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## Can losing a summary judgment motion hurt you at trial?

In *Hryniak v. Mauldin*, the Supreme Court of Canada called for a “culture shift” in the legal community’s approach to adjudicating disputes. Justice Karakatsanis provided a clear directive: summary judgment is a “legitimate alternative for adjudicating and resolving legal disputes”. It is not merely a “tool used to weed out clearly unmeritorious claims or defences.”

As Justice Karakatsanis rightly pointed out, failed, or even partially successful, summary judgment motions add costs and delay to proceedings. But what about the strategic risks? If a party’s summary judgment motion fails, is the party estopped from making the same argument at trial?

Not necessarily, says the Ontario Court of Appeal in *Vanden Bussche Irrigation & Equipment Limited v. Kejay Investments Inc.*

In this case, the Plaintiff, Vanden Bussche Irrigation & Equipment Limited, brought an action against the Defendant, Kejay Investments Inc., for payment for equipment that it had supplied to the Defendant. Kejay brought a motion for summary judgment on the grounds that the limitation period had run out and the Plaintiff’s claim was statute-barred.

The motion judge dismissed Kejay’s motion for summary judgment, finding that some equipment had been returned to Vanden, triggering an extension of the limitation period. The motion judge concurrently refused to grant summary judgment in favour of Vanden, without providing reasons, and sent the action to trial.

Kejay wanted to be able to argue the limitations period defence at trial. However, it was concerned that it could be estopped from doing so by the motion judge’s decision.

Kejay first appealed to the Divisional Court. It then concluded that it had brought its appeal in the wrong court because the decision of the motion judge disposed of a “substantive right” and was thus a final order. Kejay advised Vanden of its position and brought a motion seeking an order permitting leave to late file its notice of appeal in the Court of Appeal.

The Court of Appeal dismissed Kejay’s motion, finding that the Court did not have the jurisdiction to hear the appeal. The

Court found that the motion judge's determination that the limitation period had not run was not binding and was not a final order.

The Court found that the motion judge "did not specifically invoke and reference the rule giving him the power to make a binding determination nor did the Order itself reflect any determination on the issue of the limitation period". Findings of fact in these circumstances are not binding on the Court at trial. Accordingly, in this case, Kejay was free to raise the issue of the limitation period again at trial.

The Court's decision in this case indicates that in certain circumstances it is possible to attenuate the strategic risks to the moving party associated with a failed summary judgment motion. Conversely, it underscores the need, from the perspective of a respondent to such a motion, to ensure that the motion judge invokes the rule giving him or her the power to make binding determinations and that the Order itself reflects the final determination on the issue. Failing that, the moving party will have several opportunities to make the same argument.