

## ***Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 The Ontario Court of Appeal’s “Reboot” of Summary Judgment**

### **The Context of the Decision**

The Ontario Court of Appeal had a five-judge panel hear five appeals from summary judgment motions. The parties were represented by counsel and five *amicus curiae* provided guidance on how the rule for summary judgement should be interpreted.

The purpose of this decision is not to analyze and discuss past jurisprudence on summary judgement. Rather this decision “marks a new departure and a fresh approach to the interpretation and application of the amended Rule 20”. (paragraph 35)

### **Background**

When the Ontario *Rules of Civil Procedure* were amended on January 1, 2010, one of the most significant developments pertained to Rule 20, which governs motions for summary judgment. When the amendments were introduced, the motion judge on a Rule 20 motion was given expanded powers to weigh evidence, assess credibility and draw inferences of fact and the wording of “no genuine issue for trial” was replaced with “no genuine issue requiring a trial”. The court noted that this change in wording was more than a semantic change. The prior wording served to filter out claims that were “plainly unmeritorious.” The amended rule, coupled with the enhanced powers, now permit the motion judge to dispose of cases where the trial process is not required in the “interest of justice”.

For the past two years, since the amendments came into force, a large body of conflicting jurisprudence has emerged and there have competing interpretations to the amended rule. This decision “marks a new departure and a fresh approach to the interpretation and application of the amended Rule 20”.

### **Types of Cases that are Amenable to Summary Judgment**

The court stated that summary judgment will generally be available in three instances:

- (a) Where both parties submit that summary judgment is the appropriate way to determine an action;
- (b) Where a motion judge determines that a claim or defence has no chance of success; and
- (c) Where a motion judge is satisfied that the trial process is not required in the “interest of justice”.

In explaining the third type of case, the court noted that some cases will require the trial process for the trial judge to gain a sufficient appreciation of the issues and the evidence in order to make dispositive findings.

### **The Full Appreciation Test**

The question a motion judge must ask when determining whether to summarily decide the second or third type of case is: “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?” (paragraph 50)

The Full Appreciation Test will generally be met in document-driven cases with limited testimonial evidence and will likely not be met in cases that have a high degree of conflicting evidence, require multiple findings of fact and involve huge records and many witnesses.

### **Summary Judgment Motions and the Discovery Process**

It will not be in the interests of justice for a motion judge to exercise his or her powers to grant summary judgment in cases where the “nature and complexity” of issues demand the normal process of oral and documentary discovery to be completed before a party is required to respond to a summary judgment motion. In such a case, the responding party can move to have the motion stayed or dismissed.

### **The Motion Judge’s Power to Call Oral Evidence in Summary Judgment Motions**

The court made it clear that the judge alone has the power to order oral evidence and the parties cannot anticipate it. Also, an order for oral evidence cannot be used to convert a motion for summary judgment into a trial. Rather it is merely a tool that allows a motion judge to determine if it is safe to dispose of an action summarily instead of by way of a trial. Furthermore, the ordering of oral evidence if not intended to allow the parties to supplement the motion record.

In the *Combined Air* decision, the court compiled a non-exhaustive list of instances where it is appropriate to order oral evidence.

The power to order oral evidence should only be used to help judges determine whether they have full appreciation of the evidence. However, a party who moves for summary judgement must be in a position to present its case entirely on the paper record.

### **Summary Judgment and Simplified Procedure**

In *Parker v. Casalese*, the court stated that the full appreciation test also applies to actions brought under Rule 76, but should be discouraged where such actions have a high degree of complexity. Further, success on a summary judgment motion under Rule 76 will be unlikely as the parties do not have sufficient opportunity to develop the record.

### **The Standard of Review for Appeals of Summary Judgment Motions**

Determining whether there is a “genuine issue requiring a trial” is a legal determination, as such it is a question of law and the standard of review that applied to a decision to grant or deny a motion for summary judgment is correctness. A standard of correctness should also be applied to questions of mixed law and fact. A standard of palpable and overriding error will apply if an appellate court holds that the test was properly applied and factual determinations need to be decided.

## The Five Appeals

### ***Combined Air Mechanical v. Flesch*** (at paras. 77 – 112)

Result: The Court of Appeal upheld the motion judge's decision to limit the scope of cross-examination of a witness under a rule 20.04(2.2) oral hearing even though opposing counsel's line of questioning arose directly from the witness's testimony.

*Take-aways:*

- *The motion judge retains control of the scope of the evidence presented when oral hearings are conducted pursuant to rule 20.04 (2.2) oral hearing powers.*
- *A rule 20.04(2.2) order is appropriate where: (1) oral evidence can be obtained from a small number of witnesses in a manageable period of time; (2) the issue dealt with is likely determinative; and (3) the issue is narrow and discrete.*

### ***Mauldin v. Hryniak; Bruno Appliance and Furniture v. Hryniak*** (at paras. 113 – 181)

Results: Summary judgment against Robert Hryniak was upheld in the case of the Mauldin group of investors, but overturned in the Bruno Appliance and Furniture case.

*Take-away: These cases both possess the "hallmarks of where a full appreciation of the evidence can only be achieved at trial": (1) voluminous motion record; (2) many witnesses; (3) different theories of liability advanced against defendants; (4) numerous fact findings required; (5) credibility determinations at the heart of the dispute and the major witnesses gave conflicting evidence on key issues; and (6) a near absence of reliable documentary yardsticks making evaluation of credibility more difficult.*

### ***394 Lakeshore Oakville Holdings Inc. v. Misek*** (at paras. 182 – 231)

Result: The Court of Appeal upheld summary judgment motion judge granted after weighing evidence, evaluating credibility and drawing reasonable inferences from the evidence.

*Take-away: Unlike Mauldin and Bruno, this is an ideal case for summary judgment because: (1) the documentary evidence was not complicated; (2) there were a limited number of witnesses; and (3) principles of law were not really in dispute.*

### ***Parker v. Casalese*** (at paras. 232 – 266)

Result: The Court of Appeal upheld denial of summary judgment in a case under simplified procedure.

*Take-aways:*

- *The Full Appreciation Test applies under simplified procedure and some such cases will be appropriate for summary judgement.*
- *The efficiency rationale underlying Rule 76 will often make it preferable for the court to order a speedy trial than to conduct a Rule 20.04(2.2) oral hearing.*