

# Summary Judgment Has its Day in Court

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*The summary judgment procedure is designed to improve the efficiency of civil litigation by enabling the striking out of claims or defences that can be decided without a full trial. In 2010, the Ontario rule on summary judgment changed to facilitate this goal by conferring additional powers on motion judges to weigh evidence, draw inferences and evaluate credibility. In December 2011, the Ontario Court of Appeal clarified the application of the new rule in its Combined Air Mechanical Services v. Flesch decision.*

*The purpose of the new rule is to allow more cases to be decided by way of summary judgment, and the Combined Air decision helped clarify the extent to which the new rule has increased the mandate of motions judges to grant summary judgment. The author posits that the change adds a new category of cases that are appropriate for a summary trial: cases in which the motions judge is satisfied that a full trial is not required to serve the "interest of justice".*

*Even with the new rule and the additional guidance from the Court of Appeal, Ontario courts continue to take a relatively conservative approach. Though the new rule widens the ambit of cases courts may find appropriate for summary judgment, and also widens the mandate of the judges who hear these motions, the author questions whether this means that significantly more cases will be resolved under the new rule. She notes a lasting traditional concern that only a trial with oral evidence will allow for a "full appreciation" of the record. The tradition from which this concern stems idealizes the continuous oral trial as a focal point of litigation and, according to the author, persists at the sacrifice of other efficiency-maximizing options, such as the "summary trial" procedure adopted in British Columbia.*

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Dissatisfaction in and out of the profession with the “law’s delay” has long been manifested. As an effective remedy for such delay within the limits prescribed by its form and purpose, the summary judgment procedure has become an important feature of most modern practice systems.<sup>1</sup>

## Introduction: The Summary Judgment “Inquiry”

Since the 19<sup>th</sup> century, litigants and courts in Ontario have been decrying inefficiencies in the civil justice system and lauding the salutary effects of summary judgment. For just as long, commentators have been debating the proper role of summary judgment and the situations in which it should be used.<sup>2</sup> The quotation above from the 1929 issue of the *Yale Law Journal* could equally have served to preface the observations made in this comment.

In January 2010, a new rule on summary judgment, made by the Ontario Attorney General’s Civil Rules Committee, came into force. In the latest development on the subject, in December 2011, the Ontario Court of Appeal released combined reasons in five appeals from motions for summary judgment in *Combined Air Mechanical Services v. Flesch*.<sup>3</sup> In

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1. Charles E Clark & Charles U Samenow, “The Summary Judgment” (1929) 38:4 *Yale LJ* 423 at 423.

2. WA Bogart, “Summary Judgment: A Comparative and Critical Analysis” (1981) 19:4 *Osgoode Hall LJ* 552; John W Morden, “An Overview of the Rules of Civil Procedure of Ontario” (1984) 5:3 *Advocates’ Q* 257; SJ Page and T Pinos, *Summary Judgment* (Aurora: Canada Law Book, 1998).

3. *Combined Air Mechanical Services v Flesch*, 2011 ONCA 764, 108 OR (3d) 1.

this appeal, as it has done in other important areas of complex law,<sup>4</sup> the Court of Appeal consolidated a number of appeals in cases with varying outcomes. It also took the innovative step of appointing a panel of five *amicus curiae* to make submissions on how the new rule should be interpreted and applied: the Attorney General of Ontario, the Advocates' Society, the Ontario Bar Association, the Ontario Trial Lawyers Association, and the County and District Law Presidents' Association.<sup>5</sup>

This innovative format resembled a broadly based inquiry as much as a civil appeal. In outlining the approach that counsel and courts should take to the newly amended rule, the panel benefitted from a wide range of perspectives from the profession on summary judgment generally, and from several examples of cases decided under the new rule. The guidance was timely because the new rule was introduced to bring about fundamental changes in the approach to summary judgment. Courts are no longer precluded from weighing evidence, assessing credibility, or drawing inferences of fact on a summary judgment motion, unless it is in the interest of justice that such powers be exercised only at trial. Now, motions judges must decide whether a full appreciation of the facts and issues can be made on the basis of the motion for summary judgment. The rule applies also to simplified proceedings, and it is important to clarify its role in that context. With the benefit of a variety of cases and input, the Court was able to give the new summary judgment rule a comprehensive hearing.

Part I of this case comment describes the challenges posed by the old Ontario rule. Part II outlines the approaches taken to reform elsewhere, the recommendations of the Osborne Report, and the reforms that were made to the Ontario summary judgment rule. Part III reviews the general approach recommended by the Court of Appeal in *Combined Air*, including the new category of cases to which it applies and the various additional considerations it raises. Part IV summarizes how the results of the five cases decided in the appeal illustrate the approach set

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4. See e.g. *Muscutt v Courcelles* (2002), 60 OR (3d) 20, 213 DLR (4th) 577 (CA); *Van Breda v Village Resorts Limited*, 2010 ONCA 84, 98 OR (3d) 721.

5. *Combined Air*, *supra* note 3 at para 7. These *amici curiae* were asked to provide their perspectives on the rule and not on the individual cases.

out by the Court. Part V reflects on the implications of the current approach to summary judgment in Ontario and elsewhere for the continuing role of the concentrated oral trial as a focal point for common law procedure.

## I. Two Decades of “A Genuine Issue for Trial”

As we settle into the third generation of summary judgment rules in Ontario in recent decades<sup>6</sup> and try to set the course for an effective approach to the current rule, it is worth reflecting on the mischief that the reforms to the rule were designed to address. This part reviews the experience with the previous version of the rule, and offers some thoughts on the contextual factors that may have influenced the interpretation of the test for granting or dismissing motions for summary judgment.

### A. *What’s in a Phrase?*

Under the former rule, which came into effect in 1985, a motion for summary judgment was usually decided on the basis of the affidavits of witnesses and the transcripts of their cross-examinations, together with any available transcripts of examinations for discovery. The court had to determine whether the claim or the defence raised a “genuine issue for trial”. If not, the court issued a judgment either for or against the claim. If there was a genuine issue, but it was only a question of law, the court could decide the question of law and grant judgment. If a trial was needed, the court could order the matter to proceed to a full trial or it could specify material facts that were not in dispute, define the issues to be tried and order that the trial be heard on an expedited basis.

Summary judgment has been the focal point for considerable tension in the litigation process. It was an “all-or-nothing” (or “binary”<sup>7</sup>)

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6. Ontario, *Rules of Court*, rr 14 and 15; Ontario, *Rules of Practice and Procedure*, r 33; *The Supreme Court of Ontario Rules of Practice*, r 33.

7. Coulter A Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Ministry of the Attorney General, 2007) [Osborne Report].

approach to deciding whether or not to permit a trial with live testimony on the basis of a motion argued on a paper record. This created pressure on the interpretation of the adjective “genuine” in the phrase “genuine issue for trial”, because this phrase served as the gatekeeper for a litigant’s day in court. As Morden ACJO observed in the *Ungerma*n decision, “a litigant’s ‘day in court’, in the sense of a trial, [has] traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice”.<sup>8</sup>

Despite this, the adjective “genuine” was introduced to *restrict* the availability of a full trial. Where the moving party had met its burden of showing that there were no genuine—and not spurious—issues of fact requiring a trial for their resolution, it was inappropriate for that party to face further expense and delay in proceeding to trial. Still, the previous rule drew a clear line between issues of law and issues of fact. It was not the court’s role to resolve issues of fact—only to determine whether a genuine issue of fact existed.

From the 1991 *Ungerma*n decision onwards, through a series of carefully reasoned judgments, jurists tried to identify the decisive features of cases that should be determined on the paper record—i.e. by way of summary judgment—and those that warranted a trial. Even before that decision, Henry J. had spoken of the need for courts to take “a hard look at the merits”<sup>9</sup> and decide whether there were “real issues of credibility, the resolution of which [were] essential to determination of the facts”.<sup>10</sup> He emphasized the requirement that the responding party “put its best foot forward”,<sup>11</sup> and not be permitted to rely upon evidence that might subsequently become available for a trial. The court should be able to assess the nature and quality of the evidence on a common sense basis, and discern the overall credibility of a party’s position.

Over time, the Ontario Court of Appeal weighed in with its own interpretation of the rule, taking what was understood as a firm stance

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8. *Irving Ungerma*n Ltd v *Galanis* (1991), 4 OR (3d) 545 at 550–51, 83 DLR (4th) 734 (CA).

9. *Pizza Pizza Ltd v Gillespie* (1990), 75 OR (2d) 225 at para 23, 45 CPC (2d) 168 (Ct J (Gen Div)).

10. *Ibid* at para 41.

11. *Ibid* at para 52.

against the making of determinations of credibility and findings of fact on summary judgment motions.<sup>12</sup> In deciding motions for summary judgment, courts were never to assess credibility, weigh evidence or make findings of fact, but merely to make the threshold determination of whether there was a genuine issue of material fact requiring a trial. Although this interpretation remained in place for some time, by 2006 it had become clear that it was not serving the civil justice system well. The reconsideration of summary judgment became an important focal point of a review commissioned by the Ontario government (and conducted by former Associate Chief Justice Coulter Osborne) with a view to making civil justice more accessible and affordable.<sup>13</sup>

### *B. Contextual Influences*

It may be unclear whether the standard for granting summary judgment did not serve its purpose well from the start or whether it gradually ceased to meet the evolving needs of the civil justice system in Ontario. However, it is clear that the “genuine issue for trial” test required a motions judge to conduct a complex interpretive assessment—one that could involve a range of contextual factors.

Such an assessment can be tricky. Making findings of fact at trial is one thing. The record is as complete as it will ever be; the judge is mandated to make whatever findings of fact can be made, and to decide the case on the basis of those findings. It is a different matter, on a motion for summary judgment, to decide whether enough evidence exists to regard an issue of fact as settled (so that it is unnecessary to make a finding) or whether other evidence likely to emerge in a full trial (on the issue in question or on other related issues) might alter the situation so as to require treating the fact as genuinely in issue.

In this way, the evaluation of the evidence on a motion for summary judgment entails a different kind of assessment. It raises questions on the likely state of the record if the matter were to go to trial, and on

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12. See *Aguonie v Galion Solid Waste Material Inc* (1998), 38 OR (3d) 161 at 173 (available on QL)(CA); *Dawson v Rexcraft Storage and Warehouse Inc* (1998), 164 DLR (4th) 257, 111 OAC 201 (CA).

13. Osborne Report, *supra* note 7.

whether the evidence led at trial could affect a key finding or findings that would influence the outcome. A range of subtle contextual factors could affect this type of assessment. Such factors could include the relative emphasis to be placed, on the one hand, on procedural fairness and ensuring the accuracy of the findings, and on the other hand, on minimizing cost and delay. A judge's appreciation of whether a trial's impact on public confidence in the civil justice system warrants the burden on the litigants and the system may affect the judge's assessment of whether a genuine issue for trial exists, or whether, in all the circumstances, the facts are sufficiently clear on the existing record to determine that no genuine issue prevents judgment from being granted. As the British Columbia Court of Appeal noted in one case: "it must be accepted that while every effort must be made to ensure a just result, the volumes of litigation presently before our courts, the urgency of some cases, and the cost of litigation do not always permit the luxury of a full trial with all traditional safeguards in every case particularly if a just result can be achieved by a less expensive and more expeditious procedure".<sup>14</sup>

To observe that a summary judgment determination can legitimately reflect broader considerations affecting the civil justice system is not to suggest any particular criticism of the "genuine issue for trial" test, or anything untoward about the approach that motions judges have taken to it in Ontario. It is only to say that in seeking to understand the challenges posed by that test, it might help to consider how the circumstances of individual cases might affect how courts understand what constitutes a *genuine* issue for trial, and how the meaning of that phrase can evolve over time.

### *C. Appeal Routes and Vanishing Trials*

Two aspects of the development of the summary judgment jurisprudence have received little attention because they involve considerations that are more sociological than juridical.

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14. *Inspiration Management Ltd v McDermid St Lawrence Ltd* (1989), 36 BCLR (2d) 202, 36 CPC (2d) 199 (CA).

First, the procedure for appeals on summary judgment matters in Ontario is asymmetrical. Appeals from the granting of a summary judgment motion go directly to the Court of Appeal, but appeals from the denial of such a motion go to the Divisional Court, and only then with leave. This is because, generally speaking, granting a summary judgment motion will decide the rights of the parties with finality, and will be considered a final decision; denying a summary judgment motion will not have that affect, so it will be considered interlocutory.<sup>15</sup> In theory, appeals from the denial of a summary judgment motion can reach the Court of Appeal if the result in the Divisional Court is appealed, but it is relatively rare for this to happen.

As a result of this asymmetry, the court that makes the most authoritative pronouncements on the standard for granting summary judgment—the Court of Appeal—tends to do so in cases where the motions court has denied the complainant her day in court. The Court of Appeal rarely hears appeals in which the appellant claims to have been wrongly deprived of a prompt and efficient resolution by way of summary judgment. Of course, there is nothing scientific about this. The fact that a decision has been appealed is an indication of a losing party's discontent with it, and not necessarily an indication that the decision was wrong. And, in any event, each case is decided on its own merits.

Nevertheless, because most of the appeal decisions on the standard in summary judgment have involved concerns of a lack of procedural fairness rather than a lack of efficiency, this asymmetry could have a conservative influence on the overall approach recommended by the Court of Appeal. By way of analogy, if a manufacturer formulating a production policy were to ask only its sales department or its service department about the general level of customer satisfaction, the manufacturer would get a distorted impression—either that most customers are eager for quick delivery of new products or that most customers are concerned by flawed workmanship. On this analogy, Ontario's approach to summary judgment has been developed in consultation with the service department and not with the sales department.

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15. See *Cole v Hamilton (City)* (2002), 60 OR (3d) 284, 29 CPC (5th) 49 (CA).



Secondly, recent decades have witnessed the rise of alternative dispute resolution methods, bringing significantly more options for resolving matters before trial, and even more compelling reasons to do so in order to avoid the costs and delay of going to trial. The proportion of matters that reach trial has continued to fall throughout North America since the 1985 reform to the summary judgment rule—so much so that studies have examined the phenomenon of the “vanishing trial”.<sup>16</sup>

Of course, there is a range of reasons why matters do or do not settle. Some of these relate to the extent of the parties’ knowledge of both sides of the case, and others involve cost-benefit considerations that may favour having the matter decided by a judge at trial rather than resolving it earlier. One might imagine that the greater the opportunities and incentives to resolve a matter before trial, the more likely it is that the matters that do proceed to trial will be particularly complex, or will be cases in which at least one party is steadfastly determined to have its day in court for reasons other than the creation of a full trial record. Such reasons could include the desire to have a public hearing, or have a judge make a formal pronouncement on the issues.

As is true of the asymmetry of appeals, such considerations may do little to explain particular cases but may provide some insight into the current jurisprudence as a whole. If a growing proportion of the cases today that “should” settle but do not are those in which at least one party is simply not prepared to settle under any circumstances, this could help to explain why litigants who resist summary judgment are doing so all the more doggedly. To them, it is an article of faith that a full trial is “the essence of procedural justice and its deprivation the mark of procedural injustice”.<sup>17</sup>

Overall, the challenges in deciding summary judgment motions have increased steadily over the years. If the conservative interpretation of the standard that emerged was ever appropriate, it gradually ceased to be so. Courts no longer needed to be warned to exercise caution—they needed to be encouraged to be decisive.

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16. Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts” (2004) 1:3 *J Empirical Legal Studies* 459; WK Winkler, “The Vanishing Trial” (2008) 27 *Advocates’ Soc J* 2.

17. *Ungerma*n, *supra* note 8 at para 20.

## II. The Trouble with Summary Judgment

Although concerns about the summary judgment rule often focused on the formulation of the standard, it was far from clear that the phrase “no genuine issue for trial” was the source of the problem. Nor was it at all clear that the phrase could be revised to identify the decisive factor that would indicate whether a matter should be determined on summary judgment or left for trial. Even if the standard was once at the heart of the problem, the concerns it raised may have been overtaken by developments affecting the relationship between the pre-trial phase of civil litigation and the trial phase. This part of the article considers the approaches that have been taken to summary disposition in other jurisdictions, and summarizes the highlights of the Osborne Report and the new rule on summary judgment in Ontario.

### *A. A Test by any Other Name?*

In recent years, various formulations of the standard for summary judgment have been used in Canada and other common law jurisdictions. The “no genuine issue for trial” test has been used in the Federal Court,<sup>18</sup> in Manitoba<sup>19</sup> and in Prince Edward Island<sup>20</sup>. In the Federal Court, as in Ontario, judicial interpretation of this test failed to encourage a sufficiently robust approach to resolving matters where appropriate without a full trial. The Federal Court jurisprudence required that a summary judgment motion be dismissed where an issue of credibility arose, or where there was conflicting evidence and the outcome of the motion required the drawing of inferences from an incomplete record.<sup>21</sup> This approach did not provide the flexibility needed to manage the caseload efficiently. Following a series of

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18. *Federal Courts Rules*, r 215.

19. Manitoba, *Court of Queen’s Bench Rules*, r 20.03 (1)–(4).

20. Prince Edward Island, *Rules of Civil Procedure*, r 20.

21. See *MacNeil Estate v Canada (Indian and Northern Affairs Department)*, 2004 FCA 50, [2004] 3 FCR 3; *Trojan Technologies v Suntec Environmental*, 2004 FCA 140, 239 DLR (4th) 536.

consultations with the bar, the Federal Courts Rules Committee adopted various changes to the rule in 2009.<sup>22</sup>

In Nova Scotia, until 2009 the rules employed a test of “no arguable issue”.<sup>23</sup> In that year, the “no genuine issue for trial” test was adopted, with a view to having more matters resolved through summary judgment.

In British Columbia,<sup>24</sup> Alberta,<sup>25</sup> New Brunswick,<sup>26</sup> and Newfoundland and Labrador,<sup>27</sup> the standard of “no defence to the claim/no merit to the claim” has been used. This formulation permits summary judgment to a plaintiff where there is no defence to all or part of a claim, where the defence only disputes the amount of the award, or where there is no merit in the whole or part of the plaintiff’s claim. This test appears to differ from the “no genuine (or arguable) issue for trial” test, in that it actively encourages the court to consider the merits of the claim or defence to the extent that it can do so on the record before it. The mandate to look to the merits of the claim or defence might seem likely to make courts less hesitant to grant summary judgment in

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22. For a description of the reforms to the summary judgment rule in the Federal Courts, see Canadian Forum on Civil Justice, “Inventory of Reforms: Federal Court Rules—Summary Judgment and Summary Trial (rr 213 to 219)”, online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org>> .

23. For a description of the reforms to the summary judgment rule in Nova Scotia, see Canadian Forum on Civil Justice, “Inventory of Reforms: Nova Scotia Summary Judgment (r 13)”, online: Canadian Forum on Civil Justice <<http://cfcj-fcjc.org>> .

24. *British Columbia Supreme Court Rules*, r 9-6(5). Under the recent reforms, r 18 (now r 9-6) was strengthened and clarified. Respondent(s) (now “answering parties”) must now “show cause” why the claim or defence has merit where the applicant has shown that there is no genuine issue for trial with respect to a claim or a defence. The answering party can allege that the applicant’s own pleading does not raise a meritorious cause of action or defence (i.e. there is no need to respond substantively to it); or it can point to its pleadings to set out a meritorious claim or defence; or it can provide affidavit evidence setting out a meritorious claim or defence (which is generally more prudent); or it can rely on specific facts in affidavit evidence to show that there is a genuine issue for trial. If there is no genuine issue the court now *must*—not *may*—pronounce judgment or dismiss the claim. There are costs sanctions for frivolous applications or pleadings, or if it appears that either party delayed or acted in bad faith.

25. *Alberta Rules of Court*, r 7.3(1).

26. New Brunswick, *Rules of Court*, r 22.01.

27. Newfoundland and Labrador, *Rules of the Supreme Court*, r 17.01.

appropriate cases, but the more conclusory “no defence/no merit” language could, in fact, make them more hesitant to find that a case meets the threshold. Nevertheless, as explained below, this is unlikely to result in increased trials in three of these four provinces, because their rules also include a provision for summary trial.

Similarly, in England, the Civil Procedure Rules use the formulation “no real prospect of succeeding on the claim/defending the claim”.<sup>28</sup> This formulation is even clearer in mandating the courts to anticipate the outcome at trial. However, while it may have a salutary effect in discouraging frivolous claims or defences, it has not increased the proportion of cases resolved by summary judgment. Whether that code test has any relevance for Canada is doubtful because of the many differences in the civil justice systems in England and Canada, such as the differences in the nature of pre-trial disclosure,<sup>29</sup> and in the economic contexts in which litigation is pursued.<sup>30</sup>

Finally, Quebec has adopted the standard of “no reasonable chance of success”<sup>31</sup> for considering whether to permit appeals to go forward. Like the English test, it mandates courts to look ahead to the merits and to measure the record against the prospects of success, but the reasonableness threshold is even easier to meet.

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28. The English Rules formulate the test as one of whether the “claimant has no real prospect of succeeding on the claim or issue; or the defendant has no real prospect of successfully defending the claim or issue; and there is no other compelling reason why the case or issue should be disposed of at a trial”. United Kingdom, *Civil Procedure Rules*, r 24.2. There is no oral evidence in summary judgment determinations in the English courts.

29. There is no oral examination for discovery in the English courts.

30. Similar questions arise about the instructiveness of the American experience despite its rich jurisprudence and lively commentary. For example, in celebrating 25 years of leading jurisprudence, known as “the Summary Judgment Trilogy”, summary judgment has been described as part of a long term trend—which includes the directed verdict, the motion to dismiss, and arbitration—away from jury trials in civil matters to the resolution of cases by courts and counsel. See Suja Thomas, “Keynote: Before and After the Summary Judgment Trilogy” (2012) 43 *Loyola U Chicago LJ* [forthcoming] (decrying the trend to reduce the role of the jury as unconstitutional).

31. Art 501(4.1) CCP.

## *B. The Road not Taken: Summary Trial*

Despite the range of formulations of the test, there has been remarkably consistent recognition in recent years that the standards have not succeeded in fostering the right balance in summary judgment determinations. In a number of jurisdictions this has prompted consideration of the possibility of introducing a “summary trial—an alternative to the “all or nothing” options of summary judgment. The option of holding a summary trial was first introduced into Canadian civil procedure in 1983 in British Columbia.<sup>32</sup> That option responded to dissatisfaction with the regular defeat of summary judgment motions by “artful pleaders” who were able to persuade the court that there were arguable defences or claims.<sup>33</sup>

Under the rule for summary trial in British Columbia, the onus is reversed from that for summary judgment. The option of resolving, by way of affidavits and oral argument, the issue that would otherwise prevent summary judgment can be refused only if the judge cannot find the facts necessary to decide the case, or if it would be unjust to make such a finding. Refusing to decide the matter on a summary trial could be appropriate in factually complex cases,<sup>34</sup> or where there were issues of relative fault as between defendants or issues of indemnity between third parties.<sup>35</sup>

Some variations emerged in the jurisprudence over the extent to which caution is required in adopting the summary trial proceeding, but it has generally been acknowledged that perfect justice is an elusive goal that even a conventional trial does not guarantee. In deciding whether to employ the proceeding in a given case, a court may consider the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matter that might arise.<sup>36</sup>

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32. *British Columbia Rules*, *supra* note 24.

33. *Inspiration*, *supra* note 14.

34. See e.g. *Cannaday v Tod Mountain Development Ltd* (1998), 29 BCLR (3d) 97, 142 WAC 273 (CA).

35. See e.g. *Kaba v Cambridge Western Leaseholds Ltd* (1997), 43 BCLR (3d) 80 (available on WL) (CA).

36. *Inspiration*, *supra* note 14 at 214.

The courts were, however, cautioned not to be timid in adopting the summary trial procedure, and not to reject it solely because there were factual determinations that required assessments of credibility;<sup>37</sup> courts were advised that the issue is not whether a different procedure would yield a different result, but whether in all the circumstances of the case, it would be “unjust” to reach a result through the mechanism of a summary trial.<sup>38</sup>

In recent years, summary trial procedures have been adopted in other Canadian courts, including those in Alberta<sup>39</sup> and Newfoundland<sup>40</sup> and in the Federal Court.<sup>41</sup> In British Columbia, where a party seeks summary trial, the court may make the necessary directions for the matter to be determined by summary trial on the basis of various kinds of evidence, including affidavits, answers to interrogatories, transcripts of examinations for discovery, admissions and expert reports. At the hearing, the judge may grant judgment for either party on an issue or on the matter as a whole, or employ a wide range of other options to ensure that the matter is resolved appropriately. In British Columbia, which has the most extensive experience with summary trials, the procedure has been regarded as very effective. In its 2006 report, the Civil Justice Reform Working Group listed summary trials as first among “the excellent civil justice reform initiatives” that preceded the report.<sup>42</sup>

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37. See *Clark v Stock*, 2002 BCSC 759 at para 54, 23 CPC (5th) 165.

38. *Ibid* at para 70.

39. *Alberta Rules*, *supra* note 25 at r 7.5.

40. *Newfoundland & Labrador Rules*, *supra* note 27 at r 17A.

41. *Federal Rules*, *supra* note 18 at r 213.

42. BC Justice Review Task Force, *Effective and Affordable Civil Justice: Report of the Civil Justice Reform Working Group to the Justice Review Task Force* (2006), online: BC Justice Review <[www.bcjusticereview.org](http://www.bcjusticereview.org)> .

While there is a gap between British Columbia’s current civil justice system and our vision, we must first acknowledge (and not take for granted) how lucky we are to live in a place where the rule of law is valued and preserved. We also wish to acknowledge the excellent civil justice reform initiatives that have preceded this report. These include: the Summary Trial (r 18A).

*Ibid* at 79.

Despite the popularity of summary trial elsewhere, the reforms in Ontario have taken a different direction, as we will now see.

### C. *The Osborne Report*

While British Columbia's Civil Justice Reform Working Group was completing its review and delivering its report, the Ontario government was commissioning its own review of its civil justice system. Former Associate Chief Justice Osborne was asked to provide his recommendations for making the system more accessible and affordable. The Osborne Report,<sup>43</sup> which was delivered in 2007, began its review of summary judgment by observing the concerns that the rule was not working as intended because it had been interpreted as providing too narrow a scope for resolving cases. In Osborne's view, a change in the wording of the test was not likely to accomplish its objective of expanding the scope of summary judgment. Accordingly, his report made no recommendation for changes to the phrase "genuine issue for trial". However, it did recommend various other changes to the summary judgment rule.<sup>44</sup>

First, the Osborne Report recommended that courts be permitted expressly to weigh evidence, draw inferences and evaluate credibility in appropriate cases.<sup>45</sup> The previous constraints on the process had demonstrably constrained the operation of summary judgment rules in Ontario and elsewhere in Canada.

Second, where courts needed to hear *viva voce* evidence on discrete issues to determine the motion, they should be permitted to direct a "mini-trial" to do so.<sup>46</sup> Departing from the general rule that a different judge should then hear the trial from the judge who has determined the pre-trial matters, the Report recommended that the judge who ordered the mini-trial could also then hear it.

Third, the report recommended eliminating the presumption that costs would be awarded on a substantial indemnity basis against an

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43. Osborne Report, *supra* note 7.

44. *Ibid* at 107-14.

45. *Ibid* at 115-16.

46. *Ibid* at 117-19.

unsuccessful moving party.<sup>47</sup> This presumption was discouraging parties from making appropriate efforts to streamline proceedings through summary judgment motions. The ordinary rule allowing a higher scale of costs where appropriate would suffice to discourage parties from improper use of the procedure.

Finally, the report recommended the adoption of a summary trial procedure like that which had been pioneered in British Columbia and had recently been adopted elsewhere.<sup>48</sup>

#### *D. The New Rule*

Ontario's Civil Rules Committee considered the recommendations of the Osborne Report. In drafting the new rule, which came into effect on January 2010, the Committee adopted some of the recommendations but not others, and made various adjustments to those that it did adopt.

Despite the Osborne Report's recommendation that the formulation of the test remain unchanged, the Committee adopted the "no genuine issue *requiring* a trial" test formulated in the 1991 decision of Morden ACJO in the *Ungerman* case.<sup>49</sup> As the Court of Appeal later noted in *Combined Air*, this change in language was intended to be more than merely semantic<sup>50</sup>—it called upon the motions court to consider what would be added to the adjudicative process by going to trial.

As for the changes that were recommended by the Osborne Report, the Committee agreed that restrictions on weighing evidence, drawing inferences and evaluating credibility in appropriate cases should be removed, but it recommended that the power to take these steps should be confined to judges and not extended to masters.

Second, the Committee did not adopt the Osborne Report's recommendation to make available a "mini-trial" in which, as an alternative to dismissing the motion, witnesses could be called to testify forthwith on one or more issues if the interests of justice required such testimony for the court to decide the matter by way of the summary

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47. *Ibid* at 120–26.

48. *Ibid* at 127–29.

49. *Ungerman*, *supra* note 8 at para 14 [emphasis added].

50. *Combined Air*, *supra* note 3 at para 44.



judgment motion. Instead, the new rule permits judges (but not masters) to order oral evidence for the limited purpose of exercising the court's powers to dispose of the motion.

Third, the presumption of costs on a substantial indemnity basis was eliminated. This brought summary judgment motions into line with other proceedings, permitting the court to make an order on a substantial indemnity basis only where there is unreasonableness or bad faith.

Finally, the Committee did not adopt the recommendation that a rule for summary trial be introduced.

### III. Proportionality and the Full Appreciation Test

With a brand new rule in place, it might have seemed that the Ontario courts would be well equipped to embark on a new phase in the determination of summary judgment motions. Moreover, on this occasion, the specific changes to the summary judgment rule were contained in a package of reforms couched in an enhanced interpretive framework that explicitly endorsed the idea of proportionality as its guiding principle.<sup>51</sup> However, few areas of procedure have proved as complex and contested as that concerning whether a matter should go to trial, and, as happened after previous summary judgment reforms, divergent approaches emerged.<sup>52</sup> Welcome guidance from the Ontario Court of Appeal came in the *Combined Air* decision.

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51. O Reg 438/08 (“[i]n 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”, s 2).

52. See e.g. *Healey v Lakeridge Health*, 2010 ONSC 725, 72 CCLT (3d) 261; *Cuthbert v TD Canada Trust*, 2010 ONSC 830, 88 CPC (6th) 359; *New Solutions Extrusion v Gauthier*, 2010 ONSC 1037 (available on WL Can); *Hino Motors Canada v Kell*, 2010 ONSC 1329 (available on WL Can); *Lawless v Anderson*, 2010 ONSC 2723 (available on WL Can); *Canadian Premier Life Insurance v Sears Canada*, 2010 ONSC 3834, 91 CCLI (4th) 120; *Enbridge Gas Distribution v Marinaccio*, 2011 ONSC 2313 (available on QL); *Optech Inc v Sharma*, 2011 ONSC 680 (available on WL Can) (with supplementary reasons at 2011 ONSC 1081).

### *A. A New Kind of Case for Summary Judgment*

A key feature of this guidance concerned the addition of a new kind of case suitable for summary judgment that was added to the existing two kinds. These first two kinds of cases include those in which the parties move jointly for summary judgment and the court is satisfied that this is appropriate, and those in which the claims or defences are without merit and, therefore, have no chance of success.<sup>53</sup> One might expect that neither of these kinds of cases would pose a significant challenge to the courts—the first kind because the parties consent to the determination based on the record as it exists, and the second kind because the mandate resembles that exercised previously in easy cases.

The new third category of summary judgment cases is the product of the change in wording from “no genuine issue for trial” to “no genuine issue *requiring* a trial.” As the Court of Appeal explained, the change reflects the expansion of the rule from one that was used merely “to winnow out plainly unmeritorious litigation” to one in which it is in “the interests of justice” to weigh evidence, draw inferences and evaluate credibility in order to decide the matter on the motion.<sup>54</sup>

While it is not necessary for the court first to categorize the case, this third category poses special challenges. Because the rule has changed the test to one of “no genuine issue *requiring* a trial” and has empowered courts to weigh evidence, draw inferences and evaluate credibility, it now mandates courts to address themselves explicitly to the complex assessment that was once glossed over by the adjective *genuine*. This does not mean that the reforms have given them a further distinguishing factor that will simplify the determination of whether an issue for trial is *genuine*. On the contrary, they are called upon to engage in the more complex assessment of whether, in all the circumstances, it is in the interests of justice to decide the matter on the motion or to send it to trial.

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53. See *Canada (AG) v Lameman*, 2008 SCC 14 at para 10, [2008] 1 SCR 372.

54. *Combined Air*, *supra* note 3 at para 44.

### *B. Full Appreciation and the “Trial Narrative”*

To help courts make this complex assessment, the Court of Appeal honed in on the functional difference between the nature of the adjudication that is possible on a motion for summary judgment and that which is possible at trial. In drawing that distinction, the Court of Appeal referred to the Supreme Court of Canada’s analysis in *Housen*, decided in 2002, where the Supreme Court observed that “[t]he trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence”.<sup>55</sup> The Court of Appeal elaborated on this point by noting that the trial judge is in a privileged position as a trier of fact, as one “who participates in the dynamic 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”.<sup>56</sup>

The Court of Appeal added that what matters is not merely a trial judge’s exposure to the totality of the evidence presented, but also the importance of affording the parties the opportunity to present their evidence as they wish. As the court explained, the “trial narrative”, or “the order in which witnesses are called, the manner in which they are examined and cross-examined, and how the introduction of documents is interspersed with and explained by the oral evidence . . . may have an impact on the outcome”.<sup>57</sup>

The court noted that there are marked differences between the way a case is presented at trial and the way it is presented on a summary judgment motion.<sup>58</sup> On such a motion, the court bases its reasoning only on affidavits drafted by or with the assistance of counsel, together with transcripts of cross-examinations. This material is introduced in piecemeal fashion with no scope for observing the witnesses or asking questions to clarify their evidence. A paper record provides a far more

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55. RD Gibbens, “Appellate Review of Findings of Fact” (1992) 13:4 *Advocates’ Q* 445 at 446, cited in *Housen v Nikolaisen*, 2002 SCC 33 at para 14, [2002] 2 SCR 235.

56. *Combined Air*, *supra* note 3 at para 48.

57. *Ibid.*

58. *Ibid* at para 253.

attenuated basis for findings—both in the quantity and quality of information—than that which is presented in a trial.

This is the meaningful distinction that must be at the heart of the determination of whether a trial is warranted. “[T]he 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?”<sup>59</sup> The Court of Appeal contrasted cases requiring “multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record”<sup>60</sup> with “document-driven cases with limited testimonial evidence . . . limited contentious factual issues . . . [and] where the record can be supplemented to the requisite degree at the motion judge’s direction by hearing oral evidence on discrete issues”.<sup>61</sup> In the former, summary judgment cannot serve as an adequate substitute for a trial. The judge must decide whether it is possible to make accurate findings of fact without the benefit of the trial narrative, without hearing the witnesses speak in their own words, and without the assistance of counsel in examining the record.

### *C. Timing, Oral Evidence, Case Management, Standard of Review*

To help courts interpret and implement the new rule, the Court of Appeal provided further guidance on a number of key points. First, determining a matter on a record comprised of affidavits and cross-examinations may be less feasible early on in the process, when the record may be less complete. Summary judgment motions should not be used to circumvent the normal discovery process where it would be the most efficient means of developing the record.<sup>62</sup> Similarly, an assessment of the suitability of summary judgment in simplified proceedings must take account of the limited pre-trial disclosure contemplated by that form of procedure. Simplified procedure is designed to be more efficient

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59. *Ibid* at para 58.

60. *Ibid* at para 51.

61. *Ibid* at para 52.

62. *Ibid* at para 58.

than ordinary actions, and summary judgment motions may detract from this goal rather than further it. Parties faced with premature or other ill-conceived motions for summary judgment should seek directions to reduce the risk of wasting resources on such motions.

Second, while the judge may order the calling of oral evidence, this is not to be confused with conducting a “mini-trial”.<sup>63</sup> The drafters of the new rule did not adopt the Osborne Report’s recommendation for mini-trials; a summary judgment motion remains essentially a paper hearing. The motions judge controls the extent of oral evidence to be led, which is to be confined to that which is necessary to determine whether any of the issues genuinely require a trial for their resolution. A party moving for summary judgment should present a case capable of being decided on the documentary record. The judge must decide whether a trial with live testimony is required to resolve the issues, not merely whether it would supplement or enhance the record. In practice, however, this could preclude the moving party from arguing that the matter should be decided on the basis of a paper record supplemented by limited oral evidence on a narrow issue. Such an argument could be construed as an admission that the case is inappropriate for summary judgment. Moreover, where the judge reaches the conclusion that oral evidence is necessary, the hearing of that evidence must be scheduled for another day, increasing the expense and delay for parties.

Third, where a court dismisses a motion for summary judgment and avails itself of one or more of the many options for fashioning an appropriate procedure for resolving the dispute, it should try to facilitate a genuine trial, rather than a mere reconfiguration of the unsuccessful motion. While the motions judge is well-positioned to specify which issues of material fact are not in dispute, and to define the issues to be tried in a way that will salvage, as much as possible, the resources that went into the motion, the judge should not, for example, direct that the affidavit evidence presented on the motion replace live testimony at trial. Further, litigants should not be allowed to use a summary judgment motion to preempt sound case management

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63. *Ibid* at para 59.

techniques—for example, by expending undue resources on the motion in order to make it seem wasteful to send the matter to trial.<sup>64</sup>

Finally, the Court of Appeal clarified the standard of review. Where the issue is one of law or one of mixed law and fact, the standard is one of correctness, and “can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle”.<sup>65</sup> In contrast, where the motions court has applied the correct legal test, any factual findings that it has made should be accorded deference and reviewed only on the basis of palpable and overriding error.<sup>66</sup> Formulated in this way, the standard of review would discourage appeals relating solely to factual findings where the motions court was entitled to make those findings.

## IV. The Devil and the Details

The true effectiveness of any legal test is best measured by its application in actual cases. Accordingly, it is helpful to review the way the rule operated in each of the cases decided by the Court of Appeal in *Combined Air*.

### A. *Combined Air Mechanical v. Flesch: The Use of Oral Evidence*

The first case involved a claim by Combined Air that the defendants had breached an agreement to not compete with it. Combined Air had bought a heating, ventilating and air conditioning business from the defendants. The agreement contained a restrictive covenant requiring the defendants, for a certain period of time, to refrain from engaging in businesses the “same or similar” to the business they were selling to the plaintiff, and to not “compete” with it.<sup>67</sup> The defendants subsequently did work for an information technology company, and Combined Air claimed that this was in breach of the covenant.

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64. *Ibid* at paras 65–66.

65. *Housen*, *supra* note 55 at para 36.

66. *Combined Air*, *supra* note 3 at para 71.

67. *Ibid* at para 82.

The defendants brought a motion for summary judgment. In making its case, Combined Air relied on a document containing the unofficial bid results for a project in which the company for which the defendants had worked was listed as a bidder, along with some of Combined Air's competitors. Combined Air argued that since the other bidders were its competitors, this implied that the company in question was also a competitor, and this raised a genuine issue for trial.

In order to understand the significance of the document containing the unofficial bid results and assess the weight that it should be given, the motions judge directed that a representative of the company which Combined Air alleged was its competitor provide oral evidence on the bid. That witness testified that the allegedly competitive component amounted to only a third of the overall bid, and that this component was, in any event, to be subcontracted to Combined Air. On the basis of this evidence, the motion judge concluded that the only instance of alleged competition put forward by Combined Air actually supported the defendants' position.<sup>68</sup> Therefore, there was no genuine issue for trial, and the motion for summary judgment was granted.

Combined Air appealed this decision, arguing that the motions judge had misconstrued the meaning of "same or similar" and "compete" in determining whether the restrictive covenant had been breached. The Court of Appeal dismissed the appeal, holding that the defendants had met the burden of rebutting the specific example of alleged competition put forward by Combined Air, and that there was no further obligation on them (or on the court) to enlarge the inquiry.<sup>69</sup>

Combined Air also argued that the motions judge had erred in directing oral evidence on the document that it had put forward, and in restricting the scope of that evidence to the document itself rather than permitting questions on the company's business as a whole. The Court of Appeal disagreed and held that it was appropriate to order oral evidence for several reasons: only a small number of witnesses were required; it could be gathered in a manageable time; it could have significant impact on the outcome of the motion; and the issue was

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68. *Combined Air Mechanical Services Inc v Flesch*, 2010 ONSC 1729 at para 40, 71 BLR (4th) 27.

69. *Combined Air*, *supra* note 3 at para 81.

narrow and discrete.<sup>70</sup> Presumably, in putting its best foot forward, Combined Air could have led other evidence of the alleged breach, or of other breaches of the covenant, but it put forward only one alleged breach and one piece of evidence in support of it. The motions judge was entitled to order oral evidence to assess whether a trial was warranted, and in these circumstances the judge was right to conclude that the claim had no chance of success.

This example demonstrates that a summary judgment motion should not be treated as an opportunity to extend the discovery process in a case in which that process has not yielded enough evidence to support the need for a trial. It also illustrates an effective use of oral evidence to enable the motion judge to decide whether there was a genuine issue for trial.

*B. Mauldin v. Hryniak; Bruno Appliance and Furniture v. Hryniak: Many Parties, Many Claims, Factually Complex Cases*

The next two cases, in which allegations of investment fraud were made against Hryniak and his lawyer, were treated as companion cases. The motion for summary judgment was made under the old summary judgment rule. The Court of Appeal observed that if the motions judge had had the benefit of the new rule and the reasons in this appeal, he might well have taken a different approach.<sup>71</sup> In the first case, the plaintiff Mauldin made an investment following a meeting in 2001 with Hryniak, Hryniak's lawyer and another individual in that lawyer's office. In a complex series of transactions, Mauldin's investment was lost under dubious circumstances. In the second case, the plaintiff Bruno made an investment following a meeting in 2002 with Hryniak's lawyer and the other individual in the lawyer's office. Again, a complex series of transactions ensued, and Bruno's investment was lost under equally dubious circumstances.

Mauldin and Bruno each sued Hryniak for fraud, and they sued the lawyer and his firm for fraud, conspiracy, negligence and breach of contract. In response to Mauldin's claim, Hryniak said that someone

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70. *Ibid* at para 104.

71. *Ibid* at para 153.



else stole Mauldin's money. In response to Bruno's claim, Hyrniak said that he had never asked Bruno to invest with him and had never received Bruno's money.

In 2008, the plaintiffs moved for summary judgment. After 18 witnesses, three weeks of cross-examinations, 28 volumes of evidence, four days of argument and three years, the motions judge issued a 58-page judgment granting summary judgment against Hyrniak in both actions, but dismissing the summary judgment motions against the lawyer and his firm.

The Court of Appeal held that the Maudlin and Bruno matters would not be suitable cases for determination by way of summary judgment under the new rule. The court found that both bore the hallmarks of the types of actions in which a full appreciation of the evidence could only be achieved at trial.<sup>72</sup> In addition to the extensive evidentiary record and the large number of witnesses, different theories of liability were proposed and numerous findings of fact were needed. As well, credibility determinations were at the heart of the disputes, and were made more difficult by the near-absence of reliable documentary evidence. The partial resolution of the matter by the motions judge served to increase, rather than limit, the expense and time needed to decide the case.

These cases illustrate the challenges in determining whether to grant a summary judgment motion. Even where a key factual question can be stated simply it may not be easy to determine. Critical to the defendant's liability in both cases were the questions of what representations were made to the plaintiffs, whether these representations were known to be false and whether they induced the plaintiffs to invest with Hryniak. This necessarily involved a complex process of weighing evidence from a number of witnesses and determining credibility on the basis of a record that might be incomplete and circumstantial even after a full trial, in particular for reasons of solicitor-client privilege. Under such circumstances, the power to order oral testimony might not meet the need for a full appreciation of the record. It would therefore be better to leave it to the parties to work out what evidence should be presented, with the

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72. *Ibid* at para 152.

understanding that a trial will be the final opportunity to present their claims and defences.

In addition, the evidentiary challenges arising in the cases against the various defendants were different from one another. Resolving the case against some and not all defendants might not serve to streamline the litigation and it may require counsel to rethink the plan for the litigation, increasing the complexity and cost involved.<sup>73</sup>

C. 394 Lakeshore Oakville Holdings Inc. v. Misek: *Weighing Evidence, Evaluating Credibility, Drawing Inferences*

In the fourth case, the parties had brought competing motions to resolve a dispute over whether the plaintiff enjoyed a prescriptive easement over the property that lay between its land and a nearby beach. The motions judge granted summary judgment in favour of 394 Lakeshore (394) declaring that Misek's property at 394A Lakeshore Blvd (Misek's property) did not enjoy a prescriptive easement over 394 for the purposes of walking to the beach. To have a prescriptive easement, the occupants of Misek's property would have needed to enjoy continuous use of the lands at 394 for more than 20 years. Since the Miseks' predecessors in title, the Purvises, had owned the property from 1975 to 2002, the nature of the Purvises' enjoyment of the property was the critical issue.

The Purvises' evidence was that they did meander across 394 from their property to the beach in an uninterrupted, open and peaceful way throughout the time that they were there, but that they saw their ability to do so as having a personal rather than monetary value. The motions judge found that in contrast to a cottage property, which might require access to the beach across an adjacent piece of land for the property to be enjoyed, in this case there were many trees and bushes on the claimed easement lands, and no clear access to the beach. Further, there was evidence that the Purvises were permitted to cross 394 out of a habit of neighbourliness than out of a legal entitlement to do so.

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73. Applications have been made for leave to appeal the decisions in these cases to the Supreme Court of Canada: *Hryniak v Mauldin*, [2012] SCCA no 47 (QL); *Bruno Appliance and Furniture Inc v Hryniak*, [2012] SCCA no 48 (QL).

The Court of Appeal upheld the decision to grant the motion for summary judgment, rejecting the appellant's suggestion that certain categories of claims should not be decided on such a motion. In this case, the documentary evidence was limited and not contentious, there were a limited number of witnesses, and the legal principles were clear. The case illustrated an appropriate use of the enhanced scope for the court to weigh the evidence, evaluate credibility and draw reasonable inferences to enable it to decide the action summarily.<sup>74</sup>

#### *D. Parker v. Casalese: Summary Judgment and Simplified Procedure*

In the fifth case, the Court of Appeal considered a refusal to grant summary judgment in a claim for damage caused to the houses of the two plaintiffs by the demolition of a third house between the two, and the construction of two new houses in its place. The claims were made against the builder of the new houses and their owners. The builder responded that the work was done by his corporation and not by him. The owners of the new houses responded that the plaintiffs had suffered no damage and that in any event, they (the owners of the new homes) were not responsible for the builder's actions.

The claims were brought under the rule for simplified procedure.<sup>75</sup> This rule once had its own provisions for summary judgment, which were replaced in January 2010 by the new summary judgment rule. The motions judge dismissed the motion, and his decision was upheld by the Divisional Court. That Court held that the personal liability of the builder depended on mostly verbal agreements with the homeowners and the sub-trades, which put a premium on live testimony and cross-examination. Any vicarious liability on the part of the owners of the new homes depended on a finding that the work involved unusual and inherently dangerous risk.<sup>76</sup> The record did not differentiate between damages that might have been caused in this way and damages caused in other ways, and the plaintiff's expert report did not break down the damage calculation into components or resolve conflicts in the evidence

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74. *Combined Air*, *supra* note 3 at para 219.

75. Ontario, *Rules of Civil Procedure*, r 76.

76. *Parker v Casalese*, 2010 ONSC 5636 at para 13, 99 CLR (3d) 1.

over the possibility of pre-existing damage. For those reasons, the court also denied summary judgment against the owners of the new homes.

The Court of Appeal upheld the Divisional Court's decision, but noted that under the streamlined simplified procedure rule it will be rare for efficiencies to be gained by seeking to determine a matter on summary judgment where there are multiple witnesses with conflicting evidence requiring cross-examination, or where oral evidence is needed to decide key issues.<sup>77</sup> These considerations will not apply in every case, but where they do apply, a responding party should seek directions and ask that the motion be stayed or dismissed so that the matter can proceed expeditiously to trial.

## V. Is that a Bell I Hear Tolling? Perhaps Only in the Distance

All in all, the reforms to summary judgment in Ontario reflect a subtle but profound difference in direction from those taken in other parts of the country. The contrast is particularly strong between the Ontario reforms and those in British Columbia, where summary trials were introduced more than a quarter century ago. Although it can be difficult to compare from one legal system to another the balance between fairness and efficiency that is created through the combined effect of various procedures, the two provinces seem to be on different paths. What role do the differences in summary judgment play in the emerging divide as against other differences between the two systems?

For example, both British Columbia and Ontario have developed active case management procedures, but in British Columbia judges are assigned to try the cases they case manage, while in Ontario a different judge must preside at trial. This divergence shows that the two provinces give significant weight to two important procedural aspirations: the British Columbia approach emphasizes the salutary effect on the conduct of counsel in the pre-trial phase of knowing that the motions judge will try the case if there is a trial, while the Ontario approach

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77. *Combined Air*, *supra* note 3 at para 261.

emphasizes the importance of preserving the integrity of the presentation of a case at trial.

The choice to assign the same judge to both manage and try a case in the British Columbia procedure was introduced through a mere practice direction,<sup>78</sup> but it may well have changed the course of the approach in that province more generally. Since it is now expected that a single judge will preside over the entire process, litigants seem to be more accepting of an active role on the part of the judge in anticipating and dealing with arrangements for the trial. Active judicial involvement throughout the process could lead to a blurring of the line between the pre-trial and trial phases. Directing a summary trial of what appears to be a potentially dispositive issue could lead, perhaps without causing much concern, to the subsequent trial of a further issue or issues where necessary. Taken to its logical conclusion, this procedural path could lead to something closer to the civil law inquisitorial system—with its episodic hearings directed by the judge—than to the continuous oral trial that has been the hallmark of common law procedure. While the British Columbia courts have resisted this result, describing it as “litigating in slices”,<sup>79</sup> it is not clear whether this resistance is due to concerns about the impact on the integrity of the trial process, or to concerns that the trial process has been compromised without producing a decisive resolution of the case.

Similarly, it is easy to see how a trend towards robust case management could lead to the involvement of judges increasingly early in the process, for example, through the requirement of a “case planning conference” at the commencement of the claim.<sup>80</sup> Imposition of mandatory case planning conferences was one of the proposals for reform in British Columbia. Although it was not ultimately

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78. See the Supreme Court of British Columbia, *Practice Direction: Case Management* (20 November 1998), replaced by the Supreme Court of British Columbia, *Practice Direction: Case Planning and Judicial Management of Actions*, PD-4 (1 July 2010).

79. *Gish v Hooper Insurance and Financial Services Inc*, 2010 BCCA 443 at para 14, 13 BCLR (5th) 203.

80. British Columbia, *Supreme Court Civil Rules*, Part 5 (the proposed reforms required attendance but the rule as implemented makes this optional and it has not been pursued in many cases). Unlike a “case management” conference, which usually occurs later in the process, the “case planning conference” is designed to involve the judge in planning the pre-trial phase from the outset.

implemented as a mandatory procedure,<sup>81</sup> it bears a remarkable resemblance to the types of approaches characteristic of the inquisitorial system. In that system, the judge takes the lead throughout the litigation process, and counsel participate in the process but do not direct it.

In contrast, in Ontario, the simple device of assigning a different judge to the trial phase may have resulted in a different attitude towards judicial involvement in the pre-trial phase. For instance, it may have instilled a sense of caution in making the kinds of pre-trial directions that might pre-judge the evidence and the procedure needed for adequate fact-finding at trial; and it may have fostered a larger commitment to the goal of preserving the integrity of the final trial. In this ethos, the aspiration of achieving a “full appreciation” of the facts shaped through counsel’s carefully crafted “trial narrative” could be given more weight in relation to the efficiencies to be gained from more robust case management, versus one in which the judge assigned to the case is involved throughout.

Whether or not the continuous oral trial will ultimately dissolve into the process of case management in British Columbia, it is interesting that the gains in efficiency achieved by summary trial in that province have promoted a tolerance for imperfection in the trial process, and the recognition that perfect justice is an elusive goal which even a conventional trial cannot always meet. In contrast, whether or not Ontario’s approach to summary judgment can preserve the ideal of the continuous oral trial, it is interesting to consider the balance that approach calls for between the roles of counsel and the courts, and the challenges it creates.

The *Combined Air* decision affirmed that the summary judgment motion in Ontario is to remain essentially a paper hearing, in which the motions judge is responsible not only for weighing the evidence presented but also for deciding whether it is sufficient to warrant rendering judgment without the need for a full oral hearing. Although there is a provision for oral evidence, it is only at the behest of the judge who calls for it, and is to be used only for the purpose of helping to decide whether a full trial is needed. This seems to add to the complexity of the judge’s task, as oral evidence must be led at the judge’s initiative,

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81. *Case Planning and Judicial Management of Actions*, *supra* note 78.

rather than at that of counsel, who at that point in the proceedings will have a better idea than the judge of the sort of record that might be created at trial. In essence, this procedure requires the judge to assume direction of the taking of evidence, but, ironically, only for the purpose of deciding whether to defer to counsel's leadership in fashioning the record through the development of the trial narrative. And all this is for the purpose of ensuring that whether the case is decided at the time of the motion for summary judgment or only after a full trial, the high standard of a "full appreciation" of the facts is met.

The rejection of the halfway measures of mini-trials means that the outcome of the summary judgment motion in Ontario continues to be, in a sense, binary (i.e. all or nothing), and that the stakes are high. Judges are now specifically authorized to weigh evidence, assess credibility and draw inferences of fact, but they do so in the shadow of a traditional concern that the interest of justice may dictate that such powers be exercised only at trial. Furthermore, they do so in the light of the stated expectation that judgment should be rendered only after attaining a "full appreciation" of the record, and in the light of the acknowledgement of the important role of counsel in developing the "trial narrative" if the matter goes to trial. While the new procedure clarifies the role of summary judgment, it might not result in the resolution of significantly more cases before trial than were resolved under the previous rule.

Given the broad similarities in the procedural values and structures of the civil justice systems of British Columbia and Ontario, one might wonder what could bring about such fundamentally different approaches to summary judgment. Is it possible that the result in *Combined Air* might have been affected by a form of sample bias not unlike that attributed above to the asymmetries of appellate review? While the interveners before the Ontario Court of Appeal represented a broad cross-section of the legal profession, those most immediately affected by whether the reforms will promote a more accessible and affordable justice system—the litigants themselves—seemed to have had no direct representation. Again, this is not to criticize the approach taken to organizing the *Combined Air* "inquiry", or to suggest that there would be an obvious way to include such representatives, or even that such representatives, if given the choice, would express a preference for procedures that emphasized efficiency over accuracy. Though the

interveners in *Combined Air* were surely knowledgeable and concerned with the best interests of their clients, they might ultimately reflect the perspectives of the professionals (i.e., the litigators). Ultimately, litigators are concerned with maximizing the opportunities to perform their responsibilities well—even perhaps where accessibility and affordability are compromised.

Differences in the way in which summary judgment operates in different kinds of cases may also help to explain the result in *Combined Air*. Is it possible that larger and more complex matters in Ontario have sharpened the awareness of the participants in the *Combined Air* appeal to the importance of the trial narrative in ensuring a full appreciation of the facts in cases where proportionality warrants it? In the absence of statistics showing a clear difference in the “typical” size and complexity of cases decided in each system, such a theory remains purely speculative. However, the approach prescribed in *Combined Air* may well protect the integrity of the trial process in larger and more complex cases, but this might be at the expense of the efficiencies that would benefit smaller matters. The tension between standardized and customized procedures is a perennial challenge for civil justice systems. However, different approaches to summary judgment seem unavoidably to benefit, at least in principle, different kinds of cases. Whether the choices made in Ontario are well suited to the particular range of cases decided in Ontario remains to be seen.

Indeed, the true impact of the changes to the rule and its interpretation remains to be seen as Ontario courts develop familiarity with the new procedure. In this sense, while the summary judgment “inquiry” has concluded, the verdict is still out. Nevertheless, it can be said that the bell may be tolling for the traditional features of common law procedure, particularly the continuous oral trial, in other parts of the world and, perhaps, even in other parts of Canada—but not in Ontario.