



FAST JUSTICE AGAIN? SUMMARY JUDGMENT MOTIONS IN ONTARIO

by Thomas W. Arndt
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Clients often lament that the wheels of justice grind too slowly and ask what, if anything, can be done to have their dispute resolved more expeditiously. This reality often leads commercial lawyers to include Alternative Dispute Resolution (i.e. mediation and arbitration) agreements into contracts in an attempt to set out an efficient method of resolving potential future disputes. ADR agreements can be very effective, but, without getting into the details in this article, they can also merely add an extra layer or two into the resolution process which harks back to the maxim, "justice delayed is justice denied".

Another avenue to achieve fast justice is to seek summary judgment in the courts. In Ontario, as is the case with many jurisdictions around the world, the court has the power to grant judgment on a summary basis without the need of a trial or indeed many of the procedural steps that lead up to a trial. The proper goal of a summary judgment motion is to obtain a decision in a period of months rather than years for less money where the case is clear.

To encourage the use of the summary judgment process in the courts, the Summary Judgment Rule states that the court *shall* grant summary judgment unless there is a *genuine issue requiring a trial*.¹ Historically the appeal court's interpretation of the Summary Judgment Rule reined in the lower court's ability to grant summary judgment by limiting the judge's ability to weigh the evidence among other things. The judge's restrained powers combined with possible negative consequences of losing a summary judgment motion resulted in only those parties with the surest of cases attempting a proper summary judgment motion for fear of the consequences of failure. The outcome was that summary judgment motions were uncommon and only attempted by the bravest of clients and lawyers.

In November 2007, former Associate Chief Justice Coulter Osborne made recommendations to change the court process to enhance access to justice in Ontario. A laudable goal given the reality of modern day litigation and burden it placed on the parties and the court system. The report made numerous suggestions, one of which was a re-write of the Summary Judgment Rule.

The Summary Judgment Rule was re-written and in January 2010 the new rule came into force, moving the pendulum away from (1) the old rule - discouraging parties from bringing a summary judgment motion unless they were very sure to win, to (2) the new rule - encouraging parties to bring a summary judgment motion if they thought they had a chance to win. To achieve this goal the presiding judge was given broader powers including the power to weigh the evidence and conduct mini-trials. The presumption of adverse costs sanctions was also removed. The new rule came into effect in January 2010 and the courts went about their task of weighing evidence, conducting mini-trials and deciding summary judgment motions.

In late June 2011, the Court of Appeal for Ontario struck a five member Panel (normally the Court has three member panels and reserves a five member panel for rare occasions) to hear four separate appeals from summary judgment rulings in four consecutive hearing days. The Court invited intervenors (non-parties) to make submissions. These intervenors consisted of various lawyer associations in Ontario.

One lawyer made submissions that the new rule is a thermonuclear weapon that overrides a thousand years of common law turning our legal system into an inquisitorial system and permitting the Judge to become too engaged in the process. Others submitted that the new rule properly balances the various competing interests and if there is any intrusion, it is justified by the benefits to the stakeholders.

The effect of all of this could be that the new rule could become the new old rule after the Court of Appeal reviews the new rule, the case law and arguments or at a minimum we will have a pronouncement from Ontario's highest court on how to apply the new rule.

This is a watershed moment. Will we have fast justice again or is the price too great?

I happened to be in the Court of Appeal for Ontario on another matter during the week these appeals were being argued. The entire court house was abuzz with the energy of the hearings. We can expect a tremendous amount of activity in the legal community when the Court of Appeal decisions are released.

¹ Or in the limited circumstances where the parties agree to have all or part of the dispute determined by way of summary judgment, the court satisfied that it is appropriate to grant summary judgment.

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