FTR Now

Appreciate This: The New Test for Summary Judgment

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The Ontario Court of Appeal has created a new test for granting summary judgment. The Court convened a rare five-judge panel and heard five cases together to provide "guidance" to lower courts, litigants and lawyers on the law of summary judgment. This process culminated in the recent decision, *Combined Air Mechanical Services Inc. v. Flesch*, in which the Court held that a motion judge must be satisfied that she or he can achieve the "full appreciation" of the evidence and issues that is required to make dispositive findings before exercising the expanded powers under the *Rules of Civil Procedure* to decide a case on a motion record. This is a new concept that could have a profound impact on summary judgment law. In this *FTR Now*, we discuss this case, the new test and the use of summary judgment going forward.

WHAT WAS THE CASE ABOUT?

The main legal question before the Court was: in what circumstances should a motion judge use the powers in Rule 20 of the *Rules of Civil Procedure* to weigh evidence, make findings of credibility and draw inferences from the evidence in order to decide a summary judgment motion? These were significant new powers that were part of the January 2010 amendments to the Rules, and granting these powers to motion judges overruled restrictions that had been created by previous Court of Appeal decisions.

Since the Rule changes were enacted, motion judges had diverged on how and when to use these powers, resulting in five separate appeals coming before the Court of Appeal:

- *Combined Air Mechanical Services Inc.* was an action for breach of a non-competition covenant. The defendant brought a motion for summary judgment. The motion judge called for oral evidence during the motion, and concluded based on the evidence that there was no genuine issue requiring a trial and granted summary judgment.
- In the companion cases, *Mauldin v. Hryniak,* and *Bruno Appliance and Furniture v. Hryniak*, the plaintiffs sued for fraud, conspiracy, negligence and breach of contract in relation to failed investments. Both plaintiffs moved for summary judgment. The motion record consisted of 28 volumes of evidence and four days of oral evidence. The motion judge granted partial summary judgment.
- In *394 Lakeshore Oakville Holdings Inc. v. Misek*, the motion judge had granted summary judgment in favour of the plaintiff relating to an easement. The Court of Appeal found that the case had limited, uncontentious documentary evidence, few witnesses, and the governing legal principles were not in dispute. Summary judgment was, therefore, appropriate and the appeal was dismissed.
- *Parker v. Casalese* was a simplified procedure action relating to damage to properties during construction on adjacent property. The plaintiffs moved for summary judgment. The motions judge dismissed the motion. The decision was appealed and upheld at the Divisional Court and the Court of Appeal.

THE FULL APPRECIATION TEST

The Court presented its decision as an attempt to reconcile two principles: on the one hand, the summary judgment rules are intended to make summary disposition of an action "more accessible to litigants with a view to achieving cost savings and a more efficient resolution of disputes", while on the other hand "it is equally clear that the amendments to Rule 20 were never intended to eliminate trials." The Court contrasts the "trial dynamic" – in which the trial judge has "extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and … familiarity with the case as a whole" – to the summary judgment motion, which "is decided primarily on a paper record" and lacks the "trial narrative."

It is somewhat surprising that the Court looks down on cases involving a mere “paper record”, considering that the Court has repeatedly held that factual findings based on a “paper record” are due the same deference on appeal as factual findings made at trial. Nonetheless, the Court uses these descriptions as a backdrop to set out the new law.

The Court noted that in addition to situations where the parties had agreed to resolve matters by way of summary judgment and where the claim or defence in issue had no chance of success, the amended Rules now permitted courts to deal with cases where these new powers allowed a court to fairly and justly resolve the matter. The Court held that, when determining whether to grant summary judgment in this third class of cases, the guiding consideration for a motion judge is whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means to achieve a fair and just resolution of the dispute. To determine whether it is appropriate to dispose of such a case on a motion for summary judgment, a motion judge must now ask: 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?

This “full appreciation” test must be applied before the motion judge exercises his or her powers under the amended Rules to weigh evidence, evaluate credibility, or draw reasonable inferences from the evidence.

The Court provides guidance as to the features that are likely to render a case appropriate, or inappropriate, for summary judgment. The Court wrote that a motion judge generally cannot achieve “full appreciation” of the evidence and issues in cases that require “multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record,” and the interests of justice require a trial to decide those cases. The extreme facts found in the *Mauldin* and *Bruno Furniture* cases provide examples of cases that require a trial and should not be decided by summary judgment.

By contrast, a trial is much less likely to be required in document-driven cases with a limited evidentiary record and/or limited contentious factual issues.

The Court also noted that the full appreciation test may be met in cases where it is appropriate for the motion judge to direct oral evidence on a discrete issue. However, the Court cautioned that the Rule was not intended to convert a motion for summary judgment into a “mini-trial.” Rather, a motion judge’s discretion to order oral evidence is to be used when necessary to clarify ambiguities in the existing record, as well as to clarify narrow and discrete issues in the existing record. It is a discretion for the judge alone to use, and is not an opportunity for parties to supplement the record with new evidence. The record submitted to the court on a summary judgment motion must be capable of supporting the motion without oral evidence. In short, a party must continue to put its best case forward in its motion record and the court will only resort to allowing oral evidence to clarify that record if practical and necessary to do so.

It is also noteworthy that the Court strongly suggests that summary judgment will not be appropriate in most simplified procedure actions. In those cases, a summary judgment motion judge must not only apply the full appreciation test, but must also assess “whether entertaining the motion is consistent with the efficiency rationale reflected in the simplified procedures under Rule 76.”

THE USE OF SUMMARY JUDGMENT GOING FORWARD

It remains to be seen how this new test will play out “on the ground” in cases, and whether it will provide clarity (or further confusion) to this difficult area of the law. It is too soon to tell whether the full appreciation test will make summary judgment more elusive, but it will certainly affect the way in which lawyers and litigants strategically shape and present their cases. Parties seeking summary judgment would be well-advised to present their cases as being straightforward and document-driven ones with few truly contentious factual issues, making a motion judge feel comfortable that she can fully appreciate the case on the written record. By contrast, a responding party will likely seek to emphasize the complicated nature of the issues and the inadequacy of the motion record to fairly and justly determine these issues.

If you have any questions regarding this decision, please contact Frank J. Cesario at 416.864.7355, or your regular Hicks

Morley lawyer.

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