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Summary Judgment is the New Black: Why Arbitrators Can and Should Hear Motions for Summary Judgment

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Arbitrators can and should hear motions for summary judgment, particularly in light of the Supreme Court of Canada's recent decision emphasizing the important role that summary judgment plays in ensuring timely, cost-effective access to justice. Parties involved in the drafting or negotiation of arbitration clauses or agreements should consider including a clause specifically granting the arbitrator of their dispute the power to determine the matter summarily when appropriate.

The Supreme Court of Canada recently broadened the scope of summary judgment and the interpretation of what it means for there to be "no genuine issue" in *Hryniak v Mauldin* (2014 SCC 7) ("*Hryniak*"). Madam Justice Karakatsanis explained that summary judgment is available where the process (i) allows the decision-maker to make the necessary findings of fact, (ii) allows the decision-maker to apply the law to the facts, and (iii) is a proportionate, more expeditious and less expensive means to achieve a just result (*Hryniak* at para 49).

The Court in *Hryniak* explained its reasoning for the expanded scope of summary judgment as a critical part of the necessary "culture shift" required to promote timely, affordable access to justice (para 2). As Madam Justice Karakatsanis stated, "[s]ummary judgment motions provide one such opportunity" (para 3).

Given the emphasis on a need for a "culture shift" and the societal importance of timely and affordable access to justice, there is no reason to restrict summary judgment to court proceedings. An agreement between parties to submit their dispute to arbitration may well, absent an express provision to the contrary, allow parties to avail themselves of summary judgment where appropriate. Indeed, parties typically choose arbitration specifically in the hopes of achieving a more timely and affordable resolution than in typical court proceedings. To restrict access to summary judgment as a result of that choice would appear to be counter-intuitive.

Most arbitration rules do not specifically provide for a summary judgment procedure. However, most arbitration rule systems do provide arbitral tribunals the authority to determine the procedure to be followed in an arbitration, such as Section 20(1) of the Alberta *Arbitration Act* (the "Alberta Act"). Such provisions may, arguably, be used to ground an arbitrator's authority to hear and decide summary judgment motions. Most arbitration rules and most provincial arbitration acts contain a provision to similar effect.

A party resistant to summary judgment may argue that section 7(2)(e) of the Alberta Act (and the similar provisions of other provincial arbitration acts) implies an inability of an arbitrator to hear and decide summary judgment motions. That section states that the Court may refuse to stay a proceeding commenced in the face of an agreement to arbitrate where the matter in dispute is a proper one for default or summary judgment. However, the section does not say that an arbitrator *cannot* hear and

decide summary judgment motions, but rather that the Court may, on the application of a party, exercise its discretion to hear the matter instead if summary judgment is appropriate.

Furthermore, section 7(2)(e) of the Alberta Act has been criticized by the Alberta Law Reform Institute ("ALRI") in its Final Report 103, titled "Arbitration Act: Stay and Appeal issues" (ALRI: University of Alberta, 2013). In that report, the ALRI recommends repealing section 7(2)(e) on the basis that when parties have agreed to submit their dispute to arbitration, the Court should not interfere simply because the matter can be determined summarily, as arbitrators can and should make that determination where appropriate. The recommendation in the report was made following input solicited from arbitrators, lawyers, organizations, in-house counsel and various Canadian Bar Association sections.

There are no Supreme Court of Canada authorities dealing with whether arbitrators can hear motions for and award summary judgment, and no reported cases from the lower courts directly on point. However, some lower court decisions seem to imply that arbitrators may choose summary judgment procedure where appropriate. For example, in *Spar Aerospace Ltd v DRS Technologies Inc* (2000 CarswellOnt 4069), an oral decision of the Ontario Superior Court, a party appealed the decision of an arbitrator ordering summary judgment. The Court did not comment on whether the arbitrator had jurisdiction to hear and decide the summary judgment motion, and the issue does not appear to have been raised by the parties. However, the Court found that the arbitrator had complied with the law on summary judgment, and dismissed the appeal, necessarily implying that the arbitrator had the jurisdiction to hear and decide the summary judgment motion in the first place. In addition, although not dealing specifically with summary judgment, the Alberta Court of Queen's Bench has held that "absent manifestly unfair and unequal treatment to the other party as a result" findings made as part of an arbitrator's chosen procedure should not be disturbed (*Clarke v Bean,* 2009 ABQB 755 at paras 34-35).

Arbitrators and the parties to arbitrated disputes should take heed of the Supreme Court of Canada's recent pronouncements on the importance of increasing timely, cost-efficient access to justice and the role that summary judgment plays in achieving that goal. Where appropriate, and where doing so will lead to a proportionate, more expeditious and less expensive means of achieving a just result, arbitrators can and should utilize summary judgment in determining disputes.

A fundamental tenet of arbitration is that parties may agree to their own process. In order to ensure that summary judgment of disputes is available, parties drafting or negotiating arbitration clauses or agreements could include a clear provision that the arbitral tribunal shall have the jurisdiction to hear and award summary judgment or summary dismissal.

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