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a new departure and a fresh approach: the Ontario Court of Appeal decision in *Combined Air*

The fundamental question that the new Ontario summary judgment rule attempts to answer is neither new, nor complex. Rather, it is simple: which actions deserve or require a trial, and which can be disposed of by summary judgment? This seemingly simple question has proven exceptionally difficult to answer.

As we outline in this paper, a variety of means to resolve actions short of a trial have existed in the procedural rules of the Ontario courts for a century or more[1] and were introduced into the *Federal Courts Rules* in 1994.[2] Yet over time, and in the context of each different version of the rules, courts have struggled to articulate and maintain a consistent standard for identifying which procedure will be most just to determine the issues in a particular case. Each revised rule has followed a pattern of "interpretive erosion" in which initial wide and enthusiastic application of the summary judgment process has given way to increasingly narrow interpretation and consequent decreasing frequency of use.

The question of which actions may appropriately be resolved summarily again became the subject of debate among the Ontario civil litigation bar with the 2010 changes to Ontario's *Rules of Civil Procedure*. At this time, the test for granting summary judgment under Rule 20 changed from "there is no genuine issue for trial" to the new "there is no genuine issue *requiring* a trial" (emphasis added) and additional powers were given for judges to use in connection with a motion for summary judgment under Rule 20. The recent decision of *Combined Air Mechanical Services Inc. v. Flesch*[3] is the first Ontario Court of Appeal decision to consider the new rule. In *Combined Air*, the Court of Appeal attempts to clarify both the nature and scope of the new Rule 20 and the circumstances that will allow a party to actually obtain summary judgment.

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[1] While our focus is on summary judgment, there are other mechanisms that may result in a more expeditious resolution of a matter including a motion to strike an untenable cause of action or defence under Rule 21 of the Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, or Rule 221 of the *Federal Courts Rules*, SOR/98-106, and in limited circumstances the use of an application under Rule 14.05 of the *Rules of Civil Procedure* or Part 5 of the *Federal Courts Rules*. For example *St. Andrew Goldfields Ltd. Canada Ltd.* (2009), 179 A.C.W.S. (3d) 826, 2009 CanLII 40549 (Ont S.C.J.), affd 201 A.C.W.S. (3d) 691, 2011 ONCA 377, and *BBM Canada v. Research In Motion Ltd.* (2011), 93 C.P.R. (4th) 1, 201 A.C.W.S. (3d) 631, 2011 FCA 151.

2 SOR/94-41 . Note also that prior to 2003, the Federal Court was a single court with a trial division and an appellate division known as the Federal Court of Appeal. In 2003, the *Federal Court Act* was amended to become the *Federal Courts Act*, R.S.C. 1985, c. F-7, with the two divisions of the Federal Court becoming two separate courts. The former Federal Court Trial Division became simply the Federal Court, and the Federal Court of Appeal continued as a separate court with that name. For the sake of consistency in this paper the current terminology is used to describe each court and the *Federal Courts Rules* (unless the reference is in a quotation) regardless of its actual title at the time of the decision being discussed.

[3] *Combined Air Mechanical Services* v. *Flesch*, (2011), 108 O.R. (3d) 1, 2011 ONCA 764.

In the authors' view, while the decision in *Combined Air* is important, the true impact of the 2010 amendments will not be known for some years until successive appeals create a record upon which it will be possible to form a "full appreciation" of the significance of those amendments. The explicit powers granted to judges to resolve factual disputes short of trial gives the profession reason to hope that amended Rule 20 will not suffer the same narrowing and diminishing frequency of application as its predecessors.

1. Summary Judgment in Ontario Before 1985

It is commonly thought that the summary judgment procedure came into the Province of Ontario with the "new" *Rules of Civil Procedure* made in 1984 and effective January 1, 1985 (the "1985 Rules"). In fact, there was a form of summary judgment based on English practice in the Ontario *Rules of Practice* even before the major overhaul under Justice Middleton in 1913. Those provisions remained in the *Rules of Practice* until the 1985 Rules came into force.[4]

Under the old *Rules of Practice*, summary judgment was available only when the action was commenced with a "specially endorsed writ". Prior to 1985, an action was commenced by the issuance of a writ of summons, which roughly corresponded to a notice of action in the current Ontario practice. Such a writ would normally be "generally endorsed" with a short statement of the nature of the claim. The full particulars of the claim were provided later in a separate statement of claim.

However, for a certain class of case – defined in Rule 33[5] – the writ itself could be "specially endorsed" with a brief statement of the claim as specified in Form 8A. A defendant served with a specially endorsed writ was required to deliver an "affidavit of merits" with his appearance "showing the nature of his defence, with the facts and

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[4] The provisions of the *Rules of Practice* discussed in this paper are those as they read immediately before the *Rules of Civil Procedure* came into effect.

[5] Rule 33 (1) of the *Rules of Practice* provided: At the option of the plaintiff, the writ of summons may be specially endorsed with a statement of his claim where the plaintiff seeks to recover a debt or liquidated demand in money (with or without interest and whether the interest be payable by way of damages or otherwise) arising,

(a) upon a simple written promise to pay or upon a written acknowledgement of debt; or
(b) upon a simple contract, express or implied, for goods sold and delivered; or
(c) upon a simple contract, express or implied, where the price or method of calculation of the price has been agreed upon for,
  (i) work done or services rendered, or
  (ii) work done or services rendered and for the supply and installation of materials; or
(d) upon a cheque, promissory note or bill of exchange; or
(e) upon an account settled between the parties in writing; or
(f) upon a bond or contract under seal for payment of a liquidated sum, but not including a claim for liquidated damages; or
(g) upon a judgment; or
(h) upon a statute where the amount sought to be recovered is a fixed sum of money or is in the nature of a debt other than a penalty; or
(i) upon a guarantee in writing where the claim against the principal is in respect of a debt or liquidated demand;

or the writ of summons may be specially endorsed with a statement of his claim:

(j) in an action for recovery of land; or
(k) in an action for recovery of chattels; or
(l) in an action for foreclosure, sale or redemption.

circumstances which he deems entitled him to defend the action".[6] The plaintiff was then entitled to cross-examine on this affidavit, and move for summary judgment.[7]

To grant summary judgment, the court had to be "satisfied that the defendant has not a good defence on the merits or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action".[8] If the court was so satisfied, the court could grant judgment for the plaintiff. If the test was not met, "instead of granting judgment, the court may give the defendant leave to defend on such terms as seems just, or make an order for the speedy trial of the action with or without pleadings upon proper terms".[9]

Demonstrating that "the defendant has not a good defence to the action or has not disclosed such facts as may be deemed sufficient to entitle him to defend the action" was a difficult standard to meet as the plaintiff had to "leave no reason to doubt" that the defendant would not succeed at trial. This high standard was explained in *Arnoldson y Serpa v. Confederation Life Association.*[10]

In *Arnoldson y Serpa,* the plaintiff had sued on a special endorsement for payment of the cash surrender value of a policy issued by the defendant to the plaintiff who was a national and resident of Cuba at the time the policy was issued. The policy provided that "[a]ll payments ... shall be in currency that is at present legal tender in the United States of America",[11] and also that "[a]ll payments ... shall be made in the City of Havana, Republic of Cuba.".[12] The plaintiff sought payment in US dollars, but the defendant asserted that by the law of Cuba payment in Havana could only be made in Cuban currency. Justice Keith

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[6] Ontario *Rules of Practice,* Rule 42(1).

[7] *Ibid.,* Rule 58(1).

[8] *Ibid.,* Rule 58(2).

[9] *Ibid*., Rule 58(3). In practice, defendants would often bring a motion to strike a special endorsement instead of filing an affidavit of merits. There was plenty of scope for such motions to strike. For instance, a special endorsement could be used in the caSe of a simple contract, namely a contract not required to be under seal. However, a defendant playing for time might bring a motion if the agreement in question had a seal, ostensibly to determine whether the agreement was still a simple contract even. though it bore a seal. While the case law held contracts under seal that were not required to be under seal were still simple contracts - see for example *Queensway Lincoln Mercury Sales (1980) Ltd. v. 409918 Ontario Ltd*. (1981), 34 O.R. (2d) 568, 25 C.P.C. 186 (H.C.J.), per Reid J. - there was sufficient scope for argument and uncertainty in the case law that a motion could be brought to determine this point. Regardless of outcome, by bringing such a motion a defendant succeeded in extending the time to file his or her affidavit of merits. There is a similar volume of cases, brought for a similar purpose, discussing whether an amount claimed was a "liquidated amount". These include decisions of rent calculated as a percentage of the tenant's gross sales (see *Viking Shopping Centres Ltd. v. Foodex Systems Ltd.* (1975), 11 O.R. (2d) 503 (H.C.J.), per Morden J.) and a balance due on closing under an ordinary agreement of purchase and sale, even when subject to adjustments (*Kennedy v. 315812 Ontario Ltd.* (1976), 2 C.P.C. 281 (Ont. H.C.J.), per Southey J.). While that proposition was stated at p. 284, the particular special endorsement was struck on other grounds. On the other hand, it was determined that an architect's fees calculated as a percentage of the cost of const.ruction was not a liquidated amount (see *Rasins v. Place Park·(Windsor) Ltd.* (1977); 4 C.P.C. 63 (Ont. S.C.), per Master Davidson).

[10] *Arnoldson y Serpa v. Confederation Life Assn.* (1974), 43 D.L.R. (3d) 324, 2 O.R. (2d) 484, [1974] I.L.R. ¶1-594 (H.C.J.), revd 46 D.L.R. (3d) 641, 3 O.R. (2d) 721, [1974] I.L.R. ¶1-606 (C.A.).

[11] *Ibid.,* at p. 641 (C.A.).

[12] *Ibid.*

granted summary judgment after finding that the defence was a sham and raised no triable issue. In reversing, the Court of Appeal took a restrictive view of summary judgment powers: [13]

> We are all of the view that on an application of this nature the power to direct that judgment be summarily signed should be exercised with great caution and with the most scrupulous discretion. *The plaintiff must make out a case which is so clear that there is no reason for doubt as to what the judgment of the Court should be if the matter proceeded to trial.* Upon such a motion it is not the function of the Judge in Weekly Court or of the Master to determine matters either of law or of fact which are in serious controversy. That function should be reserved to the trial tribunal. *The authorities are clear that where there exists any real difficulty as to a matter of law or any serious conflict as to a matter of fact then summary judgment should not be granted*....
>
> In the course of argument certain grounds of defence were advanced. We do not pass upon the validity of these alleged defences nor upon the ultimate merits of the issues in this action. We content ourselves by holding that, in our opinion, the plaintiff has not made out a case which is so free of serious controversy on fact and law as to warrant summary judgment in his favour. [Emphasis added.]

As for the provision that a court could give the defendant leave to defend upon terms, this power was used upon occasion. In *Adelberg v. Lowe,*[14] the Master was dubious about the defences raised, but nevertheless determined that the case could not be decided on a motion for judgment and that a triable issue had been raised. He made an order dispensing with the need for the plaintiff to deliver a statement of claim, giving the defendant leave to file a statement of defence within eight days and directing a speedy trial. By contrast, in *Gonzales v. Pardo*,[15] the Master declined to impose terms, in part because there was some question whether the foreign judgment the plaintiff sought to enforce was final, and partly because it appeared that the plaintiff had sequestered the defendant's assets in New York. Similarly, in *Kaufman v. George Coles Ltd.*,[16] the Master had given the defendant leave to defend on terms. This was overturned on appeal on the basis that, if the defendant had raised a triable issue, the defendant could only be put on terms where very special circumstances were made out by the plaintiff. *Kaufman* appears to be the last case in which the rule was cited until it was repealed 35 years later in the 1985 Rules.

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[13] *Ibid*., at p. 642.

[14] *Adelberg v. Lowe*, [1945] O.W.N. 540 (H.C.), *per* Master Conant.

[15] *Gonzales v. Pardo*, [1947] O.W.N. 130 (H.C.), *per* Master Conant.

[16] *Kaufman v. George Coles Ltd.*, [1949] O.W.N. 357 (H.C.), *per* Wilson J.

2. Summary Judgment in Ontario After 1985

On January 1, 1985, the 1985 Rules came into force and replaced the old *Rules of Practice*.

Included in the 1985 Rules was Rule 20, a new rule governing summary judgment that made many changes to the old "specially endorsed" writ system. As stated by the Ontario Court of Appeal in *Irving Ungerman Ltd. v. Galanis*,[17] Rule 20 "substantially expanded the potential scope of a litigant's right to move for summary judgment beyond that provided for in the former *Rules of Practice".*

For instance, under Rule 20.01, summary judgment was now available to *both* plaintiffs and defendants. The new Rule also required that affidavit material or other evidence be filed in support of a motion for summary judgment.

Also, Rule 20.04(2) made the granting of summary judgment mandatory in the event that any one of three circumstances was found:

(1) there is no genuine issue for trial;

(2) the only genuine issue is a question of law; or

(3) the only genuine issue is the amount to which the moving party is entitled.

When Rule 20 was first in force, Ontario courts expressed a willingness to engage with and critically evaluate the evidence advanced on a summary judgment motion. Justice Boland, in the 1986 case *Vaughan v. Warner Communications Inc.*,[18] stated that the changes effected by Rule 20 supported the authority of the court to "freely canvass the facts and the law in order to determine whether or not there is a genuine issue for trial":

> The specific changes to the summary judgment Rule and the spirit in which other rules are changed indicates in my respectful view that *R. 20 should not be eviscerated by the practice of deferring actions for trial at the mere suggestion that further evidence may be made available or that the law is in a state of confusion*. [Emphasis added.]

Similarly, in *Greenbaum v. 619908 Ontario Ltd.*[19] Justice Sutherland stated that because evidence was now required on a summary judgment motion, courts should approach such motions with less diffidence and more assurance than under the previous rules where such evidence was not received.

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[17] *Irving Ungerman Ltd. v. Galanis* (1991), 83 D.L.R. (4th) 734, 4 O.R. (3d) 545, 1 C.P.C. (3d) 248 (C.A.), at p. 738.

[18] *Vaughan v. Warner Communications, Inc.* (1986), 56 OR (2d) 242, 10 C.P.R. (3d) 492, 10 C.P.C. (2d) 205 (H.C.J.), at paras. 12 and 17.

[19] *Greenbaum v. 619908 Ontario Ltd.* (1986), 11 C.P.C. (2d) 26, 39 A.C.W.S. (2d) 322 (Ont. H.C.J.), at. para. 51.

In *Vaughan*, Justice Boland ultimately concluded that the court now had a duty under Rule 20 to take a "hard look at the merits of an action" on a motion for summary judgment to determine if in fact a "genuine issue" for trial existed.[20] This principle was widely accepted in the subsequent jurisprudence.[21]

(1) The Jurisprudence Shifts to a More Restrictive Interpretation of the Court's Powers under Rule 20

Despite these significant changes and the initial, enthusiastic application of the summary judgment rule in early decisions, the standard that the court be "satisfied" that there is no "genuine issue for trial" grew increasingly difficult for an applicant to meet. This is because courts applying Rule 20 fairly quickly began to place a number of restrictions on their ability to scrutinize and weigh evidence on a summary judgment motion. Most notably, courts quickly placed restrictions on their ability to weigh evidence, draw inferences from the facts, and determine credibility on a summary judgment motion. These restrictions significantly inhibited the court's ability to determine whether there was a genuine issue for trial, and, as a result, reduced the number of summary judgment motions granted.

These restrictions seem to have been motivated by Ontario courts' reluctance to deprive a party of its "day in court".[22] As a result of this concern, courts began to find a genuine issue for trial existed where even the smallest factual controversy could be found. An example of this shift is exemplified by the decision of Justice Watt in the 1989 case of *Mensah v. Robinson*:[23]

> Further, it is my respectful view that, notwithstanding the change in language from former rule 58 to the present sub rule 20.04(2) and the mandatory language of the latter, *caution ought nonetheless to continue to be the rule where there are controverted matters of fact on issues material to the determination of the action*. [Emphasis added.]

In this case, Justice Watt stated that the court should not attempt to weigh competing affidavit material on a motion for summary judgment, and concluded that judgment should only be granted where there was no room for doubt as to what the judgment of the court should be if the matter proceeded to trial. In so holding, Justice Watt echoed the holding of the Court of Appeal under the *Rules of Practice* in *Arnoldson y Serpa.*[24]

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[20] *Supra,* footnote 18, at para. 17.

[21] See, for example, *209991 Ontario Ltd. v. Canadian Imperial Bank of Commerce*, (1988), 24 C.P.C. (2d) 248, 39 B.L.R. 44, 8 P.P.S.A.C. 135 (Ont. H.C.J.); *National Trust Co. v. Maxwell* (1989), 34 C.P.C. (2d) 211, 3 R.P.R. (2d) 263, 14 A.C.W.S. (3d) 318 (Ont. H.C.J.); and *Tran v. Wong* (1989), 37 C.P.C. (2d) 145, 16 A.C.W.S. (3d) 213 (Ont. H.C.J.).

[22] See, for example, *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222, 38 O.R. (3d) 161, 17 C.P.C. (4th) 219 (C.A.).

[23] *Mensah v. Robinson* (1989), 14 AC.W.S. (3d) 53 (Ont. H.C.J.), at para. 55.

[24] *Supra,* footnote 10.

Similarly, in *Riviera Farms Ltd. v. Paegus Financial Corp.*,[25] it was held that while the court must take a "hard look" at the facts, the court should not decide between competing inferences from the facts on a motion for summary judgment. Finally, the courts almost unanimously accepted the principle that, where contested issues of fact arose which involved the credibility of witnesses, summary judgment could not be granted since a trial was the only appropriate forum for determinations of credibility.[26] These restrictions further elevated the already high threshold to be met by an applicant for summary judgment.

One leading case regarding the application of Rule 20 is *Pizza Pizza Ltd. v. Gillespie.*[27] Cited not only in Ontario, but also by the Federal Court, *Pizza Pizza* has been widely accepted as a leading authority on the test governing the granting of summary judgment. In *Pizza Pizza*, Justice Henry adopts the "hard look" test from *Vaughan* and states that the applicant must put their "best foot forward":[28]

> It is that the court, in taking a hard look at the merits, must decide whether the case merits reference to a judge at trial. It will, no doubt, have to go to trial if there are real issues of credibility, the resolution of which is essential to determination of the facts. That aside, however, the rule now contemplates that the motions judge will have before him sworn testimony in the affidavits and other material required by the rule in which the parties put their best foot forward. The motions judge, therefore, is expected to be able to assess the nature and quality of the evidence supporting "a genuine issue for trial"; *the test is not whether the plaintiff cannot possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial*; if so then the parties "should be spared the agony and expense of a long and expensive trial after some indeterminate wait" (per Farley J. in *Avery*). [Emphasis added.]

This case sets out a narrow test for summary judgment that was quickly adopted by the courts. Despite Justice Henry's statements that "the court may, on a common sense basis, draw inferences from the evidence"[29] and that "[a]pparent factual conflict in evidence does not end the inquiry," [30] the decision in *Pizza Pizza* came to stand for the principle that the

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[25] *Riviera Farms Ltd. v. Paegus Financial Corp.* (1988), 29 C.P.C. (2d) 217 (Ont. H.C.J.), leave to appeal allowed 32 C.P.C. (2d) 164 (Ont. H.C.J.), at para. 16.

[26] See, for example, *CIBC*, *supra,* foot note 21 at para. 23; *Mensah*, *supra,* footnote 23; *Alvi v. Lal* (1990), 13 R.P.R. (2d) 302, 20 A.C.W.S. (3d) 1063 (Ont. H.C.J.); and *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225, 33 C.P.R. (3d) 515, 45 C.P.C. (2d) 168 (Gen. Div.), at paras. 33-34.

[27] *Ibid*.

[28] *Ibid.,* at para 41.

[29] *Ibid.,* at para 42.

[30] *Ibid*.

case must be so doubtful as to not deserve consideration by the trier of fact at a future trial in order to grant summary judgment.[31]

It is not clear on reading *Pizza Pizza* that Justice Henry's intention was to limit the scope of the application of the rule. In his analysis, Justice Henry comprehensively reviewed the Rule 20 cases to that point and attempted to strike a balance between the consequences of granting summary judgment too easily and depriving a party of the ability to test its case at a trial and the consequences of sending unmeritorious issues on to trial. Among the cases to which he favourably referred was a decision from earlier that year in which Justice Farley had repeated Justice Boland's concern (expressed four years earlier in *Vaughan*) "that Rule 20 should not be eviscerated by the practice of deferring actions for trial at the mere suggestion that further evidence may be made available or that the law is in a state of confusion".[32]

Unfortunately, as Rule 20 was further judicially interpreted, that very process of deferring actions for trial was about to begin.[33]

(2) The *Ungerman* and *Aguonie* Decisions

In 1991, the powers of a motion judge were further restricted following the decision in *Irving Ungerman Ltd. v. Galanis.*[34] In this decision, the Ontario Court of Appeal undertook to clearly set out the meaning of "genuine issue for trial" under Rule 20. To do so, the Court of Appeal looked to the origins of the term and found that "the expression 'genuine issue' was borrowed from the third sentence in Rule 56(c) in the *Federal Rules of Civil Procedure* in the

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[31] See, for example, the following Ontario decisions: *Intellibox Concept Inc. v. Intermec Technologies Canada Ltd*, (2011), 208 AC.W,S. (3d) 696, 2011 ONSC 4264; *2069190 Ontario Inc. v. Economical Mutual Insurance Group* (2009), 183 A.C.W,S. (3d) 239, 2009 CarswellOnt 7697 (S.C.J.); and *Warner v. Cherry* (1997), 71 A.C.W.S. (3d) 652, [1997] O.J. No. 2208 (Gen. Div.). Also see, for example, the following decisions of the Federal Courts: *Feoso Oil Ltd. v. "Sarla" (The),* [1995] 3 F.C. 68, 184 N.R, 307, 56 A.C.W.S. (3d) 41 (C.A.); *Granville Shipping Co. v. Pegasus Lines Ltd. S.A.,* [1996] 2 F.C. 853, 111 F.T.R. 189, 62 A.C.W.S. (3d) 1095 (T.D.); and *Federated Co-operatives Ltd. v. Canada* (M.N.R., *Customs and Excise*) (1999), 165 F.T.R. 135, 89 A.C.W.S. (3d) 1179 (T.D.), affd 268 N.R. 353, 104 A.C.W.S. (3d) 94, 2001 FCA 23, leave to appeal to S.C.C. refused 275 N.R. 399*n*, 200 F.T.R. 106*n*.

[32] *Avery v. Value Investment Corp.* (1990), 21 A.C.W.S. (3d) 488, [1990] O.J. No. 843 (H.C.J.), affd 25 A.C.W.S. (3d) 827 (C.A.).

[33] The Federal Court of Appeal recently held in *Amazon.com, Inc. v. Canada (Attorney General)* (2011), 97 C.P.R. (4th) 171, 2011 FCA 328, at paras. 53-54, in remitting a patent application to the Commissioner for further consideration: "the Commissioner should be wary of devising or relying on tests of the kind set out in the previous paragraph, even if they are intended only to summarize principles derived from the jurisprudence interpreting some aspect of the statutory definition of 'invention'. The focus should remain on the principles to be derived from the jurisprudence. Catch phrases, tag words and generalizations can take on a life of their own, diverting attention away from the governing principles. Of course, the Commissioner must consider all relevant jurisprudence, but must also recognize that each decided case turns on its own facts and arises in the context of the state of knowledge at a particular point in time, with the objective of resolving a particular disagreement between the parties to the litigation. Such contextual factors, necessarily mean that caution should be exercised in developing a principle derived from a specific decided case and extrapolating it to another case". It may be that *Pizza Pizza* suffered the fate of being distilled down to a catch phrase.

[34] S*upra,* footnote 17.

United States that were adopted in 1938".[35] Thus, following a consideration of U.S. jurisprudence, the Ontario Court of Appeal discussed the meaning of "genuine issue for trial":[36]

> It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists". [Emphasis in original.]

The Court of Appeal's focus on the effect of the words "for trial" is to be noted – the words "for trial" appear to be interpreted to mean that if "there is no issue of fact which *requires* a trial for its resolution" the requirements under Rule 20 have been met. This was the interpretation adopted by the Supreme Court of Canada in *Guarantee Co. of North America v. Gordon Capital Corp.* [37] when that Court ruled that "[t]he appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact *requiring* trial, and therefore summary judgment is a proper question for consideration by the court" (emphasis added). This sentence could be interpreted to mean that even if a genuine issue of material fact exists, so long as the motion judge determines a trial is not required to resolve the issue, summary judgment can be granted.

Unfortunately, Ontario courts following *Ungerman* did not adopt this broader interpretation. Instead, they interpreted *Ungerman* more conservatively. For example, in 1998 the Ontario Court of Appeal in *Aguonie v. Galion Solid Waste Material Inc.* – citing *Ungerman* – held that the court's role on a motion for summary judgment was "*narrowly* limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring trial"[38] (emphasis added) and that "the court will *never* assess credibility, weigh the evidence, or find the facts".[39] (emphasis added). The evaluation of credibility, the weighing of evidence, and the drawing of factual inferences were all functions to be reserved for the trier of fact[40].

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[35] *Ibid.,* at p. 738.

[36] *Ibid.,* at p. 740.

[37] *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1, 39 C.P.C. (4th) 100, at para. 27.

[38] Supra, footnote 22, at para. 32.

[39] *Ibid.*

[40] *Ibid.*

The Court of Appeal went on to adopt a narrow view of when summary judgment would be granted: [41]

> *Summary judgment*, valuable as it is for striking through sham claims and defences which stand in the way to a direct approach to the truth of a case, *was not intended to, nor can it, deprive a litigant of his or her right to a trial unless there is a clear demonstration that no genuine issue exists*, material to the claim or defence, which is within the traditional province of a trial judge to resolve. [Emphasis added.]

Thus, despite the potential for a broader interpretation making summary judgment available where a genuine issue of fact exists that does *not* require a trial for its resolution, in subsequent application *Ungerman* instead served to limit the situations in which summary judgment could be granted. Following *Ungerman,* the presence of *any* genuine issue precluded the possibility of proceeding summarily. Eventually, subsequent interpretation of the rule confirmed that the motion judge played only a "narrow role"[42] on a motion for summary judgment and that summary judgment is appropriate only where the motion judge is "satisfied that it is clear that a trial is *unnecessary*".[43]

(3) The State of the Jurisprudence under Rule 20 Before the 2010 Changes to the Rule

In the years following *Ungerman* and *Aguonie*, the restrictions on a motion judge's ability to evaluate evidence continued to be upheld. Justice Boland's 1986 statement in *Vaughan*, repeated in 1990 by Justice Farley in *Avery* and Justice Henry in *Pizza Pizza* – that Rule 20 should not be "eviscerated by the practice of deferring actions for trial at the mere suggestion that further evidence may be made available or that the law is in a state of confusion" – was, by 2009, no longer the guiding philosophy in the application of the Rule.

Instead, it became "well settled" that the role of the judge on a motion for summary judgment was limited to deciding whether there existed any genuine issue of material fact that required a trial for its resolution. Although this involved taking a hard look at the evidence presented, the motion judge was not to attempt to find facts, assess credibility or decide questions of law.[44] The motion judge was also not to draw inferences from conflicting

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[41] *Ibid.,* at para 35.

[42] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257, 26 C.P.C. (4th) 1, 111 O.A.C. 201 (C.A.), at para. 20.

[43] *Supra.,* at para. 20; and *Folland v. Reardon* (2005), 249 D.L.R. (4th) 167, 74 O.R. (3d) 688, 194 O.A.C. 201 (C.A.), at para. 33.

[44] *Ferri v. Root* (2006), 279 D.L.R. (4th) 643, 219 O.A.C. 340 *sub nom*. *Mammoliti v. Niagara Regional Police Service*, 45 C.C.L.T. (3d) 159 (C.A.), leave to appeal to S.C.C. refused [2007] 3 S.C.R. xiv, 281 D.L.R. (4th) vii, 241 O.A.C. 400, at para. 68; *Royal Bank. of Canada v. Société Générale (Canada)* (2006), 219 O.A.C. 83, 31 B.L.R. (4th) 63, 154 A.C.W.S. (3d) 72, addt'l reasons 31 B.L.R. (4th) 83, 157 A.C.W.S. (3d) 40, 2007 ONCA 302, leave to appeal to S.C.C. refused [2007] 3 S.C.R. xv, 376 N.R. 400*n*, [2007] S.C.C.A. No. 87, at para. 35; *Esses v. Friedberg & Co.* (2008), 241 O.A.C. 134, 169 A.C.W.S. (3d) 1016, 2008 ONCA 646, leave to appeal to S.C.C. refused [2009]1 S.C.R. viii, 395 N.R. 393*n*, [2008] S.C.C.A. No. 471, at para. 43.

evidence or from evidence that was not in conflict when more than one inference was reasonably possible.[45]

As a result of these strict limitations and the judge's "narrow role," Rule 20 did not make summary judgment widely available to applicants but rather limited its availability. Arguably, the purpose and objective of Rule 20 under the 1985 Rules was not achieved.

3. The Federal Courts Experience

In 1994, the *Federal Courts Rules* were amended to add a summary judgment procedure under Rules 432.1 to 423.7. These provisions came into effect on January 13, 1994,[46] and set out the scope for summary judgment motions:

- Rule 432.3(4) provided that even where "a judge decides that there is a genuine issue with respect to a claim or defence, the judge may nevertheless grant summary judgment in favour of any party, either upon an issue or generally, unless (a) the judge is unable on the whole of the evidence to find the facts necessary to decide the questions of fact and law; or (b) the judge considers that it would be unjust to decide the issues on the motion for summary judgment";

- Rule 432.3(5) authorized the judge, when dismissing the motion for summary judgment in whole or in part, to order the action or the issues in the action not disposed of by summary judgment to proceed to an expedited trial under Rule 327.1 upon the request of any party; and

- Rule 327.1 provided for an expedited trial, similar to a summary trial under British Columbia Rule 9-7 (formerly Rule 18A).[47] By Rule 327.1(e), the expedited trial rule was explicitly integrated with the summary judgment rules, and provided that any additional discovery prior to the expedited trial be limited to matters not covered in the affidavits filed for the summary judgment motion and the cross-examinations on those affidavits.

One of the first cases to interpret Rules 432.1-432.7 was *Marine Atlantic Inc. v. Blyth.*[48] In *Blyth*, defence counsel cited numerous decisions under the Ontario *Rules of Practice* in support of its arguments against summary judgment. The Federal Court, however,

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[45] *Transamerica Occidental Life Insurance Co. v. Toronto-Dominion Bank* (1999), 173 D.L.R. (4th) 468, 44 O.R. (3d) 97, 118 O.A.C. 149 (C.A.), at para. 50, citing *Aguonie, supra*, footnote 22, at para. 32.

[46] *Supra,* note 2.

[47] British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009. A summary trial in British Columbia is an expedited trial process in which the litigants provide evidence primarily by way of written affidavits. Following the hearing of a summary trial, 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.

[48] *Marine Atlantic Inc. v. Blyth* (1994), 77 F.T.R. 97, 47 A.C.W.S. (3d) 1107 (T.D.).

concluded that it was not clear that the new Federal Courts Rules were to be interpreted in the same fashion as the Ontario Rules:[49]

> …Rules 432.1 and following should be interpreted by reference to their own textual framework. Rule 432.3(4) provides that summary judgment should not be granted on an issue when (1) on the whole of the evidence the judge cannot find the necessary facts or (2) it would be unjust to do so. These are the criteria which must be considered …

This became the test to be applied by the Federal Court under the new Rules. In the early jurisprudence relating to the summary judgment rules, the Federal Court acknowledged the broader power allowed under the new Rules, compared to the Ontario Rules, with respect to deciding both questions of law and fact on summary judgment.[50]

(1) The Federal Courts Adopt the Ontario Jurisprudence in the Interpretation of the Federal Summary Judgment Rules

Blyth remained the leading authority on summary judgment in Federal Court until the Federal Court of Appeal's 1995 decision in *Feoso Oil Ltd. v. The Sarla*[51] *Feoso* was the first Federal Court case to use Ontario case law in the interpretation of Rules 432.1-432.7. In *Feoso*, the Court of Appeal considered *Blyth* and agreed that the new rules should be interpreted by reference to their own textual framework. However, the Court of Appeal also felt that "the Court should [not] disregard decisions of a provincial superior court bearing on the interpretation of any similar rules, particularly where those rules are expressed in language which in all material respects is identical with the rules now under consideration".[52]

Justice Stone, speaking for the majority in *Feoso*, considered several Ontario summary judgment decisions, including *Pizza Pizza*[53] and *Ungerman.*[54] The Federal Court of Appeal relied on these decisions to support its conclusion that the moving party on a summary judgment motion is required to satisfy the court that no genuine issue for trial exists and that, therefore, the moving party must bring forth evidence to this effect.[55] This requirement is arguably inconsistent with the power granted under Rule 432.3(4), which stated that a judge may grant summary judgment despite the presence of a genuine issue

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[49] *Ibid.,* at paras. 14 and 15.

[50] In *Patrick v. Canada* (1994), 49 A.C.W.S. (3d) 1216, [1994] F.C.J. No. 1216 (T.D.), Justice Strayer stated at para. 6 that: "[t]he new Federal Court Rule 432.3(4)(a) clearly authorizes a judge to decide questions of both fact and law on a motion for summary judgment if he is able to do so on the material before him. broader than that provided under Ontario Rule 20".

[51] Supra, footnote 31.

[52] *Ibid.,* at para 12.

[53] *Supra*, footnote 26.

[54] S*upra,* footnote 17.

[55] S*upra,* footnote 31.

for trial so long as the requisite facts can be found and it is not unjust to decide the issues on such a motion.[56] This discretionary power granted under the rules is not mentioned in *Feoso*.

Feoso effectively adopted the Ontario jurisprudence in the interpretation of the new summary judgment of the *Feoso* decision, several Federal Court summary judgment cases followed the Court of Appeal's example and used Ontario case law to interpret the federal summary judgment rules.

For example, in *Collie Woolen Mills Ltd. v. Canada*,[57] the court reviewed a large number of Ontario cases and asserted that "[a]lthough the Ontario Courts' application of the summary judgment provisions are not determinative of the interpretation to be adopted by this Court…the language of the Ontario Rules is in all material respects identical with that of Rule 432.3(1). Thus, the decisions of the Ontario courts provide some useful guidance".

Similarly, in *Granville Shipping v. Pegasus Lines Ltd. S.A.*,[58] Justice Tremblay-Lamer summarized the principles enunciated by the Federal Courts' jurisprudence regarding Rules 432.1-432.7. In this case, the court attempted to strike a balance between the federal jurisprudence, citing *Blyth* for the principle that "each case should be interpreted in reference to its own contextual framework," and then citing *Feoso* and *Collie* for the principle that "provincial practice rules (especially Rule 20 of the Ontario *Rules*) can aid in interpretation". [59] It is notable that Justice Tremblay-Lamer did not make reference to the two-part test set out in *Blyth* – a test derived from reference to the Rules' own contextual framework. Instead, Justice Tremblay-Lamer states: "Stone J.A. [in *Feoso*] seems to have adopted the reasons of Henry J. in [*Pizza Pizza*]. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial".[60] Thus, with this decision, the test for summary judgment applied in Ontario courts came to be adopted by the Federal Courts as the test under their rules.

Unlike *Blyth* and other cases adopting *Blyth*, both *Feoso* and *Granville Shipping* continue to be frequently followed and considered by the Federal Courts.[61] Therefore, by extension, Ontario jurisprudence continues to be followed and considered by the Federal Courts in summary judgment cases.

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[56] S. John Page and Timothy Pinos, *Summary Judgment* (Aurora, Ont.: Canada Law Book, 1998), at p. 16.

[57] *Collie Woolen Mills Ltd. v. Canada*, [1996] 2 C.T.C. 152, 96 D.T.C. 6146, 107 F.T.R. 93 (T.D.), affd (unreported, January 15, 1998; F.C.A.), leave to appeal to S.C.C. refused 234 N.R. 197*n*, at para. 6 (T.D.).

[58] *Granville Shipping v. Pegasus Lines Ltd. S.A.*, [1996] 2 F.C. 853, 111 F.T.R. 189, 62 A.C.W.S. (3d) 1095 (T.D.).

[59] *Supra*, at para 8.

[60] *Ibid.*

[61] From a note-up of *Blyth, Feoso, Granville Shipping and Pallman Maschinenfabrik GmbH Co KG v. CAE Machinery Ltd.* (1995), 62 C.P.R. (3d) 26, 98 F.T.R. 125, 56 A.C.W.S. (3d) 155 (T.D.), in Westlaw. *Pallman* is one of the leading cases which adopted the test from Blyth (at paras. 44-45).

(2) The Effect of the Federal Courts Adopting Ontario Jurisprudence

As discussed above, deriving interpretive guidance from Ontario's summary judgment jurisprudence may have had the effect of restricting application of the Federal Court summary judgment rules.

The key distinction between Ontario's Rule 20 and the Federal Courts Rules 432.1-432.7 was the broader power of the Federal Court to determine both questions of law *and fact* on a motion for summary judgment.[62] As noted, Rules 432.1-432.7 granted a broader discretion to Federal Court judges in the disposition of a summary judgment motion because "Rule 432.3(4) allows a judge to grant summary judgment despite the presence of a genuine issue for trial unless he is unable to find the facts necessary to decide the questions of fact or law or it would be unjust to decide the issues on the motion for summary judgment".[63] This is consistent with the summary judgment test articulated in *Blyth*.

Adoption of the "so doubtful as to not deserve consideration by the trier of fact at a future trial" test from *Pizza Pizza* by the court in *Feoso* and *Granville Shipping* may have resulted in narrowing the test for summary judgment by disregarding the judge's discretion under Rules 432.1-432.7 to grant summary judgment even if there is a genuine issue for trial. No reference to this discretion is made in either *Feoso* or *Granville Shipping,* which may have resulted in the lack of consideration of this discretion in subsequent cases.

For example, the Federal Court in *Paige Innovations v. Noma Inc.*[64] stated that "[t]he jurisprudence has established that the test for granting summary judgment is not whether a party cannot possibly succeed at trial, but whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial". This statement, taken from *Pizza Pizza*, makes no mention of the judge's ability in Federal Court to grant summary judgment despite the presence of a genuine issue for trial. A review of the jurisprudence from 1994 to 1998 revealed only one decision under Rules 432.1-432.7 in which the judge's discretion to grant summary judgment despite the presence of a genuine issue for trial was emphasized.[65] We found no case in which the Federal Court actually exercised this discretion.

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[62] *Granville Shipping*, *supra* note 58 at para. 8.

[63] Page and Pinos, *op. cit.*, footnote 56, at p. 16.

[64] *Paige Innovations v. Noma Inc.* (1997), 77 C.P.R. (3d) 194, 135 F.T.R. 277, 73 A.C.W.S. (3d) 1031 (T.D.), at para. 7.

[65] *Ruhl Estate v. Mannesmann Kienzle GmbH*, (1997) 80 C.P.R. (3d) 190, 137 F.T.R. 81, 74 A.C.W.S. (3d) 946 (T.D.). In *Ruhl*, the Federal Court at para. 23 stated that "Mr. Justice Stone, in *[Feoso]*, concluded that, on a motion such as this; the moving party, here the plaintiff, is required to satisfy the Court that no genuine issue for trial exists or, if one does exist, that the Court should nonetheless exercise its discretion under Rule 432.3(2) or (3). [The responding party], in response to the motion, is obligated to bring forth whatever evidence is available to it showing that there is a genuine issue for trial. But this, in the words of Mr. Justice Stone, 'imposes an evidentiary burden only.' The onus remains with the applicant." At para. 26, upon finding that there was a genuine issue for trial, the Federal Court concluded that the applicant had not sufficiently established that the court should nonetheless exercise its discretion.

(3) The 1998 Federal Courts Rules

On April 25, 1998 the new Federal Courts Rules came into force (the "1998 Rules"). Under the 1998 Rules, changes were made to the rules governing summary judgment, now Rules 215-219. Most notably, the power under old Rule 432.3(4) was changed. Under old Rule 432.3(4), the court had the power to grant summary judgment despite the presence of a genuine issue for trial unless the judge was unable to find the necessary facts to decide the question or unless it would be unjust to do so. Under the 1998 Rules, if a genuine issue for trial is found on the motion for summary judgment, Rule 215(3)(a) gives the court the power to determine that issue by way of summary trial under Rule 216. The summary trial is conducted as a motion, with a motion record, although the court has the power to require the deponent of an affidavit filed in support or an expert to attend for cross-examination before the court. Rule 216(6) contains what is effectively a "full appreciation" test:

> 216(6) If the Court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment either generally or on an issue, unless the Court is of the opinion that it would be unjust to decide the issues on the motion.

The effect of these changes, however, is not addressed by the Federal Courts' jurisprudence. In fact, the Federal Courts applied the jurisprudence under the former Rules as if no substantive change had been made to them.

One of first cases under the 1998 Rules, heard in June 1998, was *Bourque, Pierre & Fils Ltée v. Canada.*[66] In *Bourque*, the Federal Court essentially equated the old summary judgment Rules 432.1-432.7 to the new summary judgments Rules 215-219 without any analysis or discussion of the changes in wording and, following the old rules jurisprudence, applied *Granville Shipping* as setting out the guiding principles for granting summary judgment.

This trend of applying the old jurisprudence under the new rules continued uninterrupted over the years in cases including *Kodak v. Racine Terminal (Montreal) Ltd.,*[67] *F. Von Langsdorff Licensing Ltd.* v. *S.F. Concrete Technology Inc.*,[68] *Shaw v. Canada,*[69] and *Federated Co-operatives Ltd. v. Canada (M.N.R.).*[70] In 2001, the Federal Court of Appeal considered summary judgment under the new rules in *ITV Technologies, Inc. v. WIC*

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[66] *Bourque, Pierre & Fils Ltée v. Canada* (1999), 162 FTR 98, 85 A.C.W.S. (3d) 562 (T.D.), leave to appeal to S.C.C. refused 278 N.R. 197*n*.

[67] *Kodak v. Racine Terminal (Montreal) Ltd.* (1999), 165 F.T.R. 299, 88 A.C.W.S. (3d) 290 (T.D.).

[68] *F. Von Langsdorff Licensing Ltd. v. S.F. Concrete Technology Inc.* (1999), 1 C.P.R. (4th) 88 165 F.T.R. 74, 87 A.C.W.S. (3d) 1019 (T.D.)

[69] *Shaw v. Canada* (1999), 167 F.T.R. 233, 88 A.C.W.S. (3d) 359 (T.D.).

[70] *Federated Co-operatives Ltd. v. Canada (M.N.R., Customs and Excise)* (1999), 165 F.T.R. 135, 89 A.C.W.S. (3d) 1179 (T.D.), affd 268 N.R. 353, 104 A.C.W.S. (3d) 94, 2001 FCA 23, leave to appeal to S.C.C. refused 275 N.R. 399*n*, 200 F.T.R. 106*n*.

Television Ltd.[71] The Federal Court, in its decision in *ITV Technologies*, cited *Federated Co-operatives*, and adopted *Granville Shipping* as setting out the proper test for granting summary judgment. On appeal, the Federal Court of Appeal confirmed that this was the appropriate test for summary judgment: [72]

> [I]t is apparent that [the motion Judge] understood and applied the correct test as set out in the decision of Tremblay-Lamer J. in *Granville Shipping Co. v. Pegasus Lines Ltd. . . .* and the "best foot forward" principle from *Pizza Pizza Ltd…*

From this point the application of the pre-1998 jurisprudence to the post-1998 summary judgment rules became binding on the Federal Court.

After the 1998 Rules came into force, no court made any rigorous comparison of the two sets of rules or considered the impact of the changes. In fairness, while the wording changed, a case can be made that the rules enacted in 1994 were potentially broader than the new provisions enacted in 1998 because the expedited trial Rule 327.1 of 1994 did not have an equivalent to the "full appreciation" test in new Rule 216(6). Nevertheless, the Federal Court and Federal Court of Appeal seamlessly adopted the jurisprudence under the old rules as the test for summary judgment under the new rules. For all practical purposes the amendments had no effect on the availability of summary judgment. Tellingly, the only cases listed in the 2011 *Federal Courts Practice*[73] under Rule 216, the summary trial rule, are British Columbia decisions.[74]

As under the old jurisprudence, the Federal Court continued to make limited distinctions between the Ontario jurisprudence and its own test for summary judgment, as in one of the first Federal Court judgments decided under the new Rules in *F. Von Langsdorff*: [75]

> To the extent that this is a narrower test than that applied in this Court, it may be attributable to the fact that Ontario has no equivalent to Rule 216(3) of the *Federal Court Rules*, 1998 which, as I have already noted, expressly authorizes a motions judge to grant summary judgment where issues of fact are in dispute. The fact that civil jury trials are still common in the United States may also explain the relatively circumscribed definition in *Jones* v. *Clinton*, *supra*, of the motions judge's powers.

Overall, the changes in the new rules regarding summary judgment had no impact on the Federal Courts' test for granting summary judgment, and as a result, did not make

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[71] *ITV Technologies, Inc. v. WIC Television Ltd.* (2001), 11 C.P.R. (4th) 174, 104 A.C.W.S. (3d) 661, 2001 FCA 11, leave to appeal to S.C.C. refused [2001] 2 S.C.R. ix, 14 C.P.R. (4th) vii, 276 N.R. 195*n*.

[72] *Supra,* at para 4.

[73] Brian J. Saunders, Donald J. Rennie, Graham Garton, *Federal Courts Practice 2011* (Toronto, Ont.: Carswell, 2010).

[74] See also *supra* footnote 47 and accompanying text.

[75] S*upra* footnote 68 at para 15.

summary judgment any more accessible to federal court litigants. Over time the differences between the Federal rules and the Ontario rules all but disappeared, as can be seen in the cefaclor litigation in Eli Lilly and Co. v. Apotex.76

In that lawsuit, Lilly sued Apotex in 1997 for infringement asserting four process patents of its own and four it had acquired from Shianogi, a Japanese firm. Apotex counterclaimed, alleging that there was a conspiracy between Lilly and Shianogi to lessen competition, and that the transfer of the four patents from Shianogi to Lilly had the effect of lessening competition entitling Apotex to damages under s. 36 of the *Competition Act*. [77]

Three motions came before Justice Hugessen, two of which being motions for summary judgment brought by Lilly and Shianogi to dismiss the counterclaim. Justice Hugessen granted summary judgment on the basis of a prior decision of the Federal Court of Appeal that held an assignment of a patent, without more, was not actionable under the *Competition Act*. He held that the allegations of conspiracy only added colour to what was, in his view, a transaction specifically allowed under the *Patent Act*. [78]

However, Apotex appealed and the Court of Appeal sent the question back to Justice Hugessen for reconsideration since it disagreed with his interpretation of the earlier case on patent assignments. The Court of Appeal set out three specific questions to be answered by Justice Hugessen, including whether the Apotex counterclaim was barred by reason of a limitation period. There was no discussion of the test to be used in granting or refusing summary judgment, since the Court of Appeal disagreed with Justice Hugessen's application of the prior case concerning the *Competition Act*.

The rehearing took place in October 2010. [79] Again, Justice Hugessen granted summary judgment on the basis that an assignment of a patent, without more, could not amount to undue lessening of competition, since a patent monopoly by its very nature limited competition, and the *Patent Act* specifically authorized that limitation of competition. He was not prepared to decide the question of the limitation period on a motion for summary judgment, nor was he prepared to hold that Apotex' assertion that its damages for the lessening of competition was the same as any damages it might be found responsible for with respect to patent infringement could not possibly succeed.

The Court of Appeal set aside the summary judgment, again on the basis that it did not agree with Justice Hugessen's interpretation of the earlier authority regarding a patent assignment not being actionable under the *Competition Act* without something more. The only mention of any authority on the test to be applied on a motion for summary judgment was of the Ontario Court of Appeal decision in *Aguonie* to the effect that when

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[76] *Eli Lilly and Co. v. Apotex Inc.* (2003), 28 C.P.R. (4th) 37, 126 A.C.W.S. (3d) 37, 2003 FC 1171, revd 240 D.L.R. (4th) 679, 32 C.P.R. (4th) 195, 323 N.R. 180 (C.A.).

[77] R.S.C. 1985, c. C-34.

[78] R.S.C. 1985, c. P-4.

[79] *Eli Lilly and Co. v. Apotex Inc.* (2004), 35 C.P.R. (4th) 155, 262 F.T.R. 154, 134 A.C.W.S. (3d) 888 (F.C.), revd 260 D.L.R. (4th) 202, 44 C.P.R. (4th) 1, 341 N.R. 114 (C.A.).

discoverability is in issue, a limitations defence should not be disposed of on a motion for summary judgment.

The case eventually came to trial in 2009. The trial decision[80] exceeds 300 pages and 880 paragraphs in length. Nearly 200 paragraphs are devoted to the counterclaim. Justice Gauthier concluded that the claim was indeed statute barred, and also that Apotex had failed to prove damages. She also found that after Apotex' supplier altered the process it used in 1998, the Apotex product no longer infringed. Lilly appealed, and Apotex cross-appealed. Only the infringement issues were raised in the appeal – the counterclaim was not. Given the complexity of the damages and limitations issues, it may well be that summary judgment was not appropriate. What is disappointing is that no serious discussion of the scope of the rule, and specifically Rule 216, occurred.

(4) The 2010 Rule Change to Ontario's Rule 20

As discussed above, over time the summary judgment Rules in both the Ontario Courts and the Federal Courts came to rely on essentially the same body of case law. This law was interpreted restrictively and the granting of summary judgments became less frequent. The growing difficulty in obtaining a summary determination meant that parties were, as a general rule and as Justice Boland foresaw in *Vaughan*, consigned to "the agony and expense of a long and expensive trial after some indeterminate wait". [81]

In 2010, the amendments to Ontario's *Rules of Civil Procedure,* including Rule 20, came into effect. These amendments brought significant changes to Ontario's summary judgment rule. First, the test for granting summary judgment was changed from no "genuine issue for trial" to no "genuine issue *requiring* a trial". Very significantly, the new Rule provided the motion judge with expanded powers. Under Rule 20.04(2.1), in determining whether there is a genuine issue requiring a trial with respect to a claim or defence, a motion judge may now weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence. Under 20.04(2.2), the rule also allowed the motions judge to direct oral evidence at the summary judgment hearing to assist in the exercise of these new powers.

The impact of these amendments was difficult to discern in the two years following the rule change. Roughly speaking, two schools of thought developed: one holding that the amendments had effected no substantive change and the other holding the amendments had equipped judges with a variety of powerful new tools that could be used to resolve actions without recourse to the full forensic machinery of a trial. In *Combined Air*, the Ontario Court of Appeal elected not to enter into a consideration of the relative merits of these different approaches, but chose to mark "a new departure and a fresh approach" to the interpretation of the amended Rule 20.[82]

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[80] *Eli Lilly and Co. v. Apotex Inc.* (2009), 80 C.P.R. (4th) 1, 184 A.C.W.S. (3d) 489, 2009 FC 991, affd 90 C.P.R. (4th) 327, 409 N.R. 173, 193 A.C.W.S. (3d) 1282 (C.A.), leave to appeal to S.C.C. refused 90 C.P.R. (4th) vi.

[81] Vaughan, supra, footnote 18.

[82] *Combined Air*, *supra* footnote 3 at para. 35.

4. The Ontario Court of Appeal's Decision in Combined Air

It is clear that the Ontario Court of Appeal intended *Combined Air* to be the definitive guide to the profession on the scope, nature, and application of the new summary judgment rule and its expanded powers. *Combined Air* is actually a collection of five separate appeals from decisions made under the new Rule 20 that were heard and released together. The decision in *Combined Air* is unanimous, from a five judge panel instead of the usual three judge panel. In addition, at the hearing the Court appointed five *amici curiae* to address the meaning and scope of the 2010 amendments to Rule 20.

One of the more significant aspects in the Court of Appeal's ruling in *Combined Air* is that the earlier restrictions on the analytical tools available to a motion judge had been expressly overruled by the 2010 Rule amendments, with the court providing guidance on how the new powers under the rule should be used.[83]

Following the format of the Court of Appeal's decision we consider its statement of principles and then examine the application of these principles in the factual context of the five individual cases that formed the basis of the appeal.

(1) Guiding Principles

The new Rule 20 is underpinned by the potentially competing goals of access to justice and proportionality. The objective of the new Rule is to make the justice system more accessible and affordable to litigants by expanding the circumstances in which matters can be summarily determined at an early stage. However, the guiding interpretive principle of the rule is proportionality; using the *most appropriate* procedure to resolve a particular dispute will generally be more important than achieving expediency or finality in the litigation process.

According to the court, the foremost consideration in determining the best procedure to resolve a matter must always be whether, in the circumstances of any given case, the procedure selected will provide an appropriate means of effecting a fair and just resolution of the dispute. The procedural fairness of each summary judgment motion and trial will depend on the nature of the issues posed and the evidence led by the parties.[84] The court notes that, in some cases, the right procedure to determine a matter will continue to be a full trial.[85] Clearly, the goal of the Rule is not to eliminate or reduce the number of trials but to eliminate *unnecessary* trials when another procedure is available to furnish the litigants with a just resolution. In other cases, the nature of the matter and the state of the record will mean that is it just, fair and appropriate to determine the matter by way of a summary judgment motion. Whether a full trial is required is a determination that, of necessity, will still need to be made on a case by case basis, according to the guidance provided in *Combined Air* and subsequent authorities.

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[83] *Ibid.,* at para. 36.

[84] *Ibid.,* at para. 39.

[85] *Ibid.,* at para. 45.

(2) Types of Cases Amenable to Summary Judgment and Application of the New Powers

In *Combined Air,* the Court of Appeal begins by identifying, without attempting to be exhaustive, three potentially overlapping categories of cases that are amenable to summary judgment. The first category comprises cases where the parties agree to proceed by way of summary judgment, subject to the court's discretion to refuse to grant judgment if, in the opinion of the motion judge, the matter is not appropriate to be resolved by way of summary judgment. The second category comprises cases where a party asserts a claim or a defence without merit. It is well-established that trying unmeritorious claims and defences imposes a significant strain on the justice system. It is in the interests of justice to weed out claims and defences "with no chance of success" early in the adjudication process. This category of case involves some overlap with Rule 21. Both these first and second categories of cases were available for summary determination under the former Rule 20.

The third category of case that may be amenable to summary determination comprises cases where a trial is not required "in the interest of justice". This is a new category of case that may now be disposed of by summary judgment pursuant to the new Rule 20.

The phrase "in the interest of justice" provides the threshold, limiting language that will determine which procedure is more appropriate to justly resolve the dispute. To make this determination, the motion judge must consider the nature of the action and the evidence required to resolve the disputed issues.

Central to this determination, the motion judge must consider whether it will be necessary to use the expanded powers available under the new Rule 20 in the course of the summary judgment motion. The test for determining whether these new powers should be used will doubtless become known as the "full appreciation" test: 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 trial? Again, it is the nature of the case and the evidence required to support arguments advanced by counsel that will determine whether cases in this third category are appropriate for resolution by way of a summary judgment motion. The full appreciation test must be considered *before* the motion judge uses any of the expanded powers under Rule 20.04(2.1).[86]

The court cautions that "fully appreciating" the evidence is something more than simply being familiar with the evidence. It requires motion judges to do more than assess if they are capable of reading and interpreting all the evidence that has been put before them. Fully appreciating the evidence, in the sense required under the new test, requires the motion judge to assess "whether the attributes of the trial process are necessary to enable him or her to fully appreciate the evidence and issues posed by the case".[87] If a trial narrative is required to weigh evidence and draw inferences, if the judge believes he or she needs to hear witnesses speak in their own words (even if supplemented by the new power to call oral evidence at a summary judgment motion) or experience the trial fact-finding process first-hand, then a trial is likely required. In other words, to be satisfied that the

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[86] *Ibid.,* at paras. 73 and 74.

[87] *Ibid.,* at para. 54.

matter can be appropriately resolved on a summary judgment motion, the motion judge must be satisfied that it is possible to make dispositive findings of fact on the motion record and through appropriate use of the expanded powers available under the new Rule.

The court provides some examples of cases where it may be appropriate to use these expanded powers and proceed by way of summary judgment motion: document-driven cases with limited testimonial evidence and cases with limited contentious factual issues where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues. By contrast, for cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, it is unlikely that the powers provided for under Rule 20.04(2.1) will provide an adequate substitute for a full trial.

The decision in *Combined Air* also provides some commentary on the qualities of a trial and why sometimes a trial process will be required to produce a just result. These include the dynamic nature of a trial, the participatory role the trial judge plays in the process and the unique and "narrative" nature of the trial record. In particular, in a trial process, the trial judge will have "total familiarity with the evidence," "extensive exposure to the evidence," and "familiarity with the case as a whole". If such an appreciation of the evidence is required, then the action should proceed to trial.

The court is clear that the power to order oral evidence is simply another tool that the motion judge may use to determine whether any issue truly requires a trial for its just and fair resolution. It is not intended that this power be used to supplement or enhance a deficient motion record and exercising this power does not turn a summary judgment motion into a hybrid or "mini" trial. As such, it is the motion judge, not counsel, who has control over whether oral evidence may be led and the issues to which the examination should be confined.

In part, because the new Rule requires a close examination of the nature of the evidence, counsel have a (perhaps heightened) responsibility to ensure they are adopting an appropriate litigation strategy. For example, it is not appropriate to bring a summary judgment motion too early in the litigation, if a "full appreciation" of the evidence requires that the normal processes of document production and oral evidence should be completed prior to any summary judgment motion. Premature summary judgment motions may benefit from being stayed until the parties are able to build a record that can satisfy the full appreciation test through the normal course of the litigation process.

In the event the court agrees to proceed by way of summary judgment, litigants are still under the evidentiary obligation to "put their best foot forward" and lead their best evidence. They are not entitled to sit back in the hopes that more favourable facts can be brought forward at trial.

(3) The Five Appeals

(a) Case 1: Combined Air Mechanical v. Flesch

The *Combined Air* appeal, which gives this case its name, provides direction on the scope, nature and application of the court's power to order oral testimony under Rule 20.04(2.2).

In the underlying action, Combined Air sued William Flesch, James Searle, and related companies for damages for breach of restrictive covenants, among other things. The covenants at issue prevented the defendants from working for companies in "competition" with Combined Air. Combined Air asserted that a company "CRSC" was in competition with it, and by working for CRSC, the defendants were in breach of the covenant.

Flesch and others brought a motion for summary judgment on the grounds that Combined Air's allegations were baseless.

In support of its motion, Combined Air adduced as evidence a bid document that named CRSC along with other of Combined Air's competitors. Combined Air said that the document demonstrated the defendants were in competition with Combined Air.

The motion judge found the document ambiguous. To understand the document and assess its weight, the motion judge directed that oral evidence be called. In making this order, the motion judge limited the oral examination to questions concerning the document only. Counsel were not allowed to cross-examine the witness (a representative of CRSC) on other bids, projects or on CRSC's business generally.

Following the hearing, the motion judge granted summary judgment on the basis that Combined Air had failed to adduce evidence to support any of its allegations. [88] Combined Air appealed only on the issues relating to the allegations of the breach of the restrictive covenants, including on the issue of whether the motion judge erred in his exercise of the power to order the presentation of oral evidence under Rule 20.04(2.2).

In dismissing the appeal, the Court of Appeal provided guidance on the proper exercise of the power to order oral evidence. It confirmed that the purpose of making such an order is to facilitate the exercise of the court's powers under Rule 20.04(2.1). The court also identified factors that tend to suggest ordering oral evidence will be appropriate: where the ambiguous issue to be clarified is narrow and discrete; where there are a limited number of issues to be clarified; where a limited number of witnesses will be required to be called, and then for a short period of time; and where the sought-after explanation will likely have a significant impact on whether the motion will be granted.

The court found that it is implicit in the language and purpose of the rule that the motion judge has the power to limit the scope of the examination and to place restrictions on the types of questions that may be asked. This is in keeping with the function of the Rule: asking questions on issues that do not require a trial risks turning an oral examination into an (unnecessary) trial, defeating the purpose of the power, and the Rule, generally.

The court also found that placing limitations on the scope and nature of oral examinations does not deny procedural fairness. Such oral testimony was heard only following argument and the presentation of supporting evidence.

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[88] *Combined Air Mechanical Services Inc. v. Flesch* (2010), 71 B.L.R. (4th) 27, 2010 ONSC 1729, 187 A.C.W.S. (3d) 100, affd 108 O.R. (3d) 1, 2011 ONCA 764.

(b) Cases 2 and 3: Mauldin v. Hryniak and Bruno v. Hryniak

Mauldin v. Hryniak and *Bruno Appliance and Furniture v. Hryniak*[89] provides an example of the type of cases that should not be decided by summary judgment and require a trial for their just resolution.

These two appeals arose from two separate actions against the defendants Hryniak, Peebles, and Cassels Brock & Blackwell LLP, resulting from lost investments. The plaintiff investors – the Maudlin Group in one action and Albert Bruno in the other – sued in fraud, conspiracy, negligence, and breach of contract. The plaintiffs moved for summary judgment.

The record for the motion was extensive: 18 witnesses filed affidavits. Cross examinations on those affidavits took three weeks. The motion record comprised 28 volumes and oral argument took four days.

The main issue on appeal was whether, given the nature of the evidence at the motion, it was in the interest of justice to grant summary judgment. On appeal, the court found that this case exemplified the sorts of cases that should not be decided by way of summary judgment since a full appreciation of the evidence could only have been achieved by using the full procedural machinery available at trial. The court identified the following characteristics of the action that suggested that summary judgment would not be appropriate:

- a voluminous motion record;
- many witnesses;
- different theories of liability against the various defendants;
- numerous findings of fact that needed to be made to decide the motion;
- credibility determinations at the heart of disputed issues;
- the evidence of major witnesses conflicted on key issues; and
- assessing credibility was made more difficult by the near absence of reliable documentary yardsticks.

The court also found that the partial resolution of these actions through summary judgment did not promote the values that Rule 20 was designed to promote: access to justice, proportionality and costs savings. In fact, bringing the motions had the opposite effect: the motions took years to prepare at a cost of 1.7 million dollars, which approached the amount in dispute. Furthermore, a trial was still required to determine the liability of some defendants.

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[89] *Mauldin v. Hryniak* and *Bruno Appliance and Furniture Inc. v. Hryniak*, 2010 ONSC 5490, 195 A.C.W.S. (3d) 305, revd 108 O.R. (3d) 1, 2011 ONCA 764. Note: leave to appeal to the Supreme Court of Canada is being sought in both cases.

(c) Case 4: 394 Lakeshore Oakville Holdings Inc. v. Misek

394 Lakeshore Oakville Holdings Inc. v. Misek[90] concerned an alleged prescriptive easement over a neighbouring property. The respondents in the appeal wished to develop their land into residential condominiums. As part of process, they applied for a particular land designation. The appellant objected to the designation because it would interfere with the easement she alleged she had over the lands, derived from her over 20 years of prior continuous use.

The motion judge, in finding that no easement existed, used the enhanced powers available to him under Rule 20.04(2.1). The appellant appealed on numerous issues, including that the motion judge erred in concluding that a trial was not required and that a case concerning an alleged prescriptive easement should not be decided on a summary judgment motion.

The court dismissed the appeal. The court found that the motion judge properly employed the enhanced powers available to him under the Rules. In particular, the Court of Appeal noted that this was, in fact, a good example of a case amenable to summary judgment: the documentary evidence was limited and not contentious, there had been a limited number of relevant witnesses and the governing legal principles were not in dispute. The court found that the motion judge did not err in using the expanded powers to weigh evidence and make a finding.

Furthermore, the court rejected the submission that certain categories of claims should not be decided on a summary judgment motion. Again, the court affirmed it is the nature of the *evidence*, and whether that evidence can be "fully appreciated" using a particular procedural process that will determine whether the matter can be disposed of by summary judgment. In doing so, the court confirmed that there is no category of claim that cannot be decided by way of summary judgment on an appropriate record.

(d) Case 5: Parker v. Casalese

In the final appeal, *Parker v. Casalese,*[91] the Court of Appeal addressed the application of the new summary judgment Rule in the context of simplified procedure actions brought under Rule 76. In such cases, the Court of Appeal found that the full appreciation test must be considered in conjunction with the "efficiency rationale" that underlies simplified actions.

In *Parker,* the appellants brought a simplified procedure action against various parties (including a builder) who constructed two new homes between the appellants' existing homes. The appellants alleged that in the process of constructing the new homes the respondents damaged the appellants' homes.

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[90] *394 Lakeshore Oakville Holdings Inc. v. Misek* (2010), 98 R.P.R. (4th) 21, 2010 ONSC 6007, 194 A.C.W.S. (3d) 1313, affd 108 O.R. (3d) 1, 2011 ONCA 764.

[91] *Parker v. Casalese* (2010), 99 CL.R. (3d) 1, 2010 ONSC 5636, 194 A.CW.S. (3d) 95, affd 108 O.R. (3d) 1, 201 1 ONCA 764.

The appellants brought a motion for summary judgment, which was dismissed. The motion judge refused to grant summary judgment on the basis of "numerous conflicts in the evidence," but did not identify those conflicts or provide an explanation of how they would prevent a just determination of the claim on the motion. The appellants obtained leave to appeal to the Divisional Court on the basis of the insufficiency of the motion judge's reasons. However, the Divisional Court concluded that a trial was nevertheless required, and dismissed the appeal.

In considering the appeal, the Court of Appeal found that Rule 20 is the primary test governing summary judgment in simplified actions. However, the court found that the motion judge must have regard to the fact that the action is brought under the simplified procedure. Part of the purpose of Rule 76 is to limit the extent of pre-trial proceedings and bring parties to an early trial. For instance, under this rule discoveries are limited and cross-examination on affidavits is prohibited. Consequently, in considering whether to apply Rule 20, the judge will have to apply the full appreciation test and will also need to assess whether entertaining the motion is consistent with the efficiency rationale reflected in the simplified procedure under Rule 76.

The court went on to find that, generally, summary judgment motions in simplified procedure actions should be discouraged, especially where there is competing evidence from multiple witnesses, the evaluation of which would benefit from cross-examination, or where oral evidence is clearly needed to decide certain issues. The court cautioned that it was not holding that summary judgment would never be appropriate in simplified actions. The court suggested that a summary judgment motion might be appropriate in a document driven case, or a case with limited contested evidence. However, the court stated it is likely the test for summary judgment will not be met in simplified actions and it is likely more efficient, and just, to simply proceed to a speedy trial.

5. Conclusion

The early indications are that the decision in *Combined Air* does indeed represent a new departure and a fresh approach to summary judgment. By the end of December 2011, less than a month after the *Combined Air* decision was released, some 11 cases had been decided on the basis of the Court of Appeal's decision.[92] Of these 11 cases, partial summary judgment was granted in eight of them. In the three cases in which the court declined to grant judgment the judge had articulated reasons why the record was insufficient to permit a full appreciation of the case.

What remains to be seen is whether this initial enthusiasm for the amendments will persist or, if over time, the rule will be interpreted increasingly narrowly and applied with decreasing frequency as similar rules have been before. In the view of the authors, the new summary judgment Rule under the 2010 Ontario *Rules of Civil Procedure* may be able to

[92] *Barzo v. Chrysler Financial Services Inc.*, 2011 ONSC 7604; *Bindaas Capital Inc. v. Sankar*, 2011 ONSC 6740; *D & A v. O.S.S.T.F.*, 2011 ONSC 7451; *Doobay v. Richmond Hill (Town)*, 2011 ONSC 7550; *Grey v. Boyd,* 2011 ONSC 7288; *King v. Dawe*, 2011 ONSC 6842; *Portuguese Canadian Credit Union Ltd. (Liquidator of) v. Pires*, 2011 ONSC 7448; *Royal Bank of Canada v. Tie Domi Enterprises Ltd.*, 2011 ONSC 7297; *Richardson v. Great Gulfcan Energy Inc.*, 2011 ONSC 6692; *Sungard Availability Services (Canada) Ltd. v. ICON Funding ULC*, 201 1 ONSC 7367, and *Van v. Qureshi*, 2011 ONSC 5746.

break the established pattern and make summary judgment a real, stable, and viable option for litigants.

In our view, the problem of "interpretive erosion" discussed in this paper may have been the result of a failure of the prior rules to make a clear and specific grant of fact-finding powers to the motion judge. In other words, restricted interpretation and eventual limited application results from a lack of clarity in the rule rather than from any inherent problem or flaw with the process of determining a case summarily. None of the earlier versions of the summary judgment Rules, in either the Ontario and Federal Courts, have articulated the evidentiary powers a motion judge may exercise on a summary judgment motion as clearly as does amended Rule 20. Even the prior Rule that most clearly indicates a judge possesses discretion to resolve certain factual disputes on a summary judgment motion, namely the 1994 *Federal Courts Rules*, did not approach the clarity with which the new Ontario Rule 20 sets out a motion judge's powers. In the absence of an intentional grant of power and a clear explanation of the application of those powers, courts have responded conservatively and demonstrated a marked reluctance to make *any* factual determinations on a summary judgment motion.

By contrast, under the new Rule the motion judges' fact-finding powers are clearly and expressly set out. No previous summary judgment Rule has set out in such detail what a motion judge may do in determining whether a case contains a genuine issue such that it is not appropriate for summary determination. Given this legislative clarity, one would not expect subsequent cases to interpret the existing Rule in a way that significantly reduces, diminishes or confines the evidentiary powers given to a motion judge. The additional guidance in *Combined Air* from the Ontario Court of Appeal on the nature, use, and scope of the powers, provided relatively early in the life of the Rule, should also prevent future "interpretive erosion" of the summary judgment Rule. However, only time will tell.[93]

While we often hear the phrase "justice delayed is justice denied," without an effective summary judgment Rule capable of efficiently winnowing out unmeritorious claims and defences, justice will be delayed and thus denied. Rule 1.04 of the *Rules of Civil Procedure* provides: "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." Rule 3 of the *Federal Courts Rules* is nearly identical.

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[93] In Ontario the rules themselves may tend to be biased toward narrowing the scope of the rule over time. A judge's order granting summary judgment is a final order and may be appealed to the Court of Appeal as of right (*Courts of Justice Act*, s. 6 (1)(b)). A judge's order refusing summary judgment is interlocutory, and an appeal is to the Divisional Court with leave (*Courts of Justice Act*, s. 19(1)(a)). Any appeal from the Divisional Court, regardless of outcome, on a question that is not one of fact alone' requires leave from the Court of Appeal (*Courts of Justice Act*, s. 6(1)(a)). The Court of Appeal is thus less likely to hear an appeal from a decision in which summary judgment has been refused. Consequently, any "new law" that is made by the Court of Appeal will tend to be in circumstances where summary judgment is overturned or partially overturned and the rule is more narrowly or restrictively applied. Where summary judgment is simply affirmed the court is less likely to provide a new or more expansive analysis of the rule - the reasoning of the motion judge is usually simply ' upheld. In these circumstances, there will be more law from Ontario's highest court concerning *reversing* summary judgments than *affirming* summary judgments. Such circumstances may naturally create a situation where lower courts, bound to follow these appellate decisions, will unconsciously be influenced toward denying summary judgment and applying the rule more restrictively. By contrast, a judge's order in Federal Court may be appealed to the Federal Court of Appeal without leave whether the order is final or interlocutory. However, to the extent the Federal Courts apply Ontario jurisprudence they, too, become susceptible to the progressive narrowing of the rule.

The American Civil War general Nathan Bedford Forrest is reputed to have said that the key to victory was to “git thar fustest with the mostest”. For litigants, justice requires that they receive a considered review of their case as quickly as possible at the least possible expense. As the Court of Appeal emphasized in *Combined Air*, counsel have a duty to consider their case carefully before seeking summary judgment. Unless a motion for summary judgment has a substantial likelihood of success the loss of time and the additional expense of such a motion weighs against bringing it. Even if summary judgment is not the answer, there are ways to expedite the discovery process and set a matter down for trial quickly that counsel should use.

However, judges also have a critical role to play in this process. The price of allowing the rule to be eviscerated by the mere suggestion that further evidence may be made available or that the law is in a state of confusion is to consign the litigants to the agony and expense of a long and expensive trial after some indeterminate wait. The key is to maintain the balance between the need for thoroughness and efficiency.

Other effects of the decision will take some time to become apparent. Since only a judge may exercise the expanded powers under Rule 20.04(2.1) and 20.04(2.2), one might anticipate that only rare motions for summary judgment will be brought before a Master. Another interesting question will be whether the Federal Court of Appeal will adopt *Combined Air* in its application of the Federal Courts summary judgment rules.

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