

## INSURANCE LAW BULLETIN

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### SUMMARY JUDGMENT MOTIONS

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On January 1, 2010, a series of amendments to the *Rules of Civil Procedure* came into force. Among the most significant of these amendments were those to the rules governing summary judgment motions. Rule 20.04 now stipulates that the test for summary judgment is whether there exists a “genuine issue requiring trial” as opposed to the previous test of whether there was a “genuine issue for trial”. Rule 20.04(2.1) also provides that judges hearing summary judgment motions now have the power to weight evidence, resolve issues of credibility and draw reasonable inferences from the evidence.

On December 5, 2011, the Court of Appeal for Ontario released its decision in *Combined Air Mechanical Services Inc. v. Flesch*, a case that was actually a consolidation of four separate appeals from summary judgment motions heard by lower courts. This was the first time that the Court of Appeal extensively considered the impact of the amendments to rule 20, and the Court assembled a special five justice panel to hear the appeals.

#### THE COURT OF APPEAL’S DECISION

The Court of Appeal acknowledged that the rationale behind the amendments to rule 20 was that outlined in the Osborne Report: that the existing jurisprudence on summary judgment motions restricted their effectiveness and availability as a procedural remedy for civil litigants. Whereas under the old rule 20 summary judgment was only available when the parties agreed to use the summary judgment process or when a claim or defence was clearly without merit, the new rule 20 permits a motion judge, in some circumstances, to decide the merits of the case.

The Court of Appeal expressly held that its old jurisprudence on summary judgment motions had been superseded by the amendments to Rule 20. The

Court further noted that while there was already a consider body of jurisprudence on the new rule 20, its ruling “marks a new departure and a fresh approach to the interpretation and application of the amended rule 20.”

### The “Interest of Justice” and the Full Appreciation Test

At the heart of the Court of Appeal’s decision is a new test called the “full appreciation test.” This test is based on the principle that the default judicial resolution of civil litigation is by way of a full trial. A trial judge is able to perceive the behaviour of witnesses, hear them in their own words and follow the narrative of the evidence as a whole. This is in contrast to a motion judge, who normally hears only arguments from counsel, and whose evidence consists of affidavits (usually drafted by counsel) and transcripts of cross-examinations of affiants.

Rule 20.04(2.1) provides that the new power to weight evidence, determine credibility and draw inferences may be exercised “unless it is in the interest of justice for such powers to be exercised only a trial”. According to the Court of Appeal, the “interest of justice” functions as threshold that must be met before a motion judge can consider exercising the powers provided under 20.04(2.1).<sup>\*</sup> The motion judge must ask himself/herself: “*can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?*”

So when can a motion judge have full appreciation of a case? One thing the Court of Appeal made clear is that the ability to fully appreciate a case is not synonymous with being able to fully read a written record. There can be no hard and fast rule as to when full appreciation of a case is possible. However, the Court of Appeal provided some factors that will have to be considered under the full appreciation test:

- *The size of the record.* Cases involving either extensive evidence or minimal evidence are likely not conducive to summary judgment. The rationale for the latter is that small cases or cases under the simplified procedure are more effectively dealt with through short trials.<sup>†</sup>

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<sup>\*</sup> The full text of Rule 20.04(2.1) reads as follows:

(2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

<sup>†</sup>The Court of Appeal specifically noted that it would be rare to have a case under the simplified procedure that would be appropriate for resolution via a summary judgment motion. The whole purpose of the simplified procedure is to resolve smaller disputes expeditiously through the use of the abridged procedures found in Rule 76. The use of summary judgment motions conflicts with this purpose.

- *The number of witness.* The more witnesses involved in a case, the less likely that a motion judge will be able to fully appreciate the case.
- *The theory of liability.* If there are multiple theories of liability being advanced, it is less likely that the case can be fully appreciated on a motion.
- *The findings of fact required.* Again, the greater the number of factual findings needed to resolve the case, the less likely that it is amendable to summary judgment.
- *The credibility issues involved.* Where credibility findings are critical components of the dispute, or where there will be difficulty in making credibility findings on the available written record, a full trial will normally be more appropriate.

### Oral Evidence and “Mini-Trials”

One of the other additions to rule 20 was the new power for motion judges to order the presentation of oral evidence at summary judgment motions. The Court of Appeal made it clear that while Rule 20.04(2.2) refers to “mini-trials”, this in no way allows a summary judgment motion to be converted into an actual trial. All that Rule 20.04(2.2) creates is “another tool to better enable the motion judge to determine whether it is safe to proceed with a summary disposition rather than requiring a trial.” It should be used sparingly, and should be restricted to a limited number of witnesses on “specific, discrete and determinative issues”.

The Court of Appeal also noted that the use of oral evidence is exclusively within the discretion of the motion judge. Parties cannot presume that they will be permitted to present oral evidence, and must be prepared to have their motion resolved on the written materials filed. Also, oral evidence cannot be used to supplement the existing motion record, but rather must go to evidence already in the existing record.

### Evidence, Procedure and Costs

The Court of Appeal held that the historic “best foot forward” principle still applies. Parties to a summary judgment motion must still put forward their best case and evidence at the hearing. However, the court then added the caveat that the full appreciation test may not be met in more complex cases before affidavits of documents and productions have been exchanged and discoveries have been completed. In such circumstances, motion judges should consider staying summary judgment motions until these steps are completed.

Another amendment of significant was the removal of the presumptive entitlement to substantial indemnity costs on the part of a successful responding party. Rule 20.06 now provides that substantial indemnity costs can only be awarded when it is shown that a party acting unreasonably or in bad faith. While at first glance this amendment may seem to highly restrict the use of substantial

indemnity costs, the Court of Appeal suggested that as the jurisprudence on the new summary judgment rule is established, “the reasonableness of the decision to move for summary judgment or to resist such a motion will be more closely scrutinized by the court in imposing cost orders under rule 20.06.” As such, the possibility of substantial indemnity costs awards cannot be easily discounted.

### Trial Management Powers

The new rule 20.05 grants a motion judge extensive trial management powers in the event that a summary judgment motion is dismissed or only partially granted. However, the Court of Appeal held that these powers are only to be used to salvage the time, effort and cost expended on the failed summary judgment motion. They are not to be used as an alternate means by which to case-manage an action.

### **COMMENTARY**

The concept of summary judgment has been a source of tension between the desire to resolve litigation expeditiously and the necessity of ensuring procedural fairness to litigants. The former was often a consideration for motion courts hearing summary judgment motions, while the latter was often invoked as a justification by appellate courts for overturning summary judgments and restricting their use. To a certain extent, the Court of Appeal’s decision in *Combined Air Mechanical Services Inc. v. Flesch* preserves this clash of principles.

The Court of Appeal’s decision is a clear statement that the new rule 20 has the same purpose as the old rule 20: to weed out claims or defences without any merit. However, the new rule is not to be treated as creating a kind of hybrid procedure, half-way between a motion and a trial, for resolving cases on their merits. The Court even went out of its way to provide an additional caution to members of the bar, warning that they have the responsibility to consider the costs of bringing a summary judgment motion as this is not an issue that should be considered by the courts hearing such motions.

The most consequential impact of the Court of Appeal’s decision is the creation of the full appreciation test, which is likely to pose a tactical dilemma for parties contemplating summary judgment motions. Parties now have to consider two questions: first, whether the issues involved in the litigation can be resolved through summary judgment; and second, whether a motion judge can fully appreciate the whole case. The concept of fully appreciating a case is nebulous and, one may add, somewhat circuitous: a motion judge is required to review a case on a written record for the purpose of determining whether they can understand the case on a written record. More importantly though, the question of whether a case can be fully appreciated is a legal question, and is therefore reviewable on the correctness standard of appellate review. This means that

appeals of summary judgment motions under the new rule are likely to effectively result in a second hearing of the motion, and consequently another opportunity for a different outcome.<sup>‡</sup>

A final point should be made. The full appreciation test is only applicable to cases that are being decided through the use of the new powers to weight evidence, determine credibility and draw inferences. In cases where these powers are not needed – cases that would have been amendable to summary judgment under the old rule 20 – the full appreciation test does not apply and summary judgment can be granted pursuant to old “genuine issue for trial” test.

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<sup>‡</sup> The Court of Appeal did hold that where full appreciation is possible, a motion judge’s findings of fact under rule 20.04(2.1) will attract a deferential standard of review on appeal. However, if the motion judge was legally incorrect about fully appreciating the case, his or her findings of fact will be irrelevant as the powers under rule 20.04(2.1) cannot be utilized as a matter of law.