

# CLIENT ALERT

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## THE COURT OF APPEAL'S PLEA TO MOTIONS SCHEDULING JUDGES: STOP LETTING PARTIES WASTE JUDICIAL RESOURCES WITH PARTIAL SUMMARY JUDGMENT MOTIONS

by Joshua Suttner

On December 12, 2020, the Ontario Court of Appeal released its decision in *Malik v. Attia*, [2020 ONCA 787](#). In this case, the Court of Appeal sent a clear message to judges scheduling motions for partial summary judgment: stop!

### WHAT IS PARTIAL SUMMARY JUDGMENT?

Every lawyer has cases that make them think to themselves, "If we could just resolve this one issue, all the other issues would fall into place."

For example, you're dealing with a breach of contract case where the vendor failed to deliver a product and the buyer suffered damages for not being able to fulfill orders without the product. The vendor says there was no contract. As a result, there are two primary issues to be dealt with: (i) did the parties actually enter into a contract? and (ii) was there a breach and, if so, what are the damages flowing from the breach?

The first question might be straightforward and based on documentary evidence only. Maybe the parties only ever spoke by email. The second question is much more complicated. It might involve financial analysis, expert reports, discussions on the issue of mitigation, and how the purchaser did not prevent their losses. What if before incurring the costs related to the second issue, including hiring an expensive expert, going through extensive discoveries, and dealing with interim motions, the Court could decide the first issue on summary judgment? If the Court finds there was no contract, the case is over and all parties can save the costs associated with the second issue.

In theory, parties could (and still can) bring a partial summary judgment motion to decide just one issue in a case. The test was set out in *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, at paras. [29-34](#). The question for the Court is whether partial summary judgment will achieve the objectives of proportionate, timely, and affordable justice or, instead, cause delay and increase expense.

In Toronto, you cannot simply schedule a summary judgment motion, whether full or partial. You need to attend before a judge at Civil Practice Court to explain to the judge why your case is appropriate for summary judgment and to set a timetable for the exchange of materials.

For anyone that has attended CPC to schedule a motion, it can be a different experience depending upon which judge is presiding. Sometimes the CPC Judge is easily convinced that a partial summary judgment motion is a good use of the Court's time. Other times the CPC judge will not schedule a partial summary judgment motion unless it is a productive use of the Court's time. Certain judges (anyone who has been to a Zoom CPC recently should know to which Judge I am referring) do an excellent job of putting the onus on the parties to show that the motion they are looking to schedule is a good use of the Court's scarce resources.

## THE COURT OF APPEAL'S RECENT DECISION

In *Malik v. Attia*, the parties entered into two agreements for the purchase and sale of two real properties. The buyer failed to close and the vendor sued. There were two issues before the Court:

1. Did the buyers breach the agreements by failing to close, thereby forfeiting the deposits?
2. What are the vendor's damages for failure to close?

The motions judge granted partial summary judgment and found that the buyers had breached the agreements. The motions judge ordered the issue of damages should proceed to trial.

The Court of Appeal upheld the motions judge decision and dismissed the appeal. However, the Court of Appeal strongly disagreed with the moving party's decision to bring the motion in the first place and strongly disagreed with the motion judge's decision to let the motion proceed in the absence of any evidence from the seller regarding damages suffered from the breach of the agreements by the buyer.

Essentially, the Court of Appeal found that now that a decision had been made on the motion, it should not be set aside. But, according to the Court of Appeal, the real issue was that the motion should never have been scheduled in the first place.

According to the Court of Appeal, when faced with a request to hear a motion for partial summary judgment, a motion judge shall make three requests from counsel:

1. Demonstrate how dividing the case will be cheaper for the parties;
2. Show how partial summary judgment will get the case out of the court system quicker; and,
3. Establish how partial summary judgment will not create a risk of inconsistent findings between the judge deciding the partial summary judgment motion and the trial judge.

Some commenters have written that this decision changes the test for granting partial summary judgment. It doesn't. It might help courts interpret the above test in *Butera*, however, the Court of Appeal made its intentions clear in paragraph 68 of the decision:

...for summary judgment to achieve its stated objective – faster and cheaper access to a final adjudication on the merits – triage processes must be put in place so that judges end up determining a case once and for all on the merits, instead of slicing determinations into a series of partial summary judgments.

In paragraph 63, immediately after setting out the above test, the Court of Appeal goes on to discuss the "motion case management or triage system." This is a clear signal from the Court of Appeal that the test they have outlined is meant to guide a case management judge or, in Toronto, a CPC judge, who is tasked with scheduling the motion.

Going forward, for anyone appearing at CPC (or a case management judge outside of Toronto), the Court of Appeal has signaled to judges that the above test needs to be conducted at the scheduling stage before a motion is set.

Judicial resources are scarce, even more so as the Courts catch up from COVID-19. A thorough analysis of whether a motion is appropriate for partial summary judgment at the scheduling stage prevents overeager parties from wasting the Court's time on a partial summary judgment motion, which doesn't deal with all the issues in an action when that time would be better spent moving all issues in the action forward to trial.

### IMPLICATIONS FOR SIMPLIFIED PROCEDURE ACTIONS

One thing the Court of Appeal did make abundantly clear is that parties will be hard-pressed to convince a scheduling Judge that partial summary judgment is appropriate in Simplified Procedure actions (actions where the total value of the claim is less than \$200,000, or less than \$100,000 for actions commenced before 2020). In paragraph 64:

"Bifurcating a simplified procedure action invariably will push legal costs into the realm of the disproportionate."

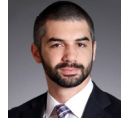
### TAKEAWAY

There are still going to be times where a partial summary judgment motion is appropriate. Before asking the Court to schedule one, you need to be prepared to answer the Court of Appeal's three questions above:

1. How will this save money?
2. How will this save time?
3. Will this result in inconsistent findings between the judges who hear the separate motion and trial?

This will require lawyers attending CPC to really think about the case before them, including the steps involved in a partial summary judgment motion and the steps involved in getting the case to trial. Lawyers will need to come to CPC with a fulsome explanation on why their case is the very rare exception that is appropriate for partial summary judgment.

### ABOUT THE AUTHOR



**Joshua Suttner** is an Associate in Dickinson Wright's Toronto office. He can be reached at 416.646.3847 or [jsuttner@dickinsonwright.com](mailto:jsuttner@dickinsonwright.com).