

Ontario Court of Appeal Gives Teeth to Summary Judgment Rule

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On December 5, 2011, the Court of Appeal for Ontario released its long-awaited decision concerning the province's new summary judgment rule (Rule 20). As anticipated, the Court confirmed the expansive breadth of the motion judge's jurisdiction under the amended Rules, signaling a marked departure from the circumscribed judicial role that had developed under the former Rules. In so doing, the Court made it clear that such jurisdiction was not unbounded and that the summary judgment procedure will not be appropriate in all cases. To the contrary, in keeping with the principles that animated the broader 2010 amendments to Ontario's civil justice system, the Court confirmed that the application of new Rule 20 will ultimately be governed by considerations of "proportionality".

Genesis of the New Summary Judgment Rule

The new summary judgment rule is part of a series of recent amendments designed to make the civil justice system in Ontario more accessible and affordable. It has its origins in the 2007 Osborne Report, which concluded that the existing summary judgment rule was not effective because of the jurisprudence that had developed which severely limited the scope and application of the former Rule 20. In particular, the case law governing the old rule prohibited the motion judge from evaluating the credibility of witnesses, weighing the evidence or making findings of fact.

The Osborne Report found that this prohibition had deterred litigants from using the summary judgment procedure and had limited its effectiveness. Accordingly, the Osborne Report recommended that the rule be amended to expressly empower judges to weigh evidence, draw inferences and evaluate credibility. The Osborne Report further recommended that the motion judge be permitted to direct a "mini-trial" in cases where the court needed *viva voce* evidence to dispose of the motion, but did not require a full trial to dispose of the case.

The new Rule 20, which came into force on January 1, 2010, adopts these recommendations. In particular, the new rule:

- replaces the test of "no genuine issue for trial" with the more focused "no genuine issue requiring a trial" (Rule 20.04(2)(a));
- empowers a judge to weigh evidence, evaluate credibility and draw inferences from evidence (Rule 20.04(2.1)); and
- allows a judge to order that oral evidence be presented for the purpose of weighing evidence, evaluating credibility and drawing inferences (Rule 20.04(2.2)).¹

Divergence in Cases Applying the New Rule

In the months following the amendments, the court began to develop its approach to summary judgment under the new Rule 20. Although a consensus emerged that the new rule broadened the court's jurisdiction, the cases diverged on the question of whether it was appropriate for a motion judge to use the new powers to decide an action on the basis of the evidence presented on a motion for summary judgment, rather than simply using the new powers to decide whether a trial was ultimately needed.²

To address this question and provide some guidance on the scope of the Court's powers under the new Rule 20, the Court of Appeal convened a five-judge panel (Winkler C.J.O., Laskin, Sharpe, Armstrong and Rouleau J.J.A.) to hear

five appeals from decisions under the amended rule. The Court also appointed five *amicus curiae* to provide submissions on how the amended rule should be interpreted: the Attorney General of Ontario, The Advocates' Society, the Ontario Bar Association, the Ontario Trial Lawyers Association and The County and District Laws Presidents' Association.

The “Fresh Approach” to Rule 20

In *Combined Air Mechanical Services Inc.*, the Court of Appeal expressly adopted a “fresh approach” to summary judgment. Accordingly, while the Court acknowledged that a substantial body of jurisprudence from the Superior Court of Justice had developed since the introduction of the new Rule 20, it refrained from commenting on prior cases on the grounds that its decision “marks a new departure and fresh approach” to summary judgment.

In summary, the Court’s new approach – described as the “full appreciation test” – requires the motion judge to conclude that he or she can fully appreciate the evidence and issues *in the case* (not just the motion) based on the motion record, as supplemented by limited oral evidence. In other words, the motion judge must determine whether this full appreciation can be obtained from the motion record, as may be supplemented by the presentation of oral evidence under Rule 20.04(2.2), or whether the attributes and advantages of the trial process are necessary to effect a full and fair resolution of the dispute.

When Will the “Full Appreciation Test” be Met?

The Court made it clear that the new Rule 20 would not eliminate all trials, but rather only the “unnecessary” ones. Its purpose, consistent with the “touchstone of proportionality” that guides interpretation of the Rules, is to “provide an appropriate means for effecting a fair and just resolution of the dispute before the court.” As a result, certain scenarios are more likely to meet the full appreciation test, such as:

- Where the case is focused on the documents;
- Where there are limited factual issues in dispute;
- Where there are only a few witnesses testifying (in writing or orally) to only a few disputed issues;
- Where the discovery process is complete or would not be necessary to permit a fair and just resolution of the dispute;
- Where the claims or defences have no chance of success; and
- Where the case turns on questions of law.

In contrast, in cases that call for multiple findings of fact based on conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion may not provide a fair and just process for resolving the dispute.

Even where parties agree that summary judgment is an appropriate process to resolve the dispute, the Court of Appeal made it clear that the full appreciation test applies and the motion judge retains a discretion to refuse summary judgment where the test is not met.

If the motion judge decides that he or she can fully appreciate the evidence and issues in the case, then the motion judge is free to resolve factual issues and dispose of the action. Notably, the Court of Appeal confirmed that once the motion judge decides that summary judgment is the right process to resolve the dispute, the evidentiary rules that

governed summary judgment under the old rule, such as the requirement that all parties put their “best foot forward”, remain in place.

What if the Summary Judgment Motion is Premature?

The Court of Appeal recognized that there may be cases in which the summary judgment motion is premature because it was brought before discovery was complete. In such a case, the Court of Appeal suggests moving to stay or dismiss the motion “where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery.” In view of this commentary, it will be interesting to see whether litigants choose to bring such a motion independently in the context of a slimmer paper record, or whether they fold it into their response on the merits.

What Scope is There for Oral Evidence?

The new Rule 20 permits a summary judgment motion judge – as distinct from the litigants themselves – to direct oral evidence in order to assist in determining whether any of the issues raised in the action require a trial for their fair and just resolution. The Court of Appeal explains that this power does not convert a summary judgment motion into a summary trial by virtue of the following limitations:

- only the motion judge can direct oral evidence;
- counsel cannot require oral evidence or appeal on the basis that the failure of the motion judge to permit oral evidence was an error;
- the motion judge can restrict the extent of the evidence to be led, the order in which it is led, and the issues to which this evidence is to be directed; and
- counsel cannot rely on oral evidence to supplement the motion record.

In short, counsel must be prepared to argue the summary judgment motion based on the paper record. Although the motion judge can order oral evidence if he or she believes that such testimony will help in weighing evidence, assessing credibility or drawing inferences, this is not intended to convert the proceeding into a summary trial (notwithstanding the reference to “mini-trials” incorporated into the body of the new rule).

Application of the “Fresh Approach” to the Five Cases Under Appeal

Having set out the general test, the Court of Appeal turned to the specific appeals before it. In so doing, it held that the standard of review is the “correctness” standard by virtue of the fact that the determination of whether there is “no genuine issue requiring a trial” is ultimately a question of law.

The Court’s application of the test to the five cases under appeal provides a useful illustration of how the test will operate in practice:

1. In *Combined Air Mechanical Servicesv. Flesch*, the motion judge granted summary judgment to the defendants, dismissing the plaintiff’s claim for damages for alleged breaches of restrictive covenants in an acquisition agreement.

The Court of Appeal dismissed the plaintiff’s appeal and approved the motion judge’s decision to hear oral evidence from a limited number of witnesses on a discrete issue. This evidence provided assisted the motion judge in weighing the evidence before him, evaluating the credibility of the deponents and drawing reasonable

inferences from the evidence.

2. In both *Mauldin et al. v. Cassels Brock et al.* and *Bruno Appliance and Furniture v. Cassels Brock et al.*, the motions were based on 18 affidavits and 3 weeks' of cross-examination transcripts but no oral evidence. The motion judge granted summary judgment against one defendant in both actions, finding that he had defrauded the plaintiffs. The motion judge refused summary judgment against the other defendants, who had been sued in fraud, conspiracy, negligence and breach of contract, concluding that a trial was necessary to determine liability.

The Court of Appeal noted that both actions bore the hallmarks of the type of actions in which the full appreciation of the evidence and issues could only be achieved at trial, including the fact that:

the motion record was voluminous;

many witnesses gave evidence;

different theories of liability were advanced against each of the defendants;

numerous findings of fact were required to decide the motions;

credibility determinations lay at the heart of the dispute;

the evidence of major witnesses was in dispute on key issues; and

assessing credibility was made more difficult by the near absence of reliable documentary yardsticks.

The Court held that going forward, cases such as *Mauldin* and *Bruno* will require a trial and should not be decided by way of summary judgment. Nonetheless, given that a decision had already been reached in *Mauldin* after careful scrutiny of a lengthy record, the Court held that the defendant's appeal should be dismissed. The Court granted the appeal in the *Bruno* action, because the motion judge failed to consider one of the elements of the cause of action for civil fraud.

3. In *394 Lakeshore Oakville Holdings Inc. v. Misek*, the motion judge reviewed the written evidence, granted summary judgment and declared that the plaintiff did not have a prescriptive easement over the defendant's property.

The Court of Appeal dismissed the appeal, noting that the documentary evidence was limited and not contentious, there were a limited number of relevant witnesses and the governing legal principles were not in dispute. The Court also rejected the defendant's argument that certain categories of claims (for instance, claims for prescriptive easements) should not be decided on a motion for summary judgment.

4. Finally, in *Parker v. Casalese*, a simplified procedure action under Rule 76, the motion judge reviewed the written evidence and refused to grant summary judgment against a contractor and a homeowner for allegedly causing damage to a neighbour's property.

The Court of Appeal dismissed the plaintiff's appeal, finding that the full appreciation test could not be satisfied with respect to the issues of causation and damages. The Court also noted that although summary judgment is available in a simplified procedure action, given the efficiencies already created by Rule 76, the motion judge will need to apply the full appreciation test and be satisfied that entertaining the motion is consistent with the efficiency rationale reflected in the simplified procedures rules. Where there is competing evidence from multiple

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witnesses or where oral evidence is clearly needed to decide certain issues, summary judgment will not be appropriate in a simplified procedure action.

If you have any questions about the subject matter of this Osler Update, or you wish to discuss further, please contact [Craig Lockwood](#), [Mary Paterson](#) or [Adam Hirsh](#).

¹ Notably, the Court released its *Practice Direction for Civil Applications, Motions and other Matters in the Toronto Region* contemporaneous with the introduction of the amendments to the Rules, which mandated a scheduling and monitoring process for all summary judgment motions to ensure that the anticipated “hybrid hearings” involving oral evidence or the subsequent “tailored trial of issues” would proceed “expeditious[ly]”.

² See the discussion in *Mauldin v. Cassels Brock & Blackwell LLP*, 2011 ONCA 67 (CanLII), (<http://canlii.ca/t/2fd7v>), at paras. 13-24.