

**BRIEF OVERVIEW OF THE ONTARIO COURT OF APPEAL'S
DECISION REGARDING SUMMARY JUDGMENT MOTIONS
UNDER THE AMENDED RULE 20 OF THE *RULES OF CIVIL
PROCEDURE*¹**

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On December 5, 2011, the Ontario Court of Appeal sitting as a five member panel released its long awaited decision regarding Summary Judgment motions under the amended Rule 20 of the *Rules of Civil Procedure* – which amendment came into force on January 1, 2010. Given that this is a precedent setting decision where the Court of Appeal has established a new test to be applied under Rule 20, we take this opportunity to provide you with a brief summary of the new test and the guiding principles now provided by the Court of Appeal.

In *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, the Court of Appeal heard five combined appeals from Summary Judgment motions. In doing so, it reviewed the current amendments to Rule 20 that came into force on January 1, 2010 and it analyzed those amendments. In hearing the appeals, the Court of Appeal took the opportunity in its 111 page decision to provide guidance and, more particularly, clarification on what the amended Rule 20 does, and does not, accomplish.

The Court of Appeal clearly stated that the restrictions on a motion judge under the previous Rule 20 are no longer applicable. A plain reading of the amended Rule makes it clear that a motion judge may now weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence in determining whether there is a genuine issue requiring a trial with respect to a claim or defence. The Court of Appeal listed the following three types of cases that are amenable to Summary Judgment. It also established a new test – the “Full Appreciation Test” - that is to be applied before the motion judge applies these expanded powers.

The first type of case is where the parties agree that it is appropriate to determine an action by way of a motion for Summary Judgment.

The second type of case encompasses those claims or defences that are shown to be without merit, i.e. the claim cannot succeed or the defence cannot stand.

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Under the amended Rule 20, there is now a third type of case which a motion judge may deal with summarily. Given the amended wording, coupled with the enhanced powers, the motion judge may now dispose of cases on the merits where the trial process is not required in the interest of justice.

As stated by the Court of Appeal, the threshold issue in understanding the application of the expanded powers granted to the motion's judge under the amended Rule 20 is the meaning to be attributed to the phrase "interest of justice." The Court of Appeal embarked on an analysis of what "interest of justice" means and in so doing, specifically reviewed the importance of the trial process and the privileged position of a trial judge as a trier of fact who participates in the dynamics of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries and hears the evidence in the words of the witnesses. It also referred to how the trial dynamic affords the parties the opportunity to present their case in the manner of their choice. Notably, the Court stated that the purpose of the amended Rule 20 is to eliminate unnecessary trials, not eliminate all trials. The guiding consideration is whether the Summary Judgment process, and the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the Court.

Through that analysis of "interest of justice," the Court of Appeal has now established a new test – the "Full Appreciation Test" - which must be satisfied in any of the above three types of cases before a motion judge can use the expanded powers provided under Rule 20. The Full Appreciation Test is stated as follows:

In deciding if [the expanded powers given to a motion judge under Rule 20.04(2.1) to weigh evidence, evaluate credibility, and draw reasonable inferences] should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: Can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of Summary Judgment, or can this full appreciation only be achieved by way of a trial?

In other words, if, based on the evidentiary record before the Court, a motion judge can come to a full appreciation of the evidence and issues that is required to make dispositive findings, he or she can then exercise the expanded powers granted under Rule 20 so as to deal with the matter by way of summary judgment. Otherwise, the trial process is required. The nature of the issue posed and the evidence led by the parties will ultimately dictate whether the matter can be dealt with by way of Summary Judgment or if a full trial is required.

This test is truly a common sense approach which ultimately allows for the expanded scope of Summary Judgment under the new Rule 20 while ensuring that matters that require the full machinery of trial are protected.

According to the Court of Appeal, 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 are not appropriate for Summary Judgment as they cannot serve as an adequate substitute for the trial process. In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the Full Appreciation Test may be met in cases with limited contentious factual issues or cases where the record can be supplemented to the requisite degree at the motion judge's direction by hearing oral evidence on discrete issues.

In this regard, it is of assistance to note the comments of the Court in relation to two of the appeals, which in its view were not the appropriate type of cases to be dealt with by way Summary Judgment. The Court stated that those were actions that bore "all the hallmarks of the type of actions in which, generally speaking, the full appreciation of evidence and issues can only be achieved at trial." For instance, in those two actions:

- The motion record was voluminous – 28 volumes of evidence together with additional evidence filed on the motions themselves;
- Many witnesses gave evidence – 18 witnesses filed affidavits, and cross-examinations on those affidavits took three weeks;
- Different theories of liability were advanced against each of the defendants;
- Numerous findings of fact were required to decide these motions;
- Credibility determinations lay at the heart of these disputes, and the evidence of the major witnesses conflicted on key issues; and
- Assessing credibility was made more difficult by the near absence of reliable documentary yardsticks.

By way of contrast, in regards to one of the other cases that was under appeal, the Court stated that it was a "good example of the type of case that is amenable to Summary Judgment based on the application of the Full Appreciation Test. The documentary evidence was limited and not contentious. There were a limited number of relevant witnesses. The governing legal principles were not in dispute. It was thus entirely appropriate for the motion judge to decide the action on the Rule 20 motion."

Therefore, the Court of Appeal's common sense approach is consistent with how we have thus far approached the new Rule 20. As we now go forward into 2012 and continue to consider the best way to achieve favourable outcomes in our clients' cases, with Summary Judgment motions as an option in the appropriate circumstances, we now have the benefit of the above analysis as the focus of any such decisions made by our clients with our firm's guidance.