

Legal Update: Noteworthy Developments

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Outline

- Summary Judgment: Fully Appreciating the “Full Appreciation” Test
- Rule 48.15: Administrative Dismissals

Summary Judgment: Rule 20

Introduction:

- The motivation behind the January 2010 amendments - “making the litigation system more accessible and affordable”
- The utility of SJ had been limited by a line of jurisprudence that precluded a judge from weighing evidence, assessing credibility or drawing inferences of fact
- 2010 amendments sought to overrule this jurisprudence while not intending to eliminate trials

Summary Judgment: Rule 20

- Amendments were implemented by regulation effective January 1, 2010
- The language of “no genuine issue for trial” was changed to “no genuine issue requiring a trial”
- Motion Judge’s powers broadened to allow:
 - weighing of the evidence
 - evaluating the credibility of a deponent
 - drawing any reasonable inferences from the evidence
 - order that oral evidence be presented with or without time limits on its presentation

Summary Judgment: Rule 20

- Cost consequences of Rule changed to eliminate mandatory substantial indemnity costs payable forthwith by the unsuccessful moving party, unless the party could establish it was reasonable to have brought the motion.
- Costs under new Rule are more discretionary.

Applying the 2010 Amendments

- Between January 2010 and December 2011, there was confusion as to the application of the “new” Rule 20.
- Expansive Approach
 - Unless there is reason to defer to the trial judge, motion judges can use new powers to make findings of fact
 - *Healey v. Lakeridge Health Corp*
- More Restrictive Approach
 - “not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on the motion for summary judgment”
 - *Cuthbert v. TD Canada Trust*

The “New” Rule 20: *Combined Air Mechanical Services Inc. v. Flesch*

- December 2011 ONCA clarified the scope and availability of summary judgment.
- The decision dealt with five separate appeals and included guidelines when summary judgment motions under the new Rule are appropriate.

The “Full Appreciation” Test

- Summary judgment is appropriate if the court is able to “fully appreciate” all of the evidence and issues required to dispose of the case without the need for a full trial.
- The motions Judge must assess whether the trial process is necessary to enable him or her to “fully appreciate” the evidence necessary to dispose of the matter.

The “Full Appreciation” Test

- In cases that call for multiple findings of fact based on conflicting evidence emanating from a number of witnesses and found in a voluminous record, a SJ motion cannot serve as an adequate substitute for the trial process.
- In document driven cases with limited testimonial evidence, a motions judge could achieve a full appreciation of the evidence and issues required to make dispositive findings.

The “Full Appreciation” Test

- The full appreciation test may be met in cases with limited contentious factual issues.
- The test may also be met in cases where the record can be supplemented at the motion judge’s direction by hearing oral evidence on discrete issues. However, it appears that oral evidence may be limited to situations where:
 - there are a small number of witnesses
 - the evidence will have a significant impact on the decision to grant summary judgment
 - the issues to be determined are narrow and/or specific

Analysis of Rule

- Discretion to order a “mini-trial” is up to the motion Judge, not counsel.
- It cannot be assumed that the Judge will allow oral evidence from witnesses.
- Parties are still required to put their “best foot forward”.

Full Appreciation in Action: *Broomfield v. Doidge*

- MVA fatality
- Accident occurred in January 2009 on a road with poor conditions (ice, snow, wind)
- Defendant tractor-trailer travelling under posted speed limit
- Witnesses saw the deceased's vehicle swerving into lane of oncoming traffic as it approach defendant's tractor-trailer
- Defendant swerved to shoulder to avoid collision
- Deceased crashed in ditch on other side of road

Broomfield v. Doidge

- Defendant brought motion for summary judgment
- Court held that there was evidence of plaintiff's negligence but no evidence defendant did anything wrong
- No further witnesses would be called at trial and no suggestion driver was lying
- Deceased's litigation administrator argued that a jury might be persuaded that the defendant was negligent if they heard him testify

Broomfield v. Doidge

- Court rejected this argument:
 - “That an issue could be decided by a jury does not mean that it needs to be tried by a jury”
- Full appreciation test applied:
 - “I can accurately weigh and draw inferences from the evidence presented on this motion for summary judgment without the ability to hear the witnesses speak in their own words and the assistance of counsel to understand the trial narrative.”

Conclusion

- Factors to consider when determining to bring a summary judgment:
 - Is the motion record voluminous?
 - Number of witnesses?
 - Are different theories of liability being advanced by the parties?
 - How important is oral evidence?

Conclusion

- Are numerous findings of fact required to be made?
- Do credibility determinations lie at the heart of the dispute?
- Does the evidence of key witnesses conflict on important issues
- Is the documentary evidence voluminous and/or contentious

Much Ado About Nothing

The Deemed Dismissal Rule That Wasn't



Rule 48

- Rule 48 was amended effective January 1, 2010
- 180 days after the claim is issued if:
 - No Statement of Defence or Notice of Intent to Defend is filed;
 - No final order or judgment is obtained; and
 - The action is not set down for trial.
- Plaintiff will receive a Status Notice that the action will be dismissed in 45 days
- This starts a panic among plaintiff's counsel for a defence or at least a Notice of Intent to Defend

The “Deemed Dismissal Rule” - 48.15(6)

- Applies to actions commenced before January 1, 2010
- Provides that absent a court order, if no “step” is taken in the proceeding from January 1, 2010 to December 31, 2011, the action is “deemed” to be dismissed as abandoned on January 1, 2012.

Practical Problems with the Rule

- There is no definition of “step”
 - Does it include the exchange of productions, discoveries, a mediation, etc.?
 - Does it only apply to something which is filed with the court, such as a Timetable or a Trial Record?
- The concern among many plaintiff’s counsel was that Registrars were going to start dismissing actions on January 2, 2012 when the courts re-opened
- Many filed Trial Records or sought Consent Timetables before December 31, 2011

The New Year Arrived Without a Bang ...

- Registrars advised they were not considering older actions to be dismissed
- This is probably in part because they too had no idea what constituted a “step” and whether it had been taken in a particular action
- Some jurisdictions were issuing Status Notices and treating January 1, 2012 as a new deadline date (like the 180 day period)
- Other jurisdictions advised they were not doing anything at all.

As if this was not enough to take the teeth out of the Rule ...

- The Superior Court of Justice ruled on February 9, 2012 that Rule 48.15(6) only applies to undefended actions (*Pinevalley Trim & Doors Ltd. v. Tibollo & Associates Professional Corporation et al* 2012 ONSC 1002)
- The reasoning was that section 48.15 deals with actions in which no defence has been filed and that the transition provisions in Rule 48.15(6) only apply to undefended actions as well.