ONTARIO COURTS

THE SUPREME COURT OF CANADA SEEKS TO REIN-IN COURT COSTS. A NEW APPROACH FOR SUMMARY JUDGMENT MOTIONS IN ONTARIO

by Thomas W. Arndt

'a horse is dangerous at both ends and uncomfortable in the middle'
~ Ian Fleming

The Supreme Court of Canada has endorsed a new approach in Ontario stating "trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened." [1]

To combat these and other challenges, in 2010 Ontario enacted a new summary judgment rule. Under the 2010 rule, motion judges gained the power to make findings of fact and to hear oral evidence without convening a full trial. The 2010 rule states that a motion judge *shall* grant judgment unless there is a *genuine issue requiring a trial*. However, the 2010 rule left it open for the courts to consider how best to decide if a genuine issue requires a trial. In December 2011, the Court of Appeal for Ontario unveiled the 'full appreciation test'[2] to aid the lower courts through this procedure. Unfortunately, the test did not achieve the desired outcome (namely cases decided earlier and more economically); motion judges continued to send cases to the perceived valhalla of a full trial, delaying justice and running up the costs for everyone involved.

In a principled decision released January 23, 2014, the Supreme Court of Canada swept away the 2011 'full appreciation test' stating it "placed too high a premium" on the conventional trial "given that such a trial is not a realistic alternative for most litigants"[3]. Justice Karakatsanis, for a unanimous Supreme Court of Canada, set out a new approach:

> [66] On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under Rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

In other words, a motion judge is to take a two-step process: first, can judgment be granted on the evidence before the court? If not, then second, the motion judge must go on to determine whether the trial can be avoided by receiving additional evidence, for example by way of a mini-trial. If so, then it is in the 'interest of justice' to hear the additional evidence in the motion.

The Supreme Court of Canada also provided guidance into the mechanics of the lead up to and after a summary judgment motion; directing the parties (where there are complex issues or the record is voluminous) to involve the motion judge in determining how and what evidence is to be presented in the summary judgment motion. Further, in order to salvage the resources invested:

> [78] Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge. I agree with the Osborne Report that the involvement of a single judicial officer throughout
>
> > saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue. [p. 88]
>
> [79] While such an approach may complicate scheduling, to the extent that current scheduling practices prevent summary judgment motions being used in an efficient and cost effective manner, the courts should be prepared to change their practices in order to facilitate access to justice.

In a step that may reduce the number of appeals, the Supreme Court of Canada also elevated the deference to which summary judgment decisions are to be given stating:

> [83] Provided that it is not against the "interest of justice", a motion judge's decision to exercise the new powers is discretionary. Thus, unless the motion judge misdirected herself, or came to a decision that is so clearly wrong that it resulted in an injustice, her decision should not be disturbed.

A review of the Supreme Court of Canada's decision and the 2010 rule reveals the full suite of tools that are available in summary judgment motions. Time will tell if the newest approach delivers access to justice in civil cases, resulting in cases being decided on their merits and in

a timely manner while reining-in runaway legal costs. Perhaps the conventional trial is riding into the sunset.

[1] *Hryniak v Mauldin*, 2014 SCC 7 at para 1

[2] "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?" *Combined Air Mechanical Services Inc. v. Flesch* 2011 ONCA 764 at para 50.

[3] *Hryniak* at para 4.

FOR MORE INFORMATION CONTACT:

Thomas Arndt is a commercial litigation lawyer and partner in Dickinson Wright's Toronto Office and can be reached at 416.777.4037 or tarndt@dickinsonwright.com