Court File No. 34645

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

B E T W E E N:

BRUNO APPLIANCE AND FURNITURE, INC.

Appellant

- and –

ROBERT HRYNIAK

Respondent

- and –

ATTORNEY GENERAL OF ONTARIO, ONTARIO TRIAL LAWYERS ASSOCIATION, THE ADVOCATES' SOCIETY, CANADIAN BAR ASSOCIATION

Interveners

FACTUM OF THE INTERVENER THE ADVOCATES' SOCIETY

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

Counsel for the Intervener, The Advocates' Society:

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, Ontario
K1P 1J9

David W. Scott, Q.C.

Tel.: 613.237.5160
Fax: 613.230.8842
Email: dscott@blg.com

Torys LLP
79 Wellington St. W.
Suite 3000, TD Centre
Toronto, Ontario
M5K 1N2

Patricia D.S. Jackson/
Crawford G. Smith

Tel.: 416.865.7323/
Tel.: 416.865.8209
Fax: 416.865.7380
Email: tjackson@torys.com
Email: csmith@torys.com

Agent for the Intervener, The Advocates' Society:

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, Ontario
K1P 1J9

Nadia Effendi

Tel.: 613.237.5160
Fax: 613.230.8842
Email: neffendi@blg.com

Counsel for the Appellant

Heydary Hamilton PC
Barristers and Solicitors
Toronto-Dominion Centre
66 Wellington Street West
Suite 4500, P.O. Box 150
Toronto, Ontario
M5K 1H1

Javad Heydary
Tel.: 416.972.9001
Fax: 416.972.9940
Email: jheydary@heydary.com

Agent for the Appellant

Gowling Lafleur Henderson LLP
Barristers and Solicitors
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

Henry S. Brown Q.C.
Tel.: 613.233.1781
Fax: 613.563.9869
Email: henry.brown@gowlings.com

Counsel for the Respondent

McCarthy Tetrault LLP
Barristers and Solicitors
Toronto-Dominion Bank Tower
Suite 5300
Toronto, Ontario
M5K 1E6

Sarit E. Batner
Moya J. Graham
Tel.: 416.601.7756
Fax: 416.868.0673
Email: sbatner@mccarthy.ca

Agent for the Respondent

Cavanagh Williams Conway Baxter LLP
1111 Prince of Wales Drive
Suite 401
Ottawa, Ontario
K2C 3T2

Colin S. Baxter
Tel.: 613.780.2016
Fax: 613.569.8668
Email: cbaxter@cweb-law.com

Counsel for the Intervener, the Attorney General for Ontario

Attorney General for Ontario
720 Bay Street, 6th Floor
Toronto, Ontario
M7A 2S9

Malliha Wilson
Kevin Hille
Vanessa Glasser
Tel.: 416.326.4953/416.314.2059/416.314.4458
Fax: 416.326.6996/416.326.4181
Email: malliha.wilson@ontario.ca
kevin.hille@ontario.ca
vanessa.glasser@ontario.ca

Agent for the Intervener, the Attorney General for Ontario

Burke Robertson LLP
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario
K2P 2H3

Robert E. Houston, Q.C.
Tel.: 613.566.2058
Fax: 613.235.4430
Email: rhouston@burkerobertson.com

Counsel for the Intervener, The Canadian Bar Association

Evans Sweeny Bordin LLP
1201 - 1 King Street West
Hamilton, Ontario
L8P 1A4

Paul R. Sweeny
Tel.: 905.523.5666
Fax: 905.523.8098
Email: psweeny@esplawyers.com

Sotos LLP
1250 - 180 Dundas Street West
Toronto, Ontario
M5G 1Z8

David Sterns
Tel.: 416.977.0007
Fax: 416.977.0717
Email: dsterns@sotosllp.com

Agent for the Intervener, The Canadian Bar Association

Supreme Advocacy LLP
397 Gladstone Avenue
Ottawa, Ontario
K1P 0Y9

Marie-France Major
Tel.: 613.695.8855
Fax: 613.695.8580
Email: mfmajor@supremeadvocacy.ca

Counsel for the Intervener, the Ontario Trial Lawyers Association

Allan Rouben
Barrister & Solicitor
70 Bon Street, Suite 200
Toronto, Ontario
M5B 1X3

Tel.: 416.360.5444
Fax: 416.365.7702
E-mail: arouben@bellnet.ca

Agent for the Intervener, the Ontario Trial Lawyers Association

Supreme Advocacy LLP
397 Gladstone Ave., Suite 100
Ottawa, Ontario
K2P 0Y9

Eugene Meehan, Q.C.
Tel. : 613.695.8855
Fax: 613.695.8580
Email: emeehan@supremeadvocacy.ca

TABLE OF CONTENTS

TABLE OF CONTENTS

TAB 1

PART I – OVERVIEW AND FACTS

1. Of the many issues facing the civil justice system, none is more pressing than the question of access to justice.

2. Fundamental to the question are the related issues of time and expense. Litigating a dispute through a full trial simply takes too much time and costs far too much money for an ordinary citizen. Even accepting the traditional view that a trial is the preferred method of resolving legal disputes, most citizens cannot afford one.

3. The Ontario Government recognized this issue. In 2010, Ontario's *Rules of Civil Procedure* were amended. The amendments reflected a consensus that summary judgment was not working as it should. Changes were therefore made to the rule pertaining to summary judgment to make it more available: to permit judges to resolve disputes by making findings of fact and exercising powers formerly prohibited on motions for summary judgment.

4. The changes to the rule demonstrate a clear intention on behalf of the Government to reduce – although not eliminate – the central role that has been taken by the trial in the administration of justice. However, the decision of the Court of Appeal in *Combined Air* has the effect of frustrating that intention. The decision minimizes the effect of the amendments to the rule, reducing the overall availability of summary judgment.

5. The Court's ruling in this appeal will have wide-reaching impact. By giving clear guidance as to when the time and expense of a full trial can be dispensed with and summary judgment granted, this Court will assist litigants in obtaining a speedier result to their disputes and increase access to justice.

PART II – QUESTIONS IN ISSUE

6. The Advocates' Society ("TAS") has focused on the amendments to rule 20 and the Ontario Court of Appeal's full appreciation of the evidence test.

PART III – ARGUMENT

7. TAS' submission reflects the perspective of its members who practice trial and appellate advocacy. Many of the 4,700 advocates represented by TAS regularly advise clients on the availability and operation of summary judgment. They have experienced the negative impact of the Court of Appeal's decision on the availability of summary judgment, as discussed below.

The Legislative decision to amend rule 20

8. Leading up to the 2010 amendments, there was a consensus in the legal community that summary judgment was not working effectively to reduce the number of cases overloading the civil justice system or to increase access to justice.

> Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings and Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) ["Osborne Report"] at 33, Respondent's Book of Authorities ("RBOA"), Vol. 3, Tab 91

9. The parameters of summary judgment were narrow, in large part due to a line of cases from the Court of Appeal for Ontario that motion judges' powers on summary judgment motions should be limited. The understanding of the courts was that, "in ruling on a motion for summary judgment, the court [would] never assess credibility, weigh the evidence, or find the facts."

> *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (CA) at para. 32, RBOA, Vol. 1, Tab 4

10. The pre-2010 case law reflected the long held preference for trials as the superior mechanism for resolving disputes: "Under the Rules of Civil Procedure, the plenary trial remains the mode for the resolution of disputes…"

> *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (ONCA) at para. 29, RBOA, Vol. 1, Tab 27

11. In a decision relied upon by the respondent in this appeal, Doherty J. (as he then was) explained this preference as follows:

> Where the outcome of a law suit hinges on the assessment of credibility, a trial in which evidence is called and the competing

> stories are told and challenged before the trier of fact has traditionally been viewed as the ideal forum.
>
> *Masciangelo v. Spensieri* (1990), 1 C.P.C. (3d) 124 (Ont. H.C.J.) at para. 14, RBOA, Vol. 2, Tab 56

12. The Attorney General for Ontario responded by retaining the Honourable Coulter Osborne to assist in reforming the administration of civil justice in Ontario. As indicated in his 2007 Civil Justice Reform Project, "the Court of Appeal's view of the scope of motion judges' authority [was] too narrow."

> Osborne Report, *supra* at 33, RBOA, Vol. 3, Tab 91

13. The amendments to rule 20 which followed:

(a) expanded the powers of motion judges to assess credibility, weigh evidence and draw inferences from the evidence on a motion for summary judgment (Rule 20.04 (2.1));

(b) granted motions judges the authority to hear oral evidence for the purpose of exercising their fact-finding powers (Rule 20.04(2.2)):

> ***Oral Evidence (Mini-Trial)***
>
> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation; and,

(c) granted motions judges the authority to issue orders and directions in cases where summary judgment is denied or granted in part to, among other things, streamline the action going forward recognizing that a full plenary trial may not be required to determine the issues (Rule 20.05).

> See *Courts of Justice Act*, R.R.O. 1990, Regulation 194, rules 20.04(2.1), 20.04(2.2) and 20.05 [*Rules of Civil Procedure*], Intervener's Factum ("IF"), Part VII, p. 12

14. The expanded powers under rule 20 were intended to afford litigants greater access to summary judgment in cases that do not require a full trial. The intention of the Legislature was to improve access to justice and make the system as a whole more accessible. Rule 20 was amended in acknowledgment that judicial interpretation of the prior rule had operated to severely circumscribe the availability of summary judgment. The amendments are consistent with rule 1.04(1) which directs that the rules "be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

> *Rules of Civil Procedure*, *supra* at rule 1.04(1), IF, Part VII, pp. 12 & 17

15. The Court of Appeal's decision minimizes the impact of each of the above three areas of amendment, thereby undermining their objective and their impact.

The default preference for trials is a barrier to access to justice

16. Despite the amendments to rule 20, the decision of the Court of Appeal reflects a continued default preference for the "forensic machinery" of the trial. TAS submits that this preference has no place in the current state of the civil justice system, and that it ultimately creates a barrier to access to justice.

17. In reaching its decision, the Court of Appeal expressed three reasons as to why trials are the preferred way to resolve disputes: (1) the judge lives with a case during trial; (2) parties have control over how to present their case in a trial; (3) the judge has an opportunity to observe the witness on the stand during a trial. None of these reasons withstands scrutiny.

> *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 at paras. 46-50, RBOA, Vol. 1, Tab 22

18. The first reason is a scheduling issue: typically judges receive motion materials only a few days before the return of the motion. Not surprisingly, in complex motions this can be problematic – the judge does not have the benefit of allowing the case to slowly unfold before the Court.

19. Of course, this problem could be addressed by better scheduling. Courts should revisit the way in which summary judgment motions are scheduled in order to give judges the time they

need to properly review motion materials. In any case, the answer should not be that the only way for a judge to familiarize herself with a case is in the court room with all counsel present.

20. The second reason – the ability of parties to present their case in the manner of their choice – while often cited, is misfocused. If dispute resolution is intended to arrive at the "just" result, it should not be so dependent on the judgment of counsel and the "trial narrative". Rather, the focus should be on the merits of the litigants' respective positions. In any event, to the extent relevant, the judgment of counsel and the manner in which a case is presented are equally features of a motion for summary judgment.

21. Finally, the third reason – that a trial permits the judge to observe the witness giving his or her testimony – has already been addressed by the amendment to the rule permitting the motions judge to order oral evidence be presented by one or more parties, with or without time limits.

> *Rules of Civil Procedure*, *supra* at rule 20.04(2.2), IF, Part VII, pp. 13 & 18

Resort to oral evidence is a key feature of the new rule 20 and should not be discouraged

22. Contrary to the decision of the Court of Appeal, the use of oral evidence should not be discouraged; the amendment permitting oral evidence upon the return of the motion is a key feature of rule 20.

23. Despite the clear intention of the Legislature to maximize the availability of summary judgment in appropriate cases, resort to oral evidence on summary judgment motions was discouraged by the Court of Appeal. As the Court held:

> A party who moves for summary judgment must be in a position to present a case capable of being decided on the paper record before the court. To suggest that further evidence is required amounts to an admission that the case is not appropriate, at first impression, for summary judgment. [Emphasis added.]
>
> *Combined Air*, *supra* at para. 63, RBOA, Vol. 1, Tab 22

24. If, as set out above, one of the main benefits of a trial is the opportunity to observe live testimony, resort to this key feature of the rule should not discouraged.

25. The passage above, among others, sends a clear message to litigants, counsel and courts that the use of oral evidence on summary judgment motions should be limited. Because parties are instructed to bring only those motions which can be decided on a paper record, the Court of Appeal, for all practical purposes, has limited the availability of oral evidence to those cases which do not require that evidence in the first place.

The use of summary judgment should not be restricted through the arbitrary categorization of cases or early disposition

26. Any interpretation of rule 20 and any guidance as to the test to be applied on a motion for summary judgment should not restrict the availability of summary judgment or discourage its use by attempting to classify in advance and in an abstract manner those species of cases that may not be amenable to summary judgment.

27. The Court of Appeal identified three categories of cases as potentially amenable to summary judgment. The first category comprises cases in which the parties have agreed to submit their dispute to resolution by way of summary judgment. The second category comprises cases for which the claim or defence has no chance of success. The third category of cases in which summary judgment may be granted includes "cases for which the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1)."

Combined Air, *supra* at paras. 72-74, RBOA, Vol. 1, Tab 22

28. Neither the first nor the second category is particularly problematic. The third, however, is unhelpful. To say that summary judgment may be granted in cases for which the motion judge is satisfied that the issues can be fairly and justly resolved by exercising the powers in rule 20.04(2.1) is inadequate. When this category is coupled with the Court of Appeal's instructions that "before using the powers in rule 20.04(2.1) [...] the motion judge must apply the full appreciation test in order to be satisfied that the interest of justice does not require that these powers be exercised only at a trial," the guidance becomes restrictive.

Combined Air, *supra* at para. 75, RBOA, Vol. 1, Tab 22

29. The Court of Appeal then further restricted the availability of summary judgment in three ways. First, by elaborating a list of species of cases that may not be amenable to summary judgment because the full appreciation test could not be met and a trial would be necessary. It described these as "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" and juxtaposed them against "document-driven cases with limited testimonial evidence", cases with limited contentious issues and cases where the record can supplemented to the "requisite degree" by hearing oral evidence at the motion.

Combined Air, *supra* at paras. 51-52, RBOA, Vol. 1, Tab 22

30. Second, the Court compounded the problem by inviting responding parties and motions judges to stay, in advance, motions for judgment deemed on their face to be "inappropriate" for summary judgment.

Combined Air, *supra* at para. 58, RBOA, Vol. 1, Tab 22

31. Third, the Court compounded the problem by cautioning against the full use of the powers granted by rule 20.05 to make orders and provide directions in respect of a case going forward where the motion for summary judgment has been denied or only granted in part. The Court of Appeal said, in this respect, that the affidavits used on the motion, "should not be treated as a substitute for the *viva voce* testimony of the witnesses in the trial judge's presence" despite the fact that rule 20.05(2)(j) authorizes the motions judge to order that, "the evidence of a witness be given in whole or in part by affidavit."

Combined Air, *supra* at para. 65, RBOA, Vol. 1, Tab 22

32. TAS submits that there should be no preconditions as to the types of cases that are amenable to summary judgment; doing so could lead to the erection of artificial and unintended barriers to summary judgment. TAS similarly submits that there should be no early screening of cases in order to strike out summary judgment motions. There are many examples of cases, that on their face, appeared to be inappropriate for summary judgment but on full investigation were found capable of being disposed of summarily.

33. The companion case in this appeal, *Mauldin*, is one example. The Court of Appeal indicated that it had "all the hallmarks of the type of actions in which, generally speaking, the full appreciation of the evidence can only be achieved at trial." Nevertheless, the Court of Appeal after a thorough review of the evidentiary record, agreed with the motions judge, that the respondent's explanation lacked any credibility and granted summary judgment against one of the principal defendants. The conclusion that it was just and "in the interests of justice" to do so is unavoidable.

Combined Air, *supra* at paras. 148 and 156, RBOA, Vol. 1, Tab 22

34. The categories developed by the Court of Appeal of the types of cases amenable, or not, to summary judgment provides little assistance. Further, the suggestions that are offered – to only use the new powers if they are not required, and to stay at an early stage motions deemed inappropriate – is harmful and contrary to the intention of the Legislature.

35. Ultimately, TAS supports an interpretation of rule 20 in which motions judges are permitted to delve into summary judgment motions – addressing the conflicting evidence and determining whether the conflicts can be eliminated and finding of fact fairly made, without requiring a trial, by weighing the relevant evidence, evaluating credibility and drawing inferences, taking into account the limitations inherent in the absence of oral evidence – and only declining to grant summary judgment when truly necessary.

36. Even in those cases where summary judgment is denied, the court should employ the full range of powers under the rule to streamline the case and make access to justice more achievable.

37. TAS has set out in an appended excerpt the principled approach it advocated before the Court of Appeal to the interpretation of rule 20 and the detailed steps and considerations which should be taken by the court when deciding a motion for summary judgment.

Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764 (Factum of *amicus curiae* The Advocates Society, para. 10), IF, Tab 2, p. 22

Potential misuse of summary judgment should not affect its availability generally

38. The respondent suggests that a broad interpretation of rule 20 could lead to abuse: that litigants will systematically bring motions for summary judgment, regardless of whether their case is at all suitable for resolution via summary judgment leading to increased costs, as well as time wasted for both litigants and the courts, rather than improved access to justice. The respondent points to the costs and time associated with the motion under appeal.

Respondent's Factum at para. 55

39. TAS does not endorse the respondent's argument. A more relevant consideration is the time and expense associated with a trial. If some or all of that can be reduced, either through a successful motion for judgment or the proper exercise of the authority to issue orders and directions, then litigants will benefit.[1]

40. Even if some litigants do resort to rule 20 in inappropriate cases, the Legislature was clear and the response of the courts should not be to limit the availability of summary judgment generally. Courts and parties must be permitted to use rule 20 to the fullest extent, and the abuse of the rule must be dealt with in other ways (i.e. costs). The result, it is submitted, will be greater access to justice.

PART IV – COSTS

41. TAS undertakes not to seek any costs and asks that no costs be awarded against it.

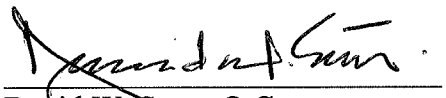
---

[1] TAS further does not agree that the costs and time associated with the motion under appeal are typical for a motion for summary judgment.

PART V – ORDER SOUGHT

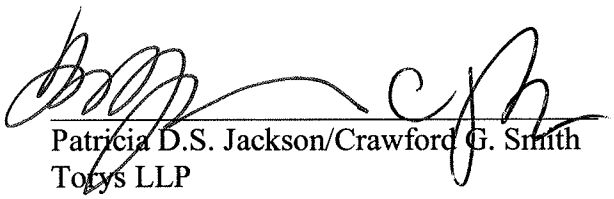
42. TAS requests the opportunity to make 10 minutes of oral submissions to the Court at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



David W. Scott, Q.C.
Borden Ladner Gervais

Counsel for the Intervener,
The Advocates' Society



Patricia D.S. Jackson/Crawford G. Smith
Torys LLP

Counsel for the Intervener,
The Advocates' Society

PART VI - TABLE OF AUTHORITIES

	Authorities	**Paragraph(s)**
1.	*Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (CA)	9
2.	*Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (ONCA)	10
3.	*Masciangelo v. Spensieri* (1990), 1 C.P.C. (3d) 124 (Ont. H.C.J.)	11
4.	*Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764	17, 23, 27-31

PART VII - STATUTES RELIED ON

Courts of Justice Act, R.R.O. 1990, Regulation 194

English (version française ci-dessous)

[...]

INTERPRETATION

General Principle

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

Proportionality

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

[...]

RULE 20 SUMMARY JUDGMENT

WHERE AVAILABLE

To Plaintiff

20.01 (1) A plaintiff may, after the defendant has delivered a statement of defence or served a notice of motion, move with supporting affidavit material or other evidence for summary judgment on all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (1).

(2) The plaintiff may move, without notice, for leave to serve a notice of motion for summary judgment together with the statement of claim, and leave may be given where special urgency is shown, subject to such directions as are just. R.R.O. 1990, Reg. 194, r. 20.01 (2).

To Defendant

(3) A defendant may, after delivering a statement of defence, move with supporting affidavit material or other evidence for summary judgment dismissing all or part of the claim in the statement of claim. R.R.O. 1990, Reg. 194, r. 20.01 (3).

EVIDENCE ON MOTION

20.02 (1) An affidavit for use on a motion for summary judgment may be made on information and belief as provided in subrule 39.01 (4), but, on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts. O. Reg. 438/08, s. 12.

(2) In response to affidavit material or other evidence supporting a motion for summary judgment, a responding party may not rest solely on the allegations or denials in the party's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. O. Reg. 438/08, s. 12.

FACTUMS REQUIRED

20.03 (1) On a motion for summary judgment, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 14.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 4.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 4.

(4) Revoked: O. Reg. 394/09, s. 4.

DISPOSITION OF MOTION

General

20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).

(2) The court shall grant summary judgment if,

(a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or

(b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment. O. Reg. 284/01, s. 6; O. Reg. 438/08, s. 13 (2).

Powers

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

1. Weighing the evidence.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence. O. Reg. 438/08, s. 13 (3).

Oral Evidence (Mini-Trial)

(2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation. O. Reg. 438/08, s. 13 (3).

Only Genuine Issue Is Amount

(3) Where the court is satisfied that the only genuine issue is the amount to which the moving party is entitled, the court may order a trial of that issue or grant judgment with a reference to determine the amount. R.R.O. 1990, Reg. 194, r. 20.04 (3); O. Reg. 438/08, s. 13 (4).

Only Genuine Issue Is Question Of Law

(4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge. R.R.O. 1990, Reg. 194, r. 20.04 (4); O. Reg. 438/08, s. 13 (4).

Only Claim Is For An Accounting

(5) Where the plaintiff is the moving party and claims an accounting and the defendant fails to satisfy the court that there is a preliminary issue to be tried, the court may grant judgment on the claim with a reference to take the accounts. R.R.O. 1990, Reg. 194, r. 20.04 (5).

WHERE TRIAL IS NECESSARY

Powers of Court

20.05 (1) Where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. O. Reg. 438/08, s. 14.

Directions and Terms

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

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

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

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

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

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

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

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

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

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

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

(k) that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for it if, in the opinion of the court, the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case and,

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

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

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

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

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

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

(p) for security for costs. O. Reg. 438/08, s. 14.

Specified Facts

(3) At the trial, any facts specified under subrule (1) or clause (2) (c) shall be deemed to be established unless the trial judge orders otherwise to prevent injustice. O. Reg. 438/08, s. 14.

Order re Affidavit Evidence

(4) In deciding whether to make an order under clause (2) (j), the fact that an adverse party may reasonably require the attendance of the deponent at trial for cross-examination is a relevant consideration. O. Reg. 438/08, s. 14.

Order re Experts, Costs

(5) If an order is made under clause (2) (k), each party shall bear his or her own costs. O. Reg. 438/08, s. 14.

Failure to Comply with Order

(6) Where a party fails to comply with an order under clause (2) (o) for payment into court or under clause (2) (p) for security for costs, the court on motion of the opposite party may

dismiss the action, strike out the statement of defence or make such other order as is just. O. Reg. 438/08, s. 14.

(7) Where on a motion under subrule (6) the statement of defence is struck out, the defendant shall be deemed to be noted in default. O. Reg. 438/08, s. 14.

COSTS SANCTIONS FOR IMPROPER USE OF RULE

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

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

(b) the party acted in bad faith for the purpose of delay. O. Reg. 438/08, s. 14.

EFFECT OF SUMMARY JUDGMENT

20.07 A plaintiff who obtains summary judgment may proceed against the same defendant for any other relief. R.R.O. 1990, Reg. 194, r. 20.07.

STAY OF EXECUTION

20.08 Where it appears that the enforcement of a summary judgment ought to be stayed pending the determination of any other issue in the action or a counterclaim, crossclaim or third party claim, the court may so order on such terms as are just. R.R.O. 1990, Reg. 194, r. 20.08.

APPLICATION TO COUNTERCLAIMS, CROSSCLAIMS AND THIRD PARTY CLAIMS

20.09 Rules 20.01 to 20.08 apply, with necessary modifications, to counterclaims, crossclaims and third party claims.

Français

[...]

PRINCIPES D'INTERPRÉTATION

Principe général

1.04 (1) Les présentes règles doivent recevoir une interprétation large afin d'assurer la résolution équitable sur le fond de chaque instance civile, de la façon la plus expéditive et la moins onéreuse. R.R.O. 1990, Règl. 194, par. 1.04 (1).

Proportionnalité

(1.1) Lorsqu'il applique les présentes règles, le tribunal rend des ordonnances et donne des directives qui sont proportionnées à l'importance et au degré de complexité des questions en litige ainsi qu'au montant en jeu dans l'instance. Règl. de l'Ont. 438/08, art. 2.

[...]

RÈGLE 20 JUGEMENT SOMMAIRE

APPLICABILITÉ

Au demandeur

20.01 (1) Le demandeur peut, après que le défendeur a remis une défense ou signifié un avis de motion, demander, par voie de motion, appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire sur la totalité ou une partie de la demande formulée dans la déclaration. R.R.O. 1990, Règl. 194, par. 20.01 (1).

(2) Le demandeur peut demander, par voie de motion présentée sans préavis, l'autorisation de signifier avec la déclaration un avis de motion en vue d'obtenir un jugement sommaire. L'autorisation peut être accordée en cas d'urgence extraordinaire, sous réserve de directives justes. R.R.O. 1990, Règl. 194, par. 20.01 (2).

Au défendeur

(3) Le défendeur peut, après avoir remis une défense, demander, par voie de motion appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire rejetant en totalité ou en partie la demande formulée dans la déclaration. R.R.O. 1990, Règl. 194, par. 20.01 (3).

PREUVES À L'APPUI D'UNE MOTION

20.02 (1) Dans un affidavit à l'appui d'une motion visant à obtenir un jugement sommaire, une partie peut faire état des éléments qu'elle tient pour véridiques sur la foi de renseignements, comme le prévoit le paragraphe 39.01 (4). Toutefois, dans le cas où la partie ne fournit pas le témoignage de toute personne ayant une connaissance directe des faits contestés, le tribunal peut en tirer des conclusions défavorables, s'il y a lieu, lors de l'audition de la motion. Règl. de l'Ont. 438/08, art. 12.

(2) Lorsqu'une motion en vue d'obtenir un jugement sommaire est appuyée d'un affidavit ou d'autres éléments de preuve, la partie intimée ne peut pas se contenter uniquement des

allégations ou dénégations contenues dans ses actes de procédure. Elle doit préciser, au moyen d'un affidavit ou d'autres éléments de preuve, des faits spécifiques indiquant qu'il y a une véritable question litigieuse nécessitant la tenue d'une instruction. Règl. de l'Ont. 438/08, art. 12.

MÉMOIRES REQUIS

20.03 (1) Dans le cas d'une motion en vue d'obtenir un jugement sommaire, chaque partie signifie aux autres parties à la motion un mémoire comprenant une argumentation concise exposant les faits et les règles de droit qu'elle invoque. Règl. de l'Ont. 14/04, art. 14.

(2) Le mémoire de l'auteur de la motion est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue, au moins sept jours avant l'audience. Règl. de l'Ont. 394/09, art. 4.

(3) Le mémoire de la partie intimée est signifié et déposé, avec la preuve de la signification, au greffe du tribunal où la motion doit être entendue, au moins quatre jours avant l'audience. Règl. de l'Ont. 394/09, art. 4.

(4) Abrogé : Règl. de l'Ont. 394/09, art. 4.

DÉCISION SUR LA MOTION

Dispositions générales

20.04 (1) Abrogé : Règl. de l'Ont. 438/08, par. 13 (1).

(2) Le tribunal rend un jugement sommaire si, selon le cas :

a) il est convaincu qu'une demande ou une défense ne soulève pas de véritable question litigieuse nécessitant la tenue d'une instruction;

b) il est convaincu qu'il est approprié de rendre un jugement sommaire et les parties sont d'accord pour que tout ou partie de la demande soit décidé par jugement sommaire. Règl. de l'Ont. 284/01, art. 6; Règl. de l'Ont. 438/08, par. 13 (2).

Pouvoirs

(2.1) Lorsqu'il décide, aux termes de l'alinéa (2) a), s'il existe une véritable question litigieuse nécessitant la tenue d'une instruction, le tribunal tient compte des éléments de preuve présentés par les parties et, si la décision doit être rendue par un juge, ce dernier peut, à cette fin, exercer l'un ou l'autre des pouvoirs suivants, à moins qu'il ne soit dans l'intérêt de la justice de ne les exercer que lors d'un procès :

1. Apprécier la preuve.

2. Évaluer la crédibilité d'un déposant.

3. Tirer une conclusion raisonnable de la preuve. Règl. de l'Ont. 438/08, par. 13 (3).

Témoignage oral (mini-procès)

(2.2) Un juge peut, dans le but d'exercer les pouvoirs prévus au paragraphe (2.1), ordonner que des témoignages oraux soient présentés par une ou plusieurs parties, avec ou sans limite de temps pour leur présentation. Règl. de l'Ont. 438/08, par. 13 (3).

Si la seule question litigieuse est le montant de la demande

(3) Le tribunal, s'il est convaincu que la seule véritable question litigieuse porte sur le montant auquel l'auteur de la motion a droit, peut ordonner l'instruction de la question ou rendre un jugement et ordonner un renvoi afin de fixer le montant. R.R.O. 1990, Règl. 194, par. 20.04 (3); Règl. de l'Ont. 438/08, par. 13 (4).

Si la seule question litigieuse est une question de droit

(4) Le tribunal, s'il est convaincu que la seule véritable question litigieuse porte sur une question de droit, peut trancher cette question et rendre un jugement en conséquence. Toutefois, si la motion est présentée à un protonotaire, elle est déférée à un juge pour audition. R.R.O. 1990, Règl. 194, par. 20.04 (4); Règl. de l'Ont. 438/08, par. 13 (4).

Demande de reddition de comptes seulement

(5) Si le demandeur est l'auteur de la motion et qu'il demande une reddition de comptes, le tribunal peut rendre jugement sur la demande et ordonner un renvoi pour la reddition des comptes, à moins que le défendeur ne convainque le tribunal qu'une question préliminaire doit être instruite. R.R.O. 1990, Règl. 194, par. 20.04 (5).

NÉCESSITÉ D'UNE INSTRUCTION

Pouvoirs du tribunal

20.05 (1) Si le jugement sommaire est refusé ou n'est accordé qu'en partie, le tribunal peut rendre une ordonnance dans laquelle il précise les faits pertinents qui ne sont pas en litige et les questions qui doivent être instruites. Il peut également ordonner que l'action soit instruite de façon expéditive. Règl. de l'Ont. 438/08, art. 14.

Directives et conditions

(2) Le tribunal qui ordonne l'instruction d'une action en vertu du paragraphe (1) peut donner les directives ou imposer les conditions qu'il estime justes, et ordonner notamment :

a) la remise par chaque partie, dans un délai déterminé, d'un affidavit de documents conformément aux directives du tribunal;

b) la présentation des motions dans un délai déterminé;

c) le dépôt, dans un délai déterminé, d'un exposé des faits pertinents qui ne sont pas en litige;

d) le déroulement des interrogatoires préalables conformément à un plan d'enquête préalable établi par le tribunal, dans lequel un calendrier des interrogatoires peut être fixé et des limites au droit à l'interrogatoire préalable qui sont justes peuvent être imposées, y compris la limitation de l'enquête préalable à des questions qui n'ont pas été traitées dans les affidavits ou les autres éléments de preuve présentés à l'appui de la motion et dans les contre-interrogatoires sur ceux-ci;

e) la modification d'un plan d'enquête préalable convenu par les parties en application de la Règle 29.1 (plan d'enquête préalable);

f) l'utilisation, à l'instruction, des affidavits ou des autres éléments de preuve présentés à l'appui de la motion et des contre-interrogatoires sur ceux-ci comme s'il s'agissait d'interrogatoires préalables;

g) la limitation de la durée de tout interrogatoire d'une personne prévu à la Règle 36 (obtention de dépositions avant l'instruction);

h) la remise par une partie, dans un délai déterminé, d'un résumé écrit de la déposition prévue d'un témoin;

i) la limitation de la durée de tout interrogatoire oral d'un témoin à l'instruction;

j) la présentation par affidavit de tout ou partie de la déposition d'un témoin;

k) la rencontre, sous toutes réserves, des experts engagés par les parties ou en leur nom relativement à l'action pour déterminer les questions en litige sur lesquelles ils s'entendent et celles sur lesquelles ils ne s'entendent pas, pour tenter de clarifier et régler toute question en litige qui fait l'objet d'un désaccord et pour rédiger une déclaration conjointe exposant les sujets d'entente et de désaccord ainsi que les motifs de ceux-ci, s'il estime que les économies de temps ou d'argent ou les autres avantages qui peuvent en découler sont proportionnels aux sommes en jeu ou à l'importance des questions en litige dans la cause et que, selon le cas :

(i) il y a des perspectives raisonnables d'en arriver à un accord sur une partie ou l'ensemble des questions en litige,

(ii) le fondement des opinions d'experts contraires est inconnu et qu'une clarification des questions faisant l'objet d'un désaccord aiderait les parties ou le tribunal;

l) la remise par chacune des parties d'un résumé concis de sa déclaration préliminaire;

m) la comparution des parties devant le tribunal au plus tard à une date déterminée, comparution au cours de laquelle le tribunal peut rendre toute ordonnance qu'autorise le présent paragraphe;

n) l'inscription de l'action pour instruction à une date donnée ou son inscription à un rôle donné, sous réserve des directives du juge principal régional;

o) la consignation de la totalité ou d'une partie de la somme demandée;

p) le versement d'un cautionnement pour dépens. Règl. de l'Ont. 438/08, art. 14.

Faits précisés

(3) Lors de l'instruction, les faits précisés conformément au paragraphe (1) ou à l'alinéa (2) c) sont réputés établis, à moins que le juge du procès n'ordonne autrement afin d'éviter une injustice. Règl. de l'Ont. 438/08, art. 14.

Ordonnance : déposition par affidavit

(4) Lorsqu'il est décidé si une ordonnance doit être rendue en vertu de l'alinéa (2) j), le fait qu'une partie opposée peut être fondée à exiger la présence du déposant à l'instruction pour le contre-interroger constitue un facteur pertinent. Règl. de l'Ont. 438/08, art. 14.

Ordonnance : experts, dépens

(5) Si une ordonnance est rendue en vertu de l'alinéa (2) k), chaque partie paie ses propres dépens. Règl. de l'Ont. 438/08, art. 14.

Défaut de se conformer à l'ordonnance

(6) Si une partie ne se conforme pas à une ordonnance de consignation prévue à l'alinéa (2) o) ou à une ordonnance de cautionnement pour dépens prévue à l'alinéa (2) p), le tribunal peut, sur motion de la partie adverse, rejeter l'action, radier la défense ou rendre une autre ordonnance juste. Règl. de l'Ont. 438/08, art. 14.

(7) Si la défense est radiée sur motion présentée en application du paragraphe (6), le défendeur est réputé constaté en défaut. Règl. de l'Ont. 438/08, art. 14.

CONDAMNATION AUX DÉPENS POUR USAGE ABUSIF DE LA RÈGLE

20.06 Le tribunal peut fixer les dépens d'une motion visant à obtenir un jugement sommaire sur une base d'indemnisation substantielle et en ordonner le paiement par une partie si, selon le cas :

a) la partie a agi déraisonnablement en présentant la motion ou en y répondant;

b) la partie a agi de mauvaise foi dans l'intention de causer des retards. Règl. de l'Ont. 438/08, art. 14.

EFFET DU JUGEMENT SOMMAIRE

20.07 Le demandeur qui obtient un jugement sommaire peut poursuivre le même défendeur pour d'autres mesures de redressement. R.R.O. 1990, Règl. 194, règle 20.07.

SURSIS D'EXÉCUTION

20.08 Le tribunal, s'il constate qu'il devrait être sursis à l'exécution d'un jugement sommaire en attendant le règlement d'une autre question en litige dans l'action, d'une demande reconventionnelle, d'une demande entre défendeurs ou d'une mise en cause, peut ordonner le sursis à des conditions justes. R.R.O. 1990, Règl. 194, règle 20.08.

APPLICATION AUX DEMANDES RECONVENTIONNELLES, AUX DEMANDES ENTRE DÉFENDEURS ET AUX MISES EN CAUSE

20.09 Les règles 20.01 à 20.08 s'appliquent, avec les modifications nécessaires, aux demandes reconventionnelles, aux demandes entre défendeurs et aux mises en cause. R.R.O. 1990, Règl. 194, règle 20.09.

TAB 2

Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764 (Factum of *amicus curiae* The Advocates Society, para. 10)

Approach to Rule 20

10. The Advocates' Society submits that a principled approach to the application of the new jurisdiction in Rule 20 involves the following steps and considerations:

(a) Determine whether there is any impediment (for example, the absence of discovery, or the prematurity of the development of damage) to the parties' ability to discharge the obligation to put before the court "in written or transcribed form, all the relevant evidence that could be placed before the trial judge". If there is such an impediment, a summary judgment motion is likely premature.

Optech Inc. v. Sharma, 2011 O.N.S.C. 680, at para. 32

(b) Identify each genuine issue that must be resolved to determine the relief sought on the motion.

(c) Eliminate as (non) contentious those issues about which there is either unanimity on the facts or an absence of conflicting evidence.

(d) Identify and analyze the nature and extent of the evidence pertaining to issues concerning which the evidence is conflicting.

(e) Address the conflicting evidence and determine whether the conflicts can be eliminated and finding of fact fairly made, without requiring a trial, by weighing the relevant evidence, evaluating credibility and drawing inferences, taking into account the limitations inherent in the absence of oral evidence.

(f) If by this process the Court is able to conclude that particular issues can be determined without the requirement of a trial, determine the summary judgment relief if any which flows from the resolution of such issues.

(g) With respect to the issues which remain to be resolved, determine whether there is a reasonable prospect that such issues can be resolved, including credibility issues, in a mini-trial with oral evidence under Rule 20.04(2.2).

The decision to order a mini-trial should be based on the objectives in sub-rule 1.04(1), and an assessment of a significant likelihood that such a mini-trial will lead to the resolution of most or all of the genuine issues in dispute.2 Ordinarily this would imply a high level of confidence that the factual disputes can be adjudicated by hearing specific viva voce evidence from a small number of key witnesses.

---

[2] Not just that a mini-trial would further assist in determining whether a trial was necessary.

(h) Where a mini-trial is determined to be appropriate to resolve particular issues, define the issue or issues in question and, where appropriate, identify the evidentiary process to be followed, including, where appropriate, the scope of the evidence and the identification of the record upon which the mini-trial is to proceed.

(i) If the genuine issues can be appropriately resolved by either the approach under subparagraphs (f) and (g), determine whether it is in the interests of justice to grant summary judgment or order a mini-trial having regard to other factors, no one of which is necessarily determinative, including:

  (i) the extent to which either course of action will resolve sufficient outstanding issues, give rise to material costs savings or likely result in the more expeditious resolution of the action;

  (ii) the importance of the issues to the parties.

(j) In the event that the Court is unable to grant summary judgment or conclude the unresolved issues in accordance with paragraphs (e) to (i), dismiss the motion;

(k) Where summary judgment is refused or granted only in part, the Court should consider what further directions under Rule 20.05 should be made with a view to streamlining the disposition of the remaining issues in the action, given that the judge hearing the summary judgment motion is in the unique position of being best able to give such further orders.