LITERATURE REVIEW

Previous literature has focused on the decision in *Hryniak* as part of the evolution of Ontario’s jurisprudence, provided practice tips for working with the culture shift, or described its impact in a particular jurisdiction.

Both Neil Finkelstein⁷ and Matthew Karabus and Ted Tjaden⁸ reviewed the decision in *Hryniak* in the context of the history of Ontario’s summary judgment rules. Finkelstein concluded that the decision was a significant break from previous jurisprudence and its success would depend on the judiciary’s willingness to actively manage such applications.⁹ Karabus and Tjaden proposed the culture shift was achieving some success, as the percentage

⁵ *Ibid* at para 2.

⁶ 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 at 2–3.

⁷ Neil Finkelstein et al, “A New Paradigm for Summary Judgment: *Hryniak v. Mauldin*” (2014) 42:4 Adv Q 489.

⁸ Matthew Karabus & Ted Tjaden, “The Impact of *Hryniak v. [Mauldin]* on Summary Judgments in Canada One Year Later” (2015) 44:1 Adv Q 85.

⁹ Finkelstein et al, *supra* note 7 at 489–90.

of applications in Ontario in which full or partial summary judgment was granted increased from about 65 percent pre-*Hryniak* to 75 percent over the course of the year after *Hryniak*.¹⁰

Peter Wells and Adrienne Boudreau wrote a case comment proposing the culture shift should be implemented beyond summary judgment.¹¹ Though they acknowledge that the “history of backsliding to old ways after initial pledges” raises the fair question of whether the culture shift will occur, they express optimism it will.¹²

Justice Colin Campbell addressed what the Supreme Court meant by “proportionality” and provided tools for implementation.¹³ He recommends practitioners rely on case law, cooperate in addressing production issues early in the proceeding, engage in best practices and professionalism, mediate early, and know their clients and opposing parties and counsel.¹⁴ Similarly, Neil Wilson provided additional steps for speeding dispute resolution, concluding “[l]ess formality in the civil litigation processes will not impair the just resolution of disputes so long as natural justice remains at the heart of adjudication.”¹⁵

Brooke MacKenzie¹⁶ and Gerard Kennedy¹⁷ explored Ontario’s culture shift, while Billingsley¹⁸ examined *Hryniak*’s infiltration into Alberta’s civil procedure. MacKenzie reviewed reported summary judgment decisions in Ontario for the years 2004–2015 to assess the impact of Ontario’s 2010 amendments to its *Rules of Civil Procedure* on summary judgment.¹⁹ She found that, though the 2010 amendment had some success in increasing the use and granting of summary judgment, the most significant improvement occurred in the two years after *Hryniak*. She concluded the culture shift had begun.²⁰ Kennedy conducted a qualitative analysis by surveying 90 Ontario litigators on their subjective experiences. Most respondents reported *Hryniak* had had a larger impact than the amendments, but the impact on increasing access to justice was marginal.²¹

Billingsley reviewed *Hryniak*’s influence on Alberta’s tests for summary judgment, striking pleadings, dismissing actions for delay, pretrial disclosure, and cost awards. She explained, “[t]he courts have advocated a wide application of this philosophy, noting that the proportionality principle described by the Supreme Court’s culture shift ‘should inform not merely this Court’s interpretation of the specific rules under consideration but the overall

¹⁰ Karabus & Tjaden, *supra* note 8 at 90.

¹¹ Peter EJ Wells & Adrienne Boudreau, “Accessible, Proportionate, Timely and Affordable – The Supreme Court of Canada’s Challenge to Bench and Bar in *Hryniak v. Mauldin*” (2014) 42:4 *Adv Q* 456.

¹² *Ibid* at 468.

¹³ Colin L Campbell, “What Is Proportionality, Anyway?” (2015) 34:3 *Adv J* 26. For further discussions of proportionality outside the *Hryniak* context, see Colleen M Hanyecz, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform” (2008) 27:1 *CJQ* 98; Trevor CW Farrow, “Proportionality: A Cultural Revolution” (2012) 1 *J Civ Litigation & Practice* 151.

¹⁴ Campbell, *ibid* at 26–29.

¹⁵ Neil G Wilson, “Beyond *Hryniak*: The Path to Accessible Civil Justice” (2015) 34:2 *Adv J* 47 at 48.

¹⁶ Brooke MacKenzie, “Effecting a Culture Shift – An Empirical Review of Ontario’s Summary Judgment Reforms” (2017) 54:4 *Osgoode Hall LJ* 1275.

¹⁷ Gerard J Kennedy, “The 2010 Amendments and *Hryniak v Mauldin*: The Perspective of the Lawyers Who Have Lived Them” (2020) 37 *Windsor YB Access Just* 21.

¹⁸ Billingsley, *supra* note 6.

¹⁹ RRO 1990, Reg 194.

²⁰ MacKenzie, *supra* note 16 at 1309.

²¹ Kennedy, *supra* note 17 at 23.

approach to civil justice issues before the courts.”²² She found, “the problem with the judicial implementation of the culture shift is that it is fraught with uncertainty for litigants and their counsel.”²³

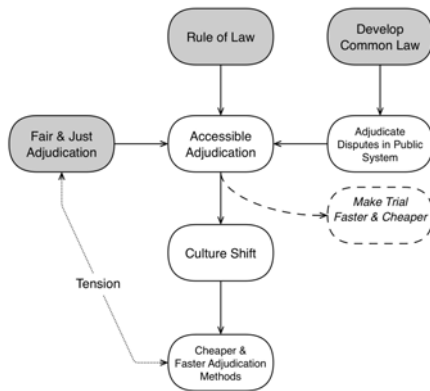
III. *HRYNIAK* AND SUPREME COURT MORALITY

As explained above, the Supreme Court used its decision in *Hryniak* to initiate changes in civil procedure to increase access to justice for “ordinary Canadians.” The literature above accepts this reasoning without exploring the logical connections between the principles enunciated by the Supreme Court and the call to action. Analysis reveals cracks in the moral foundation, illuminating some of the unintended consequences of implementation.

Using a natural law approach, the Supreme Court proposed moral principles or values in civil procedure to justify a culture shift (the *Hryniak* Morality) and instructions for implementation. In this section, I explain the Supreme Court’s moral reasoning and how the Supreme Court used it to motivate changes to summary judgment.

The *Hryniak* Morality begins with a set of top-level values proposed to be at the foundation of Canada’s civil justice system. The Supreme Court identifies conditions that must be met to maintain these values, then outlines how those conditions were not being met in the litigation procedures of the time. It then proposes a culture shift as a means of resolving that problem, with instructions on how to implement that culture shift in Ontario’s summary judgment regime. Figure 1 illustrates the Supreme Court’s reasoning.

FIGURE 1: THE *HRYNIAK* MORALITY



²² Billingsley, *supra* note 6 at 21.

²³ *Ibid* at 28.

The Supreme Court proposed the primary foundational value for the civil justice system is that adjudication must be fair and just.²⁴ This foundational value is accompanied by maintaining the rule of law and developing the common law.²⁵ These are the top-level values.

To continue development of the common law, civil disputes must be adjudicated in the public justice system. The Supreme Court proposed that alternative methods of dispute resolution, such as private arbitration, are undesirable because they undermine the development of the common law.²⁶

For adjudication in the public justice system to be fair and just, and to maintain the rule of law, such adjudication must be accessible to the “ordinary Canadian.”²⁷ Thus, to uphold the top-level values, we need fair and just adjudication in the public justice system that is accessible to ordinary Canadians. This is the *Hryniak* Morality.

Here is the problem the Supreme Court wanted to address: the public justice system is inaccessible to the “ordinary Canadian” because trial — the primary method of public adjudication — is too expensive and takes too long (the “Accessibility Problem”). This threatens all three of the foundational values — fair and just adjudication, the rule of law, and development of the common law. Ordinary Canadians do not receive justice; legal rights are not enforced; and the lack of public adjudication stunts development of the common law.

The most direct resolution would be to make trial processes faster and cheaper. The Supreme Court ignored this as a possible solution, proposing instead to shift our culture to recognize that “a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.”²⁸ In other words, instead of making trials more accessible, provide alternative methods of adjudicating disputes within the public justice system that are faster and cheaper.

In *Hryniak*, the Supreme Court acknowledged that such alternative methods may create tension with the foundational value that adjudication must be fair and just.²⁹ On the one hand, they increase fairness and justice by making the public justice system more accessible (namely, adjudication by some court processes is better than none). However, they are faster and cheaper because they forego procedural safeguards created to ensure fairness and justice, such as disclosure, questioning, viva voce evidence, and cross-examination. The key is to accurately assess when these safeguards ought to be retained.

²⁴ *Hryniak*, *supra* note 1 at para 23.

²⁵ *Ibid* at paras 1, 26. It is surprising and questionable that the Supreme Court would emphasize development of the common law on the same level as the other two principles given the prevalence and effectiveness of civil law legal systems. Yet the importance the Supreme Court places on this principle is clear by statements such as: “Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted” (at para 1); and, “private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined” (at para 26).

²⁶ *Ibid*.

²⁷ *Ibid* at paras 1, 24, 28. See also Wells & Boudreau, *supra* note 11 at 458.

²⁸ *Hryniak*, *supra* note 1 at para 27.

²⁹ *Ibid* at para 29.

The Supreme Court proposed proportionality is the answer: use only those civil procedures that are proportionate to the nature of the dispute and the interests involved (the Proportionality Principle).³⁰ Simpler matters can be resolved with fewer procedural safeguards. The Supreme Court therefore directed courts to expand the availability of summary judgment (and summary trial, in some jurisdictions) and to better use the fact-finding powers available in such applications.

Summary judgment can, and therefore should, be granted when a fair and just determination can be made without the benefits of trial. This means one can make the necessary findings of fact, apply the law to those facts, and reach a fair and just determination more quickly and cheaply than by trial.³¹ If necessary and proportionate, courts should make use of viva voce evidence. If a court denies summary judgment, it should assume management of the dispute to guide it to swift resolution. Billingsley summarized this approach succinctly: “The goal of litigation procedures should not be to get to trial in order to have a dispute resolved. Instead, the litigation process should be aimed at achieving judicial resolution in a way that is proportional to the lawsuit at hand.”³²

In assessing whether summary judgment is proportionate, courts should consider:

- summary judgment’s cost and impact on the litigation;
- its timeliness;
- the nature and complexity of the litigation;
- the benefits of the trial process, including the narrative that counsel can build through trial, the ability of witnesses to speak in their own words, and the assistance of counsel in sifting through evidence; and
- whether better evidence would be available at trial.³³

This culture shift and its implementation through summary judgment has an appealing logic as a solution to the Accessibility Problem. As Wells and Boudreau put it:

It is fundamental that whatever procedure is selected to adjudicate a claim, it must be fair and just. However, a “fair and just” adjudication is one that is also accessible — proportionate, timely and affordable. This makes logical sense: all the procedure in the world will not produce fair and just adjudications, or any adjudications at all, if the procedure offered is disproportionate to the matters at issue, results in protracted adjudications or is too expensive for the average person to reasonably access.³⁴

As stated in the *Hryniak* Morality, the Supreme Court’s overall goal is to maintain the three top-level principles — fair and just adjudication, rule of law, and development of the common law — while solving the Accessibility Problem. Despite the appeal of the stated culture shift with expanded summary judgment powers, there are reasons to doubt its ability to accomplish the Supreme Court’s goal.

³⁰ *Ibid.*

³¹ *Ibid.* at para 49.

³² Billingsley, *supra* note 6 at 6.

³³ *Hryniak*, *supra* note 1 at paras 31, 54, 56. How judges and masters are to accurately predict these final two points is not explained.

³⁴ Wells & Boudreau, *supra* note 11 at 458–59 [footnotes omitted].

As already cited, there is risk the culture shift won't occur, or that courts will "backslide" to previous habits.³⁵ Alberta's method of implementing the culture shift has been "fraught with uncertainty,"³⁶ an issue which is itself a challenge to the rule of law. In this article, I pose and assess four potential problems with the Supreme Court's approach:

- (1) the culture shift and the underlying *Hryniak* Morality will be misinterpreted and misapplied by lower courts;
- (2) participants in the civil justice system will not shift their culture;
- (3) the disputes of ordinary litigants cannot be fairly and justly determined by summary judgment; and
- (4) the Proportionality Principle fails to sufficiently maintain fairness and justice in summary judgment.

The remainder of this article explores each of these potential issues and assesses the evidence for or against them.

IV. ARE COURTS INTERPRETING THE CULTURE SHIFT CORRECTLY?

Analysis of Alberta decisions, particularly those from the Court of Appeal, demonstrate a misalignment with the *Hryniak* Morality. The consequences contradict the values identified by the Supreme Court as foundational to our public justice system.

Alberta judgments have been silent about the Supreme Court's moral justification for the culture shift. Instead, Alberta courts, led by the Court of Appeal, have taken a positivist approach³⁷ by isolating the Supreme Court's proposition that civil procedure must shift from focus on traditional trial and conjoining it with Alberta's "Foundational Rules" in Rule 1.2.³⁸ This is summarized by the Alberta Court of Appeal in *Hannam v. Medicine Hat School District No. 76*:

Hryniak's celebration of proportionality, expedition and economy squares with Alberta's foundational rules. Rule 1.2(2)(b) of the *Alberta Rules of Court* states that "these rules are intended to be used ... to facilitate the quickest means of resolving a claim at the least expense."³⁹

³⁵ *Ibid* at 468.

³⁶ Billingsley, *supra* note 6 at 28.

³⁷ It is reasonable to argue that lower courts ought to apply the positive law set by higher courts without regard to any underlying principles. The purpose of this analysis is to demonstrate the dangers in such an approach.

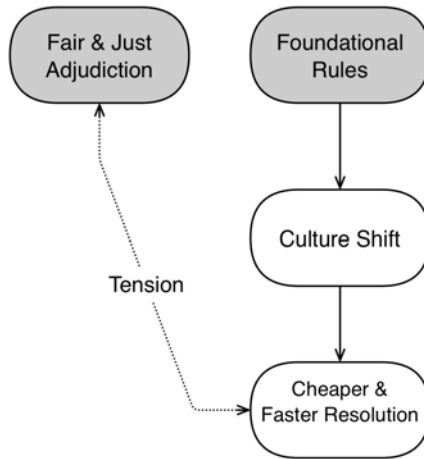
³⁸ *Alberta Rules of Court*, Alta Reg 124/2010. As Billingsley, *supra* note 6 at 21 pointed out, Alberta courts have endorsed the culture shift on the basis of key similarities between the Supreme Court's description of the culture shift and the requirements of Foundational Rule 1.2 in Alberta's *Rules of Court*.... Relying on this legislated emphasis of "resolution" rather than trial and expression of proportionality of process, Alberta courts have concluded that the culture shift called for by the Supreme Court is not new to Alberta, but is instead consistent with the approach already required by Alberta's rules.

³⁹ 2020 ABCA 343 at para 125 [*Hannam*] [footnotes omitted].

Figure 2 illustrates this “Alberta Approach.” There are two key points:

- (1) the focus is on resolution — *any* resolution — not on adjudication in the public justice system;⁴⁰ and
- (2) as will be seen, the balance is tipped toward quick and cheap rather than fair and just.

FIGURE 2: THE ALBERTA APPROACH



Though touted as rooted firmly in the Foundational Rules, these two points are contrary to a more thorough review of those same rules: “The purpose of these rules is to provide a means by which claims can be *fairly and justly* resolved in or by a *court process* in a timely and cost-effective way.”⁴¹ This part of the Foundational Rules aligns with the *Hryniak* Morality, emphasizing resolution by court processes and a balance between fair and just adjudication on one hand with timeliness and cost-effectiveness on the other. However, Alberta courts seem to ignore this, focusing instead on Rule 1.2(2)(b).

This misalignment with the *Hryniak* Morality has negative consequences.

As the Supreme Court warned in *Hryniak*, *public* adjudication must be accessible.⁴² It is particularly important for “development of the common law and related democratic norms

⁴⁰ This is clearly recognized by statements such as, “a cultural shift in litigation that deemphasises trial as the dominant mechanism of resolving civil disputes in favour of procedures such as summary dismissal and *alternative dispute resolution*” (*Ursa Ventures Ltd v Edmonton (City)*, 2016 ABCA 135 at para 18 [emphasis added]); and “the latter cases reflect the litigation culture shift mandated by *Hryniak* and the fact that *resolution in any form* is the end goal” (*Paquin v Whirlpool Canada LP*, 2016 ABQB 147 at para 19 [emphasis added]).

⁴¹ *Alberta Rules of Court*, *supra* note 38, r 1.2(1) [emphasis added].

⁴² *Hryniak*, *supra* note 1 at paras 1, 26. See also Trevor CW Farrow, *Civil Justice, Privatization, and Democracy* (Toronto: University of Toronto Press, 2014) for a thorough treatise on the importance of public adjudication and the dangers of privatized justice.

and ensuring economically disadvantaged parties have a forum to adjudicate claims with basic procedural fairness.”⁴³ Otherwise, a person’s legal fate may depend on their “economic status, rather than law.”⁴⁴ Focus on *any* resolution, by the quickest means possible, threatens these values. This danger is apparent in the outgrowth of the Alberta Approach into applications to dismiss an action for long delay, also known as “Drop Dead Applications.”⁴⁵

Though Alberta amended its *Rules of Court*, including adding the Foundational Rules, in 2010, and amended its rules for dismissal for long delay again in 2013, courts continued to rely on the traditional *Morasch* analysis⁴⁶ until *Hryniak* was adopted into Alberta law by the Court of Appeal decision in *Windsor v. Canadian Pacific Railway Ltd.*⁴⁷ Justice Topolniski relied on both decisions to change the test for Drop Dead Applications in her June 2014 decision in *Nash v. Snow*.⁴⁸

There were two prongs to the change. Justice Topolniski justified the first by the change in the wording of Rule 4.33 itself — a change which, up to this point, had been ignored.⁴⁹ She proposed the absence of the words “last thing” or “step” in the Rule changed the focus of the assessment to one of function rather than whether an act fits a defined category of activities.⁵⁰ As a result, courts were no longer to examine each “thing” or “step” for significant advancement and instead examine the dispute’s progress throughout the entire three-year window.

The second prong was based on *Windsor*’s adoption of *Hryniak*’s culture shift away from the “myth of trial.”⁵¹ In Justice Topolniski’s words, “the end goal of ‘significant advancements’ under *Rule 4.33* is not necessarily trial, but rather resolution.”⁵² Because of Alberta’s interpretation of the culture shift, the focus of the Rule changed to significant advancement toward the most proportional resolution.

The Court of Appeal affirmed Justice Topolniski’s functional approach in *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, stating:

[T]he court must view the whole picture of what transpired in the three-year period, framed by the real issues in dispute, and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors including, but not limited to, the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred.⁵³

⁴³ Kennedy, *supra* note 17 at 24 [footnotes omitted].

⁴⁴ *Ibid.*

⁴⁵ *Alberta Rules of Court*, *supra* note 38, r 4.33.

⁴⁶ *Alberta v Morasch*, 2000 ABCA 24. This analysis requires the court to assess each “thing” done in the relevant three-year window for whether it materially advanced the action toward trial. Any required procedural step was deemed to materially advance the action. Any other “thing” was evaluated for whether it furthered the litigation in a meaningful way.

⁴⁷ 2014 ABCA 108 [*Windsor*].

⁴⁸ 2014 ABQB 355 [*Nash*].

⁴⁹ See e.g. *Huynh v Rosman*, 2013 ABQB 218; *Krieter v Alberta*, 2014 ABQB 349.

⁵⁰ *Nash*, *supra* note 48 at para 29.

⁵¹ *Windsor*, *supra* note 47 at para 15.

⁵² *Nash*, *supra* note 48 at para 32.

⁵³ 2016 ABCA 123 at para 21, quoting *Nash*, *ibid* at para 30.

Academic review of this approach has found it decreases accessibility for ordinary Canadians and that it decreases fairness and justice. Billingsley concluded:

As with summary judgment, however, the problem with the judicial implementation of the culture shift is that it is fraught with uncertainty for litigants and their counsel. Generally, proportionality means employing the most efficient and cost effective litigation process possible without sacrificing a fair resolution of the dispute. Because litigation procedures are time consuming and expensive, this means that proportionality calls for litigation processes to be minimized or used only as needed in order to achieve a just resolution of the dispute.... As explained below, the subjectivity (and hence uncertainty) inherent in the doctrine of proportionality is exacerbated by the Alberta Court of Appeal's conclusion that the litigation culture shift means that "the myth of trial should no longer govern civil procedure" and that "[i]t should be recognized that interlocutory proceedings are primarily to 'prepare an action for resolution.'"⁵⁴

Counsel do not always have the foresight to pre-determine which actions will be proportional to which resolution methods. The hindsight of courts can be scathing. Quantitative evaluation of the effects of this functional analysis in Drop Dead Applications found the following consequences:

- some claims are being dismissed because the plaintiff is impecunious, meaning ordinary Canadians are more likely to have legitimate claims dismissed;
- more court and lawyer resources are being devoted to Drop Dead Applications than before, taking resources away from resolving other disputes; and
- this functional analysis is achieving faster resolution of 0.25 lawsuits each year while delaying resolution of 14.15 lawsuits each year.⁵⁵

I conclude Alberta's focus on the culture shift to the exclusion of the underlying morality is creating adverse consequences.

V. IS THE CULTURE SHIFT HAPPENING?

The Supreme Court wants participants in Canada's civil justice system to stop defaulting to a traditional trial for adjudication and instead focus on summary adjudication, when fair and just. Wanting something done is very different from it being done. Is our litigation culture changing?

As explained in the previous section, the culture shift is well entrenched in other areas of civil procedure in Alberta — particularly Drop Dead Applications — though differently than contemplated by the Supreme Court. Ironically, summary judgment has had a much slower response. The evidence indicates a cynical success of legal realism over both the *Hryniak* Morality and the Alberta Approach's positivism. I first present evidence from Ontario, then from Alberta.

⁵⁴ Billingsley, *supra* note 6 at 28 [citations omitted].
⁵⁵ Melissa Morrow & R McKay White "Drop Dead or a Slow Death? An Analysis of Rule 4.33 of the *Alberta Rules of Court*" (2020) 57:4 *Alta L Rev* 957 at 981–82.

The challenge in Ontario was referred to above. Prior to *Hryniak*, courts granted full or partial summary judgment in about 65 percent of applications. This jumped to 75 percent during the year after *Hryniak*.⁵⁶ This early success seems promising, but for the risk of backsliding.

Five years later, a survey of Ontario litigators is more discouraging.⁵⁷ Of the 90 respondents:

- 28.9 percent believe the culture shift is occurring; 46.7 percent believe it is not;
- 4.4 percent believe civil disputes are being resolved more quickly; 12.2 percent believe resolution is slower; and
- 2.2 percent believe the costs of resolution have decreased; 38.9 percent believe they have increased.⁵⁸

Now, these subjective experiences of a worsening culture were not *caused* by *Hryniak*. However, they do suggest the Supreme Court's call to action has failed to make a significant impact.

A limited culture shift has only recently emerged in summary judgment in Alberta. I reviewed every reported summary judgment decision from the Court of Queen's Bench, both by masters and by judges, for the years 2011 through 2020.⁵⁹ I determined the proportion of decisions in which summary judgment was granted in whole or in part. The results are in Table 1.

TABLE 1: FULL OR PARTIAL SUCCESS OF
SUMMARY JUDGMENT APPLICATIONS IN ALBERTA

Year	Number of Reported Applications	Percentage of Applications Granted
2011	46	56.5
2012	47	57.4
2013	42	52.4
2014	46	56.5
2015	72	69.4
2016	55	72.7
2017	62	54.8
2018	60	53.3
2019	55	58.6
2020	24	70.8

⁵⁶ Karabus & Tjaden, *supra* note 8 at 90. The authors do not appear to have reviewed the decisions to assess directly whether the increase in success was due to the culture shift or to other factors. As is explained below, Alberta had a temporary increase in summary judgment success in 2015–2016 for reasons unrelated to the culture shift.

⁵⁷ Kennedy, *supra* note 17.

⁵⁸ *Ibid* at 66–67.

⁵⁹ These were found using Westlaw Canada by reviewing every reported decision that cites the summary judgment rules and by searching for every reported decision with the term “summary judgment.”

Though the Court of Appeal explicitly adopted *Hryniak* into Alberta's summary judgment jurisprudence in *Windsor* in March 2014, the test for summary judgment remained essentially unchanged. It is tempting to propose that the spike in the success rate for 2015 and 2016 was due to a culture shift, however a review of decisions during those years clarifies that unknown factors were responsible.⁶⁰ The Court in *Infante v. Dzogov* summarized the considerations for summary judgment at that time.⁶¹ It acknowledged the culture shift called for in *Hryniak*, but proposed that, “[w]hile the modern approach to summary judgment has expanded its applicability, the test for granting summary judgment is still high.”⁶² Citing authority from the Court of Appeal, the Court concluded it must consider:

- “whether the claim or defense is so compelling that the likelihood it will succeed is very high”;⁶³
- whether the respondent demonstrates a “genuine issue of a potentially decisive material fact”;⁶⁴
- whether “the affidavits or evidence of the parties conflict on material facts”;⁶⁵ and
- that “a chambers judge cannot weigh evidence or credibility in a summary judgment hearing.”⁶⁶

It was not until February 2019 that the Court of Appeal, in a five-judge panel led by the Chief Justice of Alberta, definitively expanded the spectrum of cases for which summary judgment is permissible, in line with the two-step process in *Hryniak*. The Court of Appeal explained:

The party moving for summary judgment must, at the threshold stage, prove the *factual* elements of its case on a balance of probabilities, and that there is no genuine issue requiring a trial.... The party resisting summary judgment need only demonstrate that the record, the facts, or the law preclude a fair disposition, or, in other words, that the moving party has failed to establish there is no genuine issue requiring a trial.⁶⁷

To answer whether there is a genuine issue requiring a trial, the adjudicator must consider “whether the quality of the evidence is such that it is fair to conclusively adjudicate the action summarily.”⁶⁸ A respondent may prevent summary judgment “by challenging the moving party’s entitlement to summary judgment (based on gaps or uncertainties in the facts, the record, or the law, etc.), or by raising a positive defence (such as a limitations defence).”⁶⁹

⁶⁰ This raises the question of whether the initial rise in success in Ontario was due to an actual culture shift or other factors.

⁶¹ 2016 ABQB 41 [*Infante*].

⁶² *Ibid* at para 24.

⁶³ *Ibid* at para 25.

⁶⁴ *Ibid*, quoting 776826 *Alberta Ltd v Ostrowercha*, 2015 ABCA 49 at para 11.

⁶⁵ *Infante*, *ibid* at para 26.

⁶⁶ *Ibid*.

⁶⁷ *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd*, 2019 ABCA 49 at para 32 [*Weir-Jones*] [emphasis in original].

⁶⁸ *Ibid* at para 34.

⁶⁹ *Ibid* at para 35.

There are, thus, two parts to a successful summary judgment application in Alberta. The applicant must:

- (1) prove its case on a balance of probabilities; and
- (2) prove the state of the evidence is such that final adjudication is fair.

A respondent may prevent summary judgment by opposing either or both of these points.

Even with this definitive adjustment, adjudicators have been slow to change. There was only a marginal increase in the proportion of summary judgment applications that were granted in 2019. The Court of Appeal expressed its frustration with this in *Hannam*. It reviewed all summary judgment decisions in Alberta for the 530-day period before *Weir-Jones* and the 530-day period after, with the following results:

- most adjudicators denied summary judgment if the parties disputed material facts;
- no adjudicator heard oral testimony;
- most adjudicators granted summary judgment only if they had no doubt about the outcome; and
- in most decisions, the outcome would have been the same regardless of whether the pre-*Hryniak* or the post-*Hryniak* test was applied.⁷⁰

The change in the test for summary judgment occurred only in February 2019 and was not substantially implemented that year. It is therefore necessary to examine outcomes in 2020. This evidence is problematic, given the impact of the COVID-19 pandemic on court processes. There are only 24 reported summary judgment decisions in 2020, compared to 55 in 2019. However, it is the only evidence we have.

The summary judgment success rate jumped from 58.6 percent in 2019 to 70.8 percent in 2020.⁷¹ This may be a statistical anomaly, due to unrelated circumstances such as the spike in 2016, or to the COVID-19 pandemic and a potential desire to resolve disputes remotely and quickly. However, given the Court of Appeal's efforts, I tentatively conclude that the culture shift may finally be taking hold in summary judgment.

VI. ARE THE DISPUTES OF ORDINARY CANADIANS AMENABLE TO SUMMARY JUDGMENT?

As explained above, the Supreme Court's purpose in its culture shift is to increase the accessibility of fair and just adjudication in the public justice system for ordinary Canadians. This will work only if the Proportionality Principle permits the disputes of ordinary

⁷⁰ *Hannam*, *supra* note 39 at paras 165–68. This is intriguing, as it suggests that relaxing the test for summary judgment wouldn't make much difference, anyway. Are we to attribute any increase in the success rate to factors other than a change in the test?

⁷¹ For full or partial summary judgment.

Canadians to be resolved by summary judgment. If it does not, and ordinary Canadians are denied summary judgment, ordinary Canadians must still rely on trials for public adjudication. There is no improvement in accessibility. The evidence indicates expanded summary judgment is far more beneficial for non-ordinary Canadians than for ordinary Canadians.

Whether the disputes of ordinary Canadians tend to be proportional to summary judgment is difficult to directly measure. The Supreme Court gives no justification for its assumption that because summary judgment will be more affordable for ordinary Canadians it will also be proportional. Furthermore, it is futile to canvass the types of disputes ordinary Canadians tend to be embroiled in and predict whether summary judgment would be granted. Proportionality is very circumstantial, and current Alberta jurisprudence creates a lot of uncertainty.⁷²

I attempted to assess this issue by analysis of reported summary judgment decisions. I propose that, if the disputes of ordinary Canadians tend to be suitable for summary judgment under the Proportionality Principle, then application of that Principle will result in more summary judgment applications by ordinary Canadians and a greater proportion of these applications will be granted.

I analyzed all reported decisions⁷³ in summary judgment applications in the Court of Queen’s Bench given in the year prior to Alberta’s adoption of *Hryniak* (March 2013 through February 2014), the year after that adoption (March 2014 through February 2015), during the spike in the success rate in the 2016 calendar year, and during the 2019 and 2020 calendar years. I defined an “ordinary Canadian” as a party to an application who is a natural person and who is not assisted by an organization such as an employer or an insurer.⁷⁴ I designated a summary judgment application as being made by an ordinary Canadian if it was made only by ordinary Canadians, without a non-ordinary party as a co-applicant.⁷⁵ I determined the proportion of summary judgment applications each year that were made by ordinary Canadians, the proportion of those applications that were granted in whole or in part, and the proportion of all other applications that were granted in whole or in part. The results are in Table 2.

The proportion of applications by ordinary Canadians in 2020, the only year during which the culture shift has been operating for summary judgment applications, is right in the middle of the historical range. Only one-third of those applications succeeded — far below historical success rates. Thus, despite an overall *increase* in the success rate of summary judgment applications, success for ordinary Canadians has *decreased*. This indicates summary judgment may be unhelpful for ordinary Canadians.

⁷² Billingsley, *supra* note 6 at 28.

⁷³ This is another weakness of the analysis. There is no data on the outcomes of summary judgment applications that are not reported. We do not know if the reported decisions are a representative sample of the full population.

⁷⁴ Given that the plaintiffs in *Hryniak* were a group of individuals capable of a \$1.2 million USD investment, we can presume the class of “ordinary Canadians” isn’t defined by financial means. This is, in itself, a fault of the Supreme Court’s reasoning as there are likely some businesses who can afford litigation by trial less than the *Hryniak* plaintiffs.

⁷⁵ I reviewed each case’s facts to assess which definition each party fit.

**TABLE 2: SUMMARY JUDGMENT APPLICATIONS
BY ORDINARY CANADIANS**

Year	Proportion by Ordinary Canadians	Proportion of Ordinary Canadians Succeeding	Proportion of Non-Ordinary Canadians Succeeding
Before Adoption	12/54 = 22.2%	5/12 = 41.7%	23/42 = 54.8%
After Adoption	16/55 = 29.6%	7/16 = 43.8%	26/39 = 66.7%
2016	13/62 = 21.0%	7/13 = 53.8%	33/49 = 67.3%
2019	17/61 = 27.9%	9/17 = 52.9%	27/44 = 61.4%
2020	6/24 = 25.0%	2/6 = 33.3%	15/18 = 83.3%

On the other hand, it appears very beneficial for *non-ordinary* Canadians. Three-quarters of applications for summary judgment are by this class of litigant, and their success rate has significantly increased. This suggests that expanded summary judgment does more for non-ordinary Canadians than for ordinary Canadians.

This concern intensifies as we examine trends in applications *against* ordinary Canadians. Using the sample years identified above, I tracked the number of applications made against ordinary Canadians alone, and the number made against non-ordinary Canadians or ordinary Canadians with non-ordinary Canadians as co-respondents. I also determined the proportion of each type of application that was granted. The results are in Table 3.

**TABLE 3: SUMMARY JUDGMENT APPLICATIONS
AGAINST ORDINARY AND NON-ORDINARY CANADIANS**

Year	Against Ordinary Canadians		Against Non-Ordinary Canadians	
	# Applications	% Granted	# Applications	% Granted
Before Adoption	26	57.7	28	46.4
After Adoption	25	56.0	30	60.0
2016	25	64.0	37	64.9
2019	31	54.8	32	53.1
2020	9	77.8	15	66.7

Though the success rate against both types of litigants has increased (due to the culture shift increasing the success rate in general), the jump has been significantly greater against ordinary Canadians. This is especially remarkable compared against 2016 — the last spike in the summary judgment success rate. That spike was felt evenly by both classes of litigants. Conversely, the spike caused by the culture shift has been disproportionately against ordinary

Canadians. These Canadians may have the benefit of their disputes being resolved more quickly, just not in their favour.⁷⁶

VII. DOES THE PROPORTIONALITY PRINCIPLE PRESERVE FAIRNESS AND JUSTICE?

This is the final critique of the Supreme Court's approach to improving access to justice through summary adjudication. In *Hryniak*, the Supreme Court identified fairness and justice in adjudication as the primary principle underlying the Canadian justice system. It gave the Proportionality Principle to ensure that expanded summary adjudication preserves that value. The question is whether the Proportionality Principle succeeds in this function. Though fairness and justice are difficult to measure,⁷⁷ evidence suggests the Proportionality Principle fails in its purpose.

Scholars first raised this issue long before the Supreme Court firmly entrenched proportionality in civil litigation in *Hryniak*. As early as 2008, they warned, “[w]hat falls to procedural lawyers and scholars is to grapple with this balance between efficiency and accuracy and to ensure a model of justice that remains uncompromised by the erosion of its procedural safeguards.”⁷⁸ Further:

While no one is suggesting that less process necessarily leads to *better*, more accurate outcomes, shifts in our application of civil procedure rules suggest that we are willing to tolerate less process if it results in greater access. But does it not follow that such an elevation of efficiency as a norm must also include accountability for its results? Not only should savings in costs and time be measured, but it is equally critical to track the quality of justice that is meted out through these modified procedures, watching carefully for unacceptable compromise.⁷⁹

Critics have proposed that the changes introduced in *Hryniak* “have negatively impacted vulnerable parties who cannot explain their positions clearly through summary procedures.”⁸⁰ I have already demonstrated that, in Alberta at least, the culture shift has resulted in disproportionately greater success *against* ordinary Canadians. Whether this is because there *should* be greater success against ordinary Canadians or because ordinary Canadians are unfairly disadvantaged requires further analysis.

I calculated the success rate of applications by non-ordinary Canadians against ordinary Canadians, and the success rate of applications by ordinary Canadians against ordinary Canadians. Table 4 gives the results. Success by non-ordinary Canadians against ordinary Canadians has significantly increased. But for 2016, success for ordinary Canadians against ordinary Canadians has continuously declined.

⁷⁶ Understanding of this issue would be improved by determining the proportion of trials that are decided against ordinary Canadians and using that figure for comparison. If ordinary Canadians fare better at trial, it would further indicate that summary judgment is not beneficial for them.

⁷⁷ The Supreme Court did not expound what it meant by “fair” and “just”. I do not propose definitions here. The conclusions to be drawn in this analysis depend on what one considers “fair” and “just.”

⁷⁸ Hanycz, *supra* note 13 at 99.

⁷⁹ *Ibid* at 101 [emphasis in original].

⁸⁰ Kennedy, *supra* note 17 at 22.

**TABLE 4: SUCCESS RATE OF NON-ORDINARY
AND ORDINARY LITIGANTS AGAINST ORDINARY LITIGANTS**

Year	Non-Ordinary vs Ordinary		Ordinary vs Ordinary	
	# Applications	% Granted	# Applications	% Granted
Before Adoption	19	52.6	8	75.0
After Adoption	18	61.1	8	37.5
2016	18	61.1	7	71.4
2019	21	66.7	12	25.0
2020	8	87.5	1	0*

* This is unreliable, as there was only one application involving only ordinary Canadians in 2020.

The Proportionality Principle and the expansion of summary judgment assume that ordinary Canadians have fewer resources than non-ordinary Canadians. Yet those with more resources now have significantly greater success against the vulnerable, while disputes involving only ordinary Canadians are increasingly sent to trial. This suggests ordinary Canadians struggle to explain their position in summary judgment and are being negatively impacted by its expansion.

We can further examine this issue through analysis of appeals. This involves several steps. I first calculated what percentage of reported summary judgment decisions in the Court of Queen’s Bench in a given year were appeals and what percentage were subsequently appealed. The results are in Table 5.

The appeal rate has been significantly higher since 2016 — mostly in appeals from masters to judges. Therefore, the culture shift in 2020 hasn’t affected the overall appeal rate. To draw any conclusions, we must analyze what was appealed. I determined what percentage of appeals were appealing full or partial summary judgment and what percentage appealed denial of summary judgment. The results are in Table 6.

**TABLE 5: PROPORTION OF SUMMARY JUDGMENT DECISIONS
THAT WERE APPEALS OR APPEALED**

Year	% Decisions that were Appeals	% Decisions Appealed
Before Adoption	11.3	13.2
After Adoption	13.7	21.6
2016	23.6	21.8
2019	29.3	17.2
2020	25.0	20.8*

*This may be understated. Whether a decision was appealed was determined by the presence or absence of a reported appeal decision. At the time of writing, there may be appeals from 2021 that have not yet received a judgment.

**TABLE 6: PROPORTION OF APPEALS
FROM APPLICATIONS THAT WERE GRANTED**

Year	% Appealing Summary Judgment	% Appealing Denials
Before Adoption	60.0	40.0
After Adoption	61.1	38.9
2016	68.0	32.0
2019	33.3	66.7
2020	63.6	36.4

This measure is very consistent in every year except 2019. That is the only year in which the majority of appeals were from decisions not to grant summary judgment. Above, it was pointed out that the Court of Appeal changed the test for summary judgment to reflect the culture shift only in February of that year. We also noted that this change was not fully felt until 2020. I conclude the majority of appeals in 2019 were by counsel who recognized that adjudicators in the Court of Queen’s Bench were not granting summary judgment as often as the new test required. Again, the culture shift has not affected this trend in appeal behaviour.

The final evidence needed is on the tendency to reverse decisions on appeal, and whether such reversals are from decisions to grant summary judgment or to deny it. I calculated the percentage of appeals from masters that resulted in full or partial reversal, the percentage of appeals from judges that resulted in full or partial reversal, the total percentage of appeals that resulted in full or partial reversal, and the percentage of full or partial reversals that were from decisions granting summary judgment. The results are in Table 7.

The years 2016 and 2020 are the two years that demonstrated a spike in the success rate for summary judgment applications. Both years also exhibit an increase in reversals from previous years. The year 2019 also has an increase in the reversal rate, but this is entirely in appeals to the Court of Appeal. This is also the year with the lowest proportion of reversals from decisions granting summary judgment. It’s clear that 2019 was a year of transition, as the new test for summary judgment given in *Weir-Jones* took root.

TABLE 7: APPEAL REVERSALS

Year	% Appeals from Masters Reversed	% Appeals from Judges Reversed	% All Appeals Reversed	% Reversals from Grants
Before Adoption	33.3	22.2	26.7	50.0
After Adoption	14.3	18.2	16.7	33.3
2016	53.9	8.3	32.0	37.5
2019	41.2	40.0	40.7	27.3
2020	50.0	40.0	45.5	60.0

In 2020, we detect a problem. Even with the culture shift now blossoming, the proportion of reversals increased further. It also has the highest-ever proportion of reversals of decisions

granting summary judgment. This indicates two things. First, the high proportion of reversals suggests disagreement over when summary judgment is appropriate, and that whether summary judgment will be granted is dependent on the judge. Second, the higher tendency to reverse decisions granting summary judgment suggests a strong risk of summary judgment being granted where it shouldn't be granted. Combining these two findings with the above evidence that ordinary Canadians struggle in summary judgment, I conclude that expanded summary judgment presents a high risk of injustice for ordinary Canadians.

VIII. CONCLUSION

In *Hryniak*, the Supreme Court correctly identified that the lack of accessibility for ordinary Canadians to fair and just adjudication in the public justice system is a major problem. It must be addressed. Unfortunately, the solution provided by the Supreme Court has failed. The culture shift, to the extent implemented, has worked contrary to the interests of ordinary Canadians. There are four problems, stemming both from the internal rationality of the Supreme Court's prescription and from its implementation.

First, Alberta courts have misinterpreted the culture shift, ignoring the Supreme Court's underlying moral reasoning. As a result, the culture shift's application in civil procedures other than summary judgment is working contrary to the *Hryniak* Morality. This is creating adverse consequences for all litigants, but for ordinary Canadians in particular. These consequences include increased uncertainty, delays in dispute resolution, and increased costs.

Second, the culture shift is not happening to a sufficient degree. In Alberta, it has only recently been implemented in summary judgment applications. In Ontario, it has had only a marginal impact on accessibility.

Third, summary judgment is far more beneficial for non-ordinary Canadians than for ordinary Canadians. The culture shift is missing the target beneficiary.

Finally, there are legitimate concerns about whether the Proportionality Principle can keep summary judgment fair and just for ordinary Canadians. Non-ordinary Canadians have significant success against ordinary Canadians. This validates the concern that ordinary Canadians are less capable of explaining their positions through summary procedures. This makes ordinary Canadians at higher risk from the uncertainty surrounding when summary judgment is proportional.

We are therefore left with the Accessibility Problem the Supreme Court sought to address: How do we increase accessibility to public adjudication for ordinary Canadians while maintaining fairness and justice? The analysis in this article indicates continued urging of expanded summary judgment is counterproductive. We must consider alternatives.

One possibility is to reconsider our approach to the problem. Suppose the issue was that few litigants could use trials because they were only available on Thursdays from 6:00 am to 7:00 am. Likely, we would not propose the solution for increasing access to justice is to provide alternative adjudication methods. We would propose expanding the availability of trials. Let us analogize to our present problem that ordinary Canadians can't use trials because

they take too long and are too expensive. The solution is not to provide alternative adjudication methods, but rather to make trials faster and cheaper.

Perhaps *this* is the required culture shift. Not to change perspective from trial to an alternative adjudication method, but to change views on trial and preparation for trial. Future analysis of initiatives such as expedited trial processes, expanded jurisdiction of the Provincial Court, more aggressive case management, and limits on the use and purpose of pretrial processes may provide more effective approaches to accessible public adjudication.

In the end, what is most important is that we continue efforts to improve access to justice, with critical evaluation of those efforts along the way. Failure is to stop trying.