



THE FULL APPRECIATION TEST UNVEILED SUMMARY JUDGMENT MOTIONS EXPANDED IN ONTARIO

by Thomas W. Arndt
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As I stated in my previous article regarding summary judgment motions in Ontario,¹ Clients often lament that the wheels of justice grind too slowly and they ask what, if anything, can be done to have their dispute resolved more expeditiously. The legal community (judges, lawyers, academics and rule makers alike) hear these comments and continue to implement solutions designed to increase access to justice in the court system.

Perhaps the single most significant change in recent years came when the courts were empowered to decide a case on its merits without the need for a trial. Trials are time consuming and costly both to the parties and the taxpayers funding our court system. The concept is that if a judge can have a full appreciation of the facts and issues enabling him or her to decide the dispute on its merits without a trial then it is not in the interests of justice to commit public and private resources to having a trial.

Since the newest version of summary judgment rule came into effect, motions court judges have been going about their task of deciding summary judgment motions. However, the judges applied the new rule without the benefit of appellate court guidance.

Appellate court guidance has now arrived.² In its decision, the Court of Appeal for Ontario confirmed the two recognized circumstances³ when summary judgment could be appropriate and set out a third, in so doing unveiled the "full appreciation test". This new abridged route to a decision is grounded in the expanded powers of the motion judge to weigh evidence and direct oral evidence on discrete issues.

Under the new rule, the motion judge can (a) weigh evidence, (b) evaluate witness credibility and (c) draw any reasonable inference from the evidence in determining whether there is a genuine issue requiring a trial. These abc's were historically limited to a trial judge because he or she will have lived the case for days, weeks or even months and heard the witnesses first hand (oral evidence). To contrast, historically a summary judgment motion judge's exposure to the evidence was limited to written statements, documents and transcripts (the written record). The motion judge rarely if ever received oral evidence. As a result, the motion judge was prohibited from engaging in the above abc's or deciding a case on its merits. The motion judge was too often compelled to send off to trial a case that could have been decided with discrete additional evidence placing a huge burden on the legal system. A trial can be a long and expensive process, but it was the fairest process to resolve conflicting evidence and issues in the Ontario Court System.

The new rule coupled with the new guidance from the Court of Appeal changes the landscape. At the summary judgment motion judge's direction the written record can now be *supplemented* to include oral evidence of witnesses on discrete issues and can properly weigh the evidence. Now where the motion judge is satisfied that the dispute

can be fairly and justly resolved by exercising the new powers set out in the new rule and he or she has a full appreciation of the case, the motion judge, in the interests of justice, can decide the case (provide faster justice) and avoid a potentially expensive trial.

As time goes by we will gain a full appreciation of whether the new rule achieves its intended purpose: *to eliminate unnecessary trials, not eliminate all trials*. In the mean time, it is clear that summary judgment can now be granted in three types of cases: (1) where the parties agree; (2) where the claim or defence has no chance of success (i.e. is without merit) and the new category (3) where the motion judge is satisfied that the issues can be fairly and justly resolved without need of a trial. Under this new, third type, "the judge is to assess whether he or she can achieve a full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record – as may be supplemented by oral evidence - or if the attributes and advantages of the trial process require that these powers can only be exercised at a trial."

The Court of Appeal for Ontario found that the new rule properly balances the various competing interests and if there is any intrusion to a party's right to a trial, it is justified by the benefits to the stakeholders. Will this expanded summary judgment procedure bring the parties back into the courts and out of the private arbitration processes or worse from resolving disputes on a purely economic basis rather than the merits? It is too early to tell. But we do know that the law makers are taking steps to be responsive to our Clients' comments.

To answer the question from my prior article: Yes, we have a new summary judgment rule here in Ontario and the Court of Appeal's guidance breathes life into the words of the rule. Judges, lawyers, and perhaps most importantly, our Clients now have a better appreciation of when a summary judgment motion can be the route to fast justice. This is a watershed moment indeed.

¹ [Fast Justice Again? Summary Judgment Motions in Ontario](#)

² *Combined Air Mechanical Services Inc. v. Flesch* 2011 ONCA 764. Note that at least one party has stated that they will be seeking leave to appeal to the Supreme Court of Canada.

³ First, where the parties agree. Second, when the claims or defences are shown to be without merit.

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