COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENOR, ONTARIO BAR ASSOCIATION

File No. C51986

BETWEEN:

COMBINED AIR MECHANICAL SERVICES INC., DRAVO MANUFACTURING INC. AND COMBINED AIR MECHANICAL SERVICES

Appellants

– and –

WILLIAM FLESCH, WJF INVESTMENTS INC., SERVICE SHEET METAL INC. AND JAMES SEARLE

Respondents

File No. C52912

AND BETWEEN:

FRED MAULDIN, DAN MYERS, ROBERT BLOMBERG, THEODORE LANDKAMMER, LLOYD CHELLI, STEPHEN YEE, MARVIN CLEAIR, CAROLYN CLEAIR, RICHARD HANNA, DOUGLAS LAIRD, CHARLES IVANS, LYN WHITE AND ATHENA SMITH

Plaintiffs (Respondents)

– and –

CASSELS BROCK & BLACKWELL LLP, GREGORY JACK PEEBLES AND ROBERT HRYNIAK

Defendants (Appellant)

File No. C52913

AND BETWEEN:

BRUNO APPLIANCE AND FURNITURE INC.

Plaintiff (Respondent)

– and –

CASSELS BROCK & BLACKWELL LLP, GREGORY JACK PEEBLES
AND ROBERT HRYNIAK

Defendants (Appellant)

File No. C53035

AND BETWEEN:

394 LAKESHORE OAKVILLE HOLDINGS INC.

Plaintiff (Respondent)

– and –

CAROL ANNE MISEK AND JANET PURVIS

Defendants (Appellant)

File No. C53395

AND BETWEEN:

MARIE PARKER, KATHERINE STILES
AND SIAMAK KHALAJABADI

Plaintiffs (Appellants)

– and –

ERIC CASALESE, GERARDA DINA BIANCO CASALESE, PINO SCARFO,
ANTONIETTA DI LAURO AND MAURO DI LAURO

Defendants (Respondents)

TO: COUNSEL LISTED IN ORDER OF THE HONOURABLE ASSOCIATE CHIEF JUSTICE OF ONTARIO DATED JUNE 1, 2011 (BY EMAIL)

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PART I – OVERVIEW

1. Pursuant to an order of the Honourable Associate Chief Justice of Ontario, dated May 4, 2011, the Ontario Bar Association (the "OBA") was appointed *Amicus Curiae* for the purpose of rendering assistance to the court on the meaning and scope of rule 20 of the *Rules of Civil Procedure* (the "Rules"). The OBA does not take a position with respect to the merits of any of the decisions under appeal.

The Ontario Bar Association

2. As the largest legal advocacy organization in the Province, the OBA represents over 17,000 lawyers, judges, law professors and law students. Its mission includes promoting respect for the justice system and the rule of law. OBA lawyers include plaintiff and defense counsel who practise in no fewer than 37 practice sections and represent a broad spectrum of clients – from large corporations to the indigent.

Background to the Amendments

3. In June 2006, the Ontario Government asked former Associate Chief Justice of Ontario, the Honourable Coulter Osborne, to review and recommend improvements to the Civil Justice System to make it more accessible and affordable for Ontarians. After widespread consultation, A *Summary of Findings and Recommendations of the Civil Justice Reform Project* ("the Osborne Report") was submitted to the Attorney General of Ontario on November 20, 2007. Based largely on the recommendations in the Osborne Report, on December 11, 2008th the Ministry of the Attorney General filed Ontario Regulation 438/08 (the "Regulation") which made several changes to the Rules, including the changes to the summary judgment rule at issue here.

PART II – ISSUES

4. The question to be addressed by the OBA is, in light of the amendments to Rule 20 that came into effect pursuant to the Regulation, under what circumstances is rule 20 the appropriate procedure for determining whether a party is entitled to judgment? More specifically:

(a) Did the Regulation change the test for summary judgment or, put another way, once the motion judge has exercised the powers under rule 20.04 (2.1) and (2.2), is there any limitation on his or her ability to find facts and to grant or refuse judgment that would not apply to a judge who has conducted a full trial
(b) When is it appropriate for the judge to weigh evidence, evaluate credibility and draw reasonable inferences under rule 20.04 (2.1) in order to grant or refuse summary judgment;
(c) When is it appropriate to hear evidence under rule 20.04(2.2) as opposed to denying the motion for summary judgment, with or without an order under rule 25.05; and
(d) What are the principles to be considered in issuing orders under rule 24.05?

PART III – ARGUMENT

Overview

5. The test for summary judgment has changed from whether there are triable issues of fact to whether a determination of those issues requires a regular trial to achieve a just result. In cases where there are no issues of credibility and the evidence, on its face, clearly entitles a party to judgment, the operation of the rule has not changed as a result of the amendments - judgment should be granted. In other cases, a judge now has the power to assess credibility, weigh the evidence and draw inferences, unless it is in the interest of justice that such powers only be exercised at a trial. In determining whether it is "in the interest of justice" to proceed with the summary judgment motion and to exercise these powers, the judge must consider whether the procedure is a proportionate, expeditious method of achieving a just result. The determination of the "interest of justice" will be developed on a case by case basis but these submissions will suggest factors that may be considered.

6. Once the judge has determined that it is not contrary to the interest of justice to proceed with the exercise of the powers in rule 20.04 (2.1), the judge can make factual determinations on the basis of the paper record and/or order a mini-trial. The mini-trial will be ordered to determine discrete issues where examination and cross-examination will ensure a just result.

7. After exercising the new fact-finding powers, a motion judge is able to make any decision a trial judge could make except to the extent that he or she may be limited by the actual motions before him or her.

A. Did the Regulation change the test for summary judgment or, put another way, once the motion judge has exercised the powers under rule 20.04 (2.1) and (2.2), is there any limitation on his or her ability to find facts and to grant or refuse judgment that would not apply to a judge who has conducted a full trial?

8. Principles of statutory interpretation dictate that the amendments to rule 20 give rise to a new test.

9. When the words "no genuine issue requiring a trial" are read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and object of the Regulation and the intention of Government,[1] it is clear that the test has shifted from a determination of whether there is a material issue of fact that requires adjudication to whether the procedure of "a trial" is necessary to ensure that such adjudication is done in accordance with the interest of justice.

[1] Ruth Sullivan, *Sullivan on the Construction of Statutes,* 5th edition, (Markham,, Lexis Nexis Canada Inc., 2008), at pp. 1 and 368 ("Sullivan"); *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27, at, paras. 21 and 23.

Ordinary Meaning

10. Viewed in its ordinary sense, a genuine issue "for trial" could mean that the issue needs to be decided at a trial, that the issue is "triable" or "judicable" or that there is something genuine for a trier of fact to decide. The courts gave it the latter two meanings. The ordinary meaning of "requiring a trial," however, eliminates any ambiguity in that choice and dictates the first meaning – the procedure of *a trial* must be *needed* in order to decide the issue.

11. As Weiler J. A. put it:

> The use of the words "requiring a trial" is indicative that the court may still grant summary judgment where there is an issue on the merits that, with the exercise of its powers, the court can resolve.[2]

The Scheme of the Regulation

12. The Regulation significantly changed the scheme of rule 20 by giving the summary judgment motion judge all of the fact-finding powers of a trier of fact.

> A judge is now able to weigh the evidence, evaluate credibility and draw reasonable inferences from the evidence and order oral evidence. Implicit in these powers is the ability to make a finding of fact. [3]

Read in the context of these explicitly-conferred trial-like powers, it is clear that "a genuine issue requiring a trial" cannot mean a genuine "triable" issue or even a genuine issue traditionally left to a trial judge or jury. The explicit granting of the traditional trier-of-fact powers in rule 20 would be meaningless if the motion judge could not use them to determine the presence or absence of facts to ground judgment. If the powers are not for the purpose of finding facts, then they would serve no purpose.

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[2] *Mauldin* v. *Cassels Brock & Blackwell LLP*, 2011 ONCA 67 (CanLII), at para. 18.
[3] *Canadian Premier Life Insurance Company* v. *Sears Canada Inc*, 2010 ONSC 3834 (CanLII), at para. 68.

The Object of the Bill and the Intention of the Government

13. Interpreting the "requiring a trial" test to allow for the motion judge to do what a trial judge has traditionally done in terms of resolving disputes is also consistent with the objects and intention of the Government in enacting the Regulation. The intention to change the test is evidenced both by the very fact that rule 20.01 was amended as well as by Government statements regarding its intent.

14. An amendment to a regulation is presumed to be purposeful – either for clarification or reform of the law.[4] That the amendment to the summary judgment test was made in the context of Ontario's Civil Justice Reform Project speaks to its purpose being reform of the law.

15. The statements made by the Ministry of the Attorney General during the regulatory process,[5] specifically between the filing and the coming into force of the Regulation, make it clear that the Government's intention was to *change* the test for summary judgment in order to increase the power of the court to resolve matters at earlier stages of a proceeding, without a full trial.

16. In its explanation of the changes it made to the Rules through the Regulation, the Ministry of the Attorney General (the "Ministry") explained that:

> The summary judgment test of "no genuine issue for trial" ***has been replaced with*** "no genuine issue requiring a trial" (emphasis added).[6]

17. In outlining the purpose of the Regulation, which included the changes to the summary judgment rule, the Ministry also said:

> Ontario's new civil justice reforms will make it less expensive to access justice and easier to ***use the courts to quickly resolve disputes***....

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[4] Sullivan, at 579.
[5] Sullivan, at pp. 593, 608-609 and 616.
[6] What's New – Changes to the Rules of Civil Procedure, Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp.

> …[C]ivil justice reforms arising from 25 significant changes to the rules of Ontario's civil courts will simplify, speed up, and lower the costs of resolving disputes, including….:
>
> > Lowering litigation costs and ***reducing the need for lengthy trials*** by making it easier to ***resolve cases earlier*** (emphasis added)[7].

18. That the new summary judgment rule was designed to allow for the functions of a trial to be performed is also apparent from the Government's description of the rule 20 mini-trial process included in the Regulation:

> A judge will now be able to order oral evidence to be presented by one or more parties (a "mini-trial"), ***which will in some cases save them the time and expense of proceeding to a full trial*** (emphasis added).[8]

19. The ordinary meaning of the Regulation, the scheme of the new summary judgment regime and the object and intention of Government make it clear that the new test for summary judgment is not whether there are genuine triable issues but whether those issues can be "truthfully, fairly, and justly resolved without the forensic machinery of a trial." [9] If the motion judge can justly make the findings of fact, he or she is entitled to do so. To suggest otherwise would mean that the motion judge would perform all the functions of a trial judge only for the purposes of determining if there is a genuine issue that a trial judge could then decide by performing the very same functions over again. This duplication of effort does not comply with the principles of affordability, expediency and proportionality with which the courts are directed to interpret the rules.

B. When is it appropriate for a motion judge to weigh evidence, evaluate credibility and draw reasonable inferences under rule 20.04 (2.1) in order to grant or refuse summary judgment?

20. Rule 20.04(2.1) provides:

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[7] "Resolving Lawsuits Faster and More Affordably", Ministry of the Attorney General News Release, December 11, 2008 (http://www.attorneygeneral.jus.gov.on.ca/english/news/2008/20081211-civil-nr.asp).
[8] "Reforming Civil Justice for Ontarians", Ministry of the Attorney General Backgrounder, December 11, 2008, at p. 2 of 3 http://www.attorneygeneral.jus.gov.on.ca/english/news/2008/20081211-civil-bg.asp.
[9] *Healey* v. *Lakeridge Health Corporation*, 2010 ONSC 725 (CanLII), at para.28.

> 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*** (emphasis added)[10].

21. It was noted in the Osborne Report that jurisprudence from British Columbia already exists which will likely provide guidance to the Ontario courts in determining when a summary procedure is appropriate. While a direction that the courts consider what is "unjust" or not in the "interest of justice" is common to both rule 20 and the equivalent British Colombia rule, it must be noted that that test appears in a different place in each rule in order to determine two different things. In British Columbia, the "unjust" test is applied at the end of the motion in order to determine whether judgment should be granted.[11] A preliminary "gate-keeping" determination of whether the procedure itself is appropriate is a separate stand-alone sub-rule in British Columbia.[12] In Ontario, on the other hand, the "interest of justice" test is applied to determine if a motion judge should exercise fact-finding powers rather than to a determination of whether the court should grant judgment. It is a test of the value of engaging in the process rather than a test applied to the final determination.

The Interest of Justice Test

22. Based on the purpose and essence of the justice system, the case law from British Columbia and the interpretive direction of Ontario rule 1.04, the "interest of justice" consideration falls into essentially three categories:

(a) The reputation of the administration of justice: a just substantive result and the appearance of justice;

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[10] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, rule 20.04(2.1).
[11] *Supreme Court Civil Rules*, BC Reg 168/2009, rule 9-7(15)(a)(ii).
[12] *Supreme Court Civil Rules*, BC Reg 168/2009, rule 9-7(11) (summary trial motion may be dismissed at or before the hearing is not the suitable procedure or will not assist in the efficient resolution of the proceeding).

(b) whether proceeding with the motion is the most expeditious and least expensive way of justly determining the matter on its merits[13]; and

(c) whether the time and expense related to exercising these powers is proportionate to the importance and complexity of the issues and the amount involved.[14]

Securing Just Results and Ensuring the Appearance of Justice

23. The ultimate goal and "interest" of the justice system is a just substantive result and the appearance of a just system. While one cannot predict or enumerate all of the factors affecting the court's ability to do justice using its rule 20 fact-finding powers, some of these factors could include the following:

(a) While it is clear that a motions judge can assess credibility, if motion materials reveal that the case is entirely based on a close "he said/she said" credibility issue and both parties have not consented to a determination under rule 20 (by cross-motion or otherwise) a full trial process may be more appropriate in order to ensure an apparently just result. In the context of "he said/ she said," it seems clear that if a variety of witnesses have different perspectives, then it would be appropriate to deal with contradictory evidence at a trial[15];

(b) The prejudice of delay should be considered.[16] If justice would be effectively denied to a party by the delay of waiting for, or conducting, a full trial, this is a factor that speaks in favour of using the powers provided as part of the new expanded summary judgment procedure; and

(c) The consent of both parties to the process, by cross-motion or otherwise, is a factor that speaks in favour of the motion being seen to be a fair process.

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[13] *Rules of Civil Procedure*, RRO 1990, Reg. 194, rule 1.04(1).
[14] *Ibid*, rule 1.04 (1.1).
[15] *Canadian Premier Life Insurance Company* v. *Sears Canada Inc.*, 2010 ONSC 3834 (CanLII), at paras. 71, 78, 88.
[16] *Inspiration Management Ltd.* v. *McDermid St. Lawrence Ltd.*, 1989 CanLII 229 (BC CA), at p.19.

Expeditious determination

24. Rule 1.04(1) provides that the Rules:

> ... shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

25. While summary judgment is designed to be a faster, more efficient manner of determining disputes, this will not always be the case. Where it is not the case, a motion judge should not engage his or her new fact-finding powers. While there are no principles of universal application, factors to be considered include:

(a) Where issues of credibility are determinative and the motion record reveals that a fair determination could not be made without hearing *viva voce* evidence from many witnesses, there is generally no efficiency to be gained;

(b) Where there are cross-motions such that a motion judge exercising the new fact-finding powers could completely dispose of the matter, this speaks in favour of exercising those powers. Conversely, if the motion is likely to further polarize the parties, or add to an already lengthy and protracted proceeding without the prospect of finality, this should weigh against the use of such powers; and

(c) The impact of summary judgment motions on the prospect of settlement should also be considered. If a summary judgment motion will not resolve the entire case but will remove an obstacle to settlement, then this is a factor that the motion judge should consider when deciding whether or not to exercise its expanded powers under the new rule.

Proportionality

26. Rule 1.04(1.1) was added to the Rules by the Regulation at the same time as the amendments to the summary judgment rule. Thus, this rule is a particularly apt aid to

interpreting the "interest of justice" test as it places the test in the context of the entire scheme of the Regulation. The rule provides:

> In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and the amount involved in the proceeding.

27. When addressing proportionality, the court should consider not only the monetary value and complexity of the litigation but also the social impact of the lawsuit. The following issues may be considered in addressing proportionality:

(a) **Complexity** should not be an automatic bar nor should simplicity automatically render summary judgment the correct process. If the matter is so simple as to require a one-day trial, parties should be discouraged from preparing time-consuming and expensive motion materials (especially where *viva voce* evidence is the most valuable). On the other hand, if there is a complex commercial case that will take ten days to argue on a written record and one year to try, it might be in the interest of justice for the trial judge to exercise his or her new fact-finding powers. Complexity must also be viewed with respect to whether it is legally complex in the number of issues or factually complex in terms of the number of witnesses and evidence required to determine the case. Legal complexity should not weigh against the use of the process.

(b) The **costs** of proceeding to a conventional trial in relation to the amount involved in the lawsuit should be considered.

(c) **Importance** is a two-pronged factor. The judge should consider both the social impact of the over-all case and its importance to the parties. The judge should also consider the importance of the issue on the motion to the ultimate determination of the case. If the party seeks partial summary judgment on an issue that is unlikely to reduce the trial time,

this speaks against the motion judge taking the time and resources necessary to exercise his or her new expanded fact-finding powers in order to decide the motion.[17]

When is the Test Applied?

28. It will not always be possible to decide at the beginning of the process whether it is in the interest of justice for the motion judge to engaging in the fact-finding powers or whether the interest of justice requires a trial judge to exercise those powers. However, this should always be a preliminary consideration. The evolution of British Columbia's rule is instructive here. After several years of experience with its expanded summary procedure, a specific sub-rule was added to explicitly provide for a preliminary determination that the summary process is inappropriate. [18]

29. There will be times where it may be possible to determine, as a preliminary matter, that the interest of justice requires that only a trial judge should engage in the fact-finding process. Where, for example, the record and an understanding of the overall legal proceeding reveal that a lengthy motion will not avoid or significantly shorten a trial, the interest of justice allows the motion judge to refuse to exercise his or her expanded fact-finding capability. On the other hand, the effect of factors such as a close "he said/she said" credibility contest may not reveal an inefficiency in proceeding with the fact-finding powers until later in the motion.

30. By embedding the "interest of justice test" in the conferring of the fact-finding powers and maintaining a "requiring a trial" threshold for the determination on the merits, the Ontario rule 20 allows for the flexibility to determine the appropriateness as a preliminary consideration or as the matter proceeds. A bifurcated process is not practical because the motion judge must

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[17] *Ford Motor Co. of Canada* v. *Ontario Municipal Employees Board*, 1997 CanLII 1302 (ON CA), at para. 63.

[18] *Supreme Court Civil Rules*, BC Reg 168/2009, rule 9-7(11) (summary trial motion may be dismissed at or before the hearing is not the suitable procedure or will not assist in the efficient resolution of the proceeding).

have before him or her all of the material in order to make a determination as to whether the interest of justice requires a trial. As the case law develops, the parties may receive more guidance as to whether or not a case is appropriate for a summary judgment motion and costs decisions concerning the scale of costs to be awarded for a failed motion can address non-compliance with clear guidelines.

C. When is it appropriate to hear evidence under rule 20.04(2.2)?

31. In *Optech Inc. v. Sharma*[19] Brown J. provided a helpful analysis of why and when to use a mini-trial to resolve credibility issues:

> It is important to stress that a mini-trial is only an option. Several factors influence its attractiveness as one:
>
> (i) First, for a mini-trial to make any sense in terms of the proportionality of the additional litigation costs associated with it. .... If the resolution of the material factual disputes will require *viva voce* evidence from a significant number of witnesses, it would make more sense to hold a "regular" trial, taking advantage of the work product from the summary judgment motion, coupled with other trial-shaping directions under Rule 20.05(2);
>
> (ii) Second, a mini-trial only makes practical sense if a likelihood exists that the adjudication of the factual dispute on the mini-trial will result in the granting of the motion for summary judgment. …
>
> (iii) In order to minimize costs to the litigants and to make the best use of stretched judicial resources, courts should strive to schedule mini-trial for the initial hearing of the summary judgment motion, and not schedule them as a "Phase Two" of the motion. **…**
>
> (iv) Finally, the complexity and sheer volume of the evidence to be adduced on a summary judgment motion must factor into the determination about whether to hold a mini-trial or, indeed, whether a summary judgment motion is appropriate given the nature of the case. That is not to say that summary judgment cannot be used to deal with large-record cases: at the end of the day, nine boxes of no cogent evidence in support of a claim or defence still add up to nothing. …[20]

32. Although the heading of rule 20.04(2.2) is "mini–trial", the rule says that this trial can be "without" time limits. Thus, the prospect of a multi-day mini-trial should not be an inhibitor to

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[19] *Optech Inc.* v. *Sharma*, 2011 ON SC 680 (CanLII).
[20] *Optech Inc.* v. *Sharma*, 2011 ON SC 680 (CanLII) at paras. 38-46.

its use, if truly needed for the motion judge to fulfill his or her duty. However, the rule must be interpreted with reference to proportionality. Where two or more days of oral evidence would determine the matter on a summary judgment motion, as opposed to allowing a case to proceed to a trial which may last six months, proportionality would support the determination of the issue in a mini-trial.

33. In deciding whether a mini-trial is necessary, the existence of "head-on" conflict in evidence may be used as a guide. In *Jutt* v. *Doehring*, the British Columbia Court of Appeal, in deciding that the Chambers judge ought not to have granted a judgment under Rule 18A, stated:

> The fundamental problem in this case is that the material filed on the 18A application shows "head-on" conflict in the evidence which goes directly to the foundation of the Appellant's action against the Respondents. It was not possible to resolve the conflicts without credibility findings being made. This case was unsuited to summary trial for the issues of fact should not have been decided solely on the basis of the conflicting material which was before the court, regardless of whether the chamber judge preferred one version to the other. [21]

Under the amended rule, the "head-on" conflict in evidence can be addressed by the mini-trial, where the principles of expediency and proportionality would also be served.

D. What are the principles to be considered in issuing orders under rule 24.05?

34. If summary judgment is not granted, the process need not have been for naught. The amendments to rule 20.05 augment the motion judge's dispositive powers where, despite all the powers to grant summary judgment on a paper record and with the aid of a mini-trial, the motion is dismissed and the action must go on to a regular trial. The OBA submits that the proper meaning and scope of rule 20.05 can be gleaned from the Superior Court decision in *Optech Inc. v. Sharma*,[22] *supra:*

> First, Rule 20.05(2) was designed to be used, not ignored. … The new rules signalled a desire for a shift in Ontario's litigation culture, and the judiciary must do its part to

[21] *Jutt* v. *Doehring*, 1993 CanLII 560 (BC CA), at para. 13.
[22] *Optech Inc.* v. *Sharma*, 2011 ON SC 1081 (CanLII).

> inculcate that new culture by addressing the issues the Rules now ask us to consider when we refuse motions for summary judgment.
>
> Second, a judge who has heard a complex summary judgment motion possesses extensive knowledge of the issues in the case and the evidence touching on those issues. Where summary judgment is refused, that knowledge should be used to the advantage of the justice system.....
>
> In default of remaining seized of the action for trial, a summary judgment motion judge should issue directions for the further conduct of the proceeding, drawing on his or her understanding of the key issues and of what is left to be done to create a record for trial.…
>
> In my respectful opinion the principle of proportionality requires that where a motion for summary judgment containing an extensive record is not granted, the record created for the motion should form part of the record for the trial....[23]

35. The motion judge has been explicitly given direction which will assist in ensuring that the trial focuses on the genuine issues which need to be resolved and which is consistent in ensuring the just, most expeditious and least expensive determination of a case on its merits and reinforces the court's ability to control the process. The extent to which a failed summary judgment motion has assisted, through a rule 24.05 order, in narrowing the trial process can also be considered when determining the scale of costs to be awarded to the successful party.

Conclusion

36. The modification of the summary judgment test signals the view of the Government that a traditional trial is not the only way to provide procedural fairness and substantive justice. A litigant is entitled to an efficient, effective and just decision by an impartial decision maker based on admissible evidence. Access to justice does not always mean access to a full trial. In fact, where a full trial is not necessary, an effective summary procedure enhances access to justice by making the case more affordable for the parties and freeing up scarce court resources for those cases in which the interests of justice do require a full trial.

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[23] *Optech Inc.* v. *Sharma*, 2011 ON SC 1081 (CanLII), at paras. 5-13.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY THE ONTARIO BAR ASSOCIATON, BY ITS COUNSEL:

June 6, 2011

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SCHEDULE A - CASES CITED

I. Cases

Canadian Premiere Life Insurance Co. v. Sears Canada Inc., 2010 ONSC 3834 (CanLII).
Ford Motor Co. of Canada v. *Ontario Municipal Employees Board*, 1997 CanLII 1302 (ON CA).
Healey v. Lakeridge Health Corporation, 2010 ONSC 725 (CanLII).
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Mauldin v. *Cassels Brock & Blackwell LLP*, 2011 ONCA 67 (CanLII).
Optech Inc. v. *Sharma*, 2011 ON SC 680 (CanLII)
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Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC)

II. Treatises

Ruth Sullivan, *Sullivan on the Construction of Statutes. Fifth Edition*, (Markham,, Lexis Nexis Canada Inc., 2008).

What's New – Changes to the Rules of Civil Procedure, Ministry of the Attorney General http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/changes_to_rules_of_civil_procedure.asp

Resolving Lawsuits Faster and More Affordably", Ministry of the Attorney General News Release, December 11, 2008 http://www.attorneygeneral.jus.gov.on.ca/english/news/2008/20081211-civil-nr.asp)

Reforming Civil Justice for Ontarians", Ministry of the Attorney General Backgrounder, December 11, 2008, http://www.attorneygeneral.jus.gov.on.ca/english/news/2008/20081211-civil-bg.asp

SCHEDULE B - LEGISLATION

Ontario Regulation 438/08 made under the *Courts Of Justice Act* R.S.O. 1990, c. C-43, amending Reg. 194 of R.R.O. 1990 (Rules of Civil Procedure)

2. Rule 1.04 of the Regulation is amended by adding the following subrule:

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

13. (1) Subrule 20.04 (1) of the Regulation is revoked.

(2) Clause 20.04 (2) (a) of the Regulation is amended by striking out "no genuine issue for trial" and substituting "no genuine issue requiring a trial".

(3) Rule 20.04 of the Regulation is amended by adding the following subrules:

Powers

(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.

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

(4) The French version of subrules 20.04 (3) and (4) of the Regulation is amended by striking out "seule question litigieuse" wherever it appears and substituting in each case "seule véritable question litigieuse".

14. Rules 20.05 and 20.06 of the Regulation are revoked and the following substituted:

WHERE TRIAL IS NECESSARY

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously.

Directions and Terms

(2) If an action is ordered to proceed to trial under subrule (1), the court may give such directions or impose such terms as are just, including an order,

(a) that each party deliver, within a specified time, an affidavit of documents in accordance with the court's directions;

(b) that any motions be brought within a specified time;

(c) that a statement setting out what material facts are not in dispute be filed within a specified time;

(d) that examinations for discovery be conducted in accordance with a discovery plan established by the court, which may set a schedule for examinations and impose such limits on the right of discovery as are just, including a limit on the scope of discovery to matters not covered by the affidavits or any other evidence filed on the motion and any cross-examinations on them;

(e) that a discovery plan agreed to by the parties under Rule 29.1 (discovery plan) be amended;

(f) that the affidavits or any other evidence filed on the motion and any cross-examinations on them may be used at trial in the same manner as an examination for discovery;

(g) that any examination of a person under Rule 36 (taking evidence before trial) be subject to a time limit;

(h) that a party deliver, within a specified time, a written summary of the anticipated evidence of a witness;

(i) that any oral examination of a witness at trial be subject to a time limit;

(j) that the evidence of a witness be given in whole or in part by affidavit;

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or

other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

(i) there is a reasonable prospect for agreement on some or all of the issues, or

(ii) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the court;

(l) that each of the parties deliver a concise summary of his or her opening statement;

(m) that the parties appear before the court by a specified date, at which appearance the court may make any order that may be made under this subrule;

(n) that the action be set down for trial on a particular date or on a particular trial list, subject to the direction of the regional senior judge;

(o) for payment into court of all or part of the claim; and

(p) for security for costs.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration.

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may dismiss the action, strike out the statement of defence or make such other order as is just.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

20.06 The court may fix and order payment of the costs of a motion for summary judgment by a party on a substantial indemnity basis if,

(a) the party acted unreasonably by making or responding to the motion; or

(b) the party acted in bad faith for the purpose of delay.

***Court Rules Act,* Supreme Court Civil Rules (British Columbia)**
[includes amendments up to B.C. Reg. 241/2010, July 30, 2010]

Rule 9-6 — Summary Judgment

Definitions

(1) In this rule:

""answering party"", in relation to a claiming party's originating pleading, means a person who serves, on the claiming party, a responding pleading that relates to a claim made in the originating pleading;

""claiming party"" means a party who filed an originating pleading.

Application

(2) In an action, a person who files an originating pleading in which a claim is made against a person may, after the person against whom the claim is made serves a responding pleading on the claiming party, apply under this rule for judgment against the answering party on all or part of the claim.

Response to application

(3) An answering party may respond to an application for judgment under subrule (2) as follows:

(a) the answering party may allege that the claiming party's originating pleading does not raise a cause of action against the answering party;

(b) if the answering party wishes to make any other response to the application, the answering party may not rest on the mere allegations or denials in his or her pleadings but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

Application by answering party

(4) In an action, an answering party may, after serving a responding pleading on a claiming party, apply under this rule for judgment dismissing all or part of a claim in the claiming party's originating pleading.

Power of court

(5) On hearing an application under subrule (2) or (4), the court,

(a) if satisfied that there is no genuine issue for trial with respect to a claim or defence, must pronounce judgment or dismiss the claim accordingly,

(b) if satisfied that the only genuine issue is the amount to which the claiming party is entitled, may order a trial of that issue or pronounce judgment with a reference or an accounting to determine the amount,

(c) if satisfied that the only genuine issue is a question of law, may determine the question and pronounce judgment accordingly, and

(d) may make any other order it considers will further the object of these Supreme Court Civil Rules.

Claiming party may proceed

(6) If, under this rule, a claiming party obtains judgment against a person on a claim made against that person in the originating pleading, the judgment is without prejudice to the right of the claiming party to

(a) proceed with the action in respect of any other claim made, in the originating pleading, against the person against whom the judgment was obtained, and

(b) proceed with the action against any other person against whom a claim is made in the originating pleading.

Costs consequences

(7) Subject to subrule (8), if the party applying under subrule (2) or (4) obtains no relief on the application, the court may

(a) fix the costs of the party responding to the application, and

(b) fix the period within which those costs must be paid.

Court may decline to fix costs

(8) The court may decline to fix and order costs under subrule (7) if the court is satisfied that the application under subrule (2) or (4), although unsuccessful, was nevertheless reasonable.

Bad faith or delay

(9) If it appears to the court that a party to an application under subrule (2) or (4) has acted in bad faith or primarily for the purpose of delay, the court may

(a) fix the costs of the application as special costs, and

(b) fix the period within which those costs must be paid.

Rule 9-7 — Summary Trial

Definition

(1) In this rule, **"summary trial application"** means an application referred to in subrule (2).

Application

(2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:

(a) an action in which a response to civil claim has been filed;

(b) a proceeding that has been transferred to the trial list under Rule 22-1 (7) (d);

(c) a third party proceeding in which a response to third party notice has been filed;

(d) an action by way of counterclaim in which a response to counterclaim has been filed.

When application must be heard

(3) A summary trial application must be heard at least 42 days before the scheduled trial date.

Setting application for hearing

(4) Unless the court otherwise orders, a summary trial application must be set for hearing in accordance with Rule 8-1.

Evidence on application

(5) Unless the court otherwise orders, on a summary trial application, the applicant and each other party of record may tender evidence by any or all of the following:

(a) affidavit;

(b) an answer, or part of an answer, to interrogatories;

(c) any part of the evidence taken on an examination for discovery;

(d) an admission under Rule 7-7;

(e) a report setting out the opinion of an expert, if

(i) the report conforms with Rule 11-6 (1), or

(ii) the court orders that the report is admissible even though it does not conform with Rule 11-6 (1).

Application of Rule 12-5

(6) Rule 12-5 (46), (49), (50), (51), (56) to (58) applies to subrule (5) of this rule.

Application of Rule 11-6

(7) Rule 11-6 (2) applies to a summary trial application.

[am. B.C. Reg. 119/2010, Sch. A, s. 23.]

Filings with application

(8) A party who applies for judgment under subrule (2)

(a) must serve, with the notice of application and the other documents referred to in Rule 8-1 (3), every expert report, not already filed, on which the party will rely in support of the application, and

(b) must not serve any further affidavits, expert reports or notices except

(i) to tender evidence that would, at a trial, be admitted as rebuttal evidence,

(ii) to respond to a notice of application filed and served by another party of record, or

(iii) with leave of the court.

Notice of evidence to be used on application

(9) If a party intends, on a summary trial application, to rely on

(a) evidence taken on an examination for discovery,

(b) answers to interrogatories, or

(c) admissions,

the party must give notice of that fact in accordance with subrule (10).

Giving notice

(10) Notice under subrule (9) must be given

(a) by an applicant, in accordance with Rule 8-1 (7) and (8), and

(b) by a party who is not an applicant, in accordance with Rule 8-1 (9).

[am. B.C. Reg. 241/2010, Sch. A, s. 2.]

Adjournment or dismissal

(11) On an application heard before or at the same time as the hearing of a summary trial application, the court may

(a) adjourn the summary trial application, or

(b) dismiss the summary trial application on the ground that

(i) the issues raised by the summary trial application are not suitable for disposition under this rule, or

(ii) the summary trial application will not assist the efficient resolution of the proceeding.

Preliminary orders

(12) On or before the hearing of a summary trial application, the court may order that

(a) a party file and serve, within a fixed time, any of the following on which the party intends to rely in support of the application:

(i) an affidavit;

(ii) a notice referred to in subrule (9),

(b) the person who swore or affirmed an affidavit, or an expert whose report is relied on, attend for cross-examination, either before the court or before another person as the court directs,

(c) cross-examinations on affidavits be completed within a fixed time,

(d) no further evidence be tendered on the application after a fixed time, or

(e) a party file and serve a brief, with such contents as the court may order, within a fixed time.

Ancillary or preliminary orders may be made at or before application

(13) An order under subrule (11) or (12) may be made by a judge or by a master, and may be made before or at the same time as a summary trial application.

Judge not seized of application

(14) A judge who makes an order under subrule (11) or (12) in relation to a summary trial application is not seized of the summary trial application unless the judge otherwise orders.

Judgment

(15) On the hearing of a summary trial application, the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, and

(c) award costs.

No further application without leave

(16) If the court does not grant judgment under subrule (15), the applicant may not apply again under subrule (2) without leave of the court.

Orders

(17) If the court is unable to grant judgment under subrule (15) and considers that the proceeding ought to be expedited, the court may order the trial of a proceeding generally or on an issue and may

(a) order that the parties attend a case planning conference,

(b) make any order that may be made under Rule 5-3 (1), or

(c) make any other order the court considers will further the object of these Supreme Court Civil Rules.

Right to vary or set aside order

(18) A court may, before or at trial, vary or set aside an order made under subrules (12) and (17) of this rule.

Order if jury notice filed

(19) A party may apply to the court for judgment under subrule (2) even though a party may have filed a notice under Rule 12-6 (3) requiring that the trial of the action be heard with a jury.