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Ontario's New Rules For Simpler, Faster, Lower-Cost Resolution of Commercial Disputes Raise Concerns at the Court ofAppeal

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Originally published in *Commercial Litigation Update* (April 2012)

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The *Rules of Civil Procedure* in Ontario require courts to apply and interpret the rules of court in a way that helps the parties secure the "just, most expeditious and least expensive determination of every civil proceeding on its merits".

Yet anyone who has been involved in a lawsuit knows that it can often take years to get the case to trial and cost many tens, if not hundreds, of thousands of dollars to get there.

This article summarizes the latest efforts of the judicial system to make the litigation process faster and more affordable.

Rule 20, the Summary Judgment rule, was initially introduced with wholesale amendments to the *Rules of Civil Procedure* in 1985. It allows a party to bring a motion to the court for judgment on its claim, or judgment dismissing the claim, on the basis that there was no genuine issue for trial. The idea was that cases that had no merit, either on the plaintiff's side or the defendant's side, could be weeded out by the court at an early stage, allowing the parties to secure a just, expeditious and less expensive determination on the merits. The procedure involved a motion whereby a paper record (affidavits and transcripts of cross-examinations) would be put before the judge and he or she would decide the case without the need to spend the time and expense of a full-blown trial with live witnesses.

While it may have been an attractive idea in theory, the courts wanted to assure that the process would be fair to the parties and that they would not be precluded from telling their whole story. Through a long line of cases at the Court of Appeal level, the law developed such that in deciding whether or not there was a genuine issue for trial, a judge was not permitted to make findings of credibility or draw inferences from certain evidence or the lack of evidence. This basically allowed a party to deflect a motion for summary judgment if it could raise an issue of credibility that might have a chance of success.

The result was that it was difficult to succeed on a motion for summary judgment, forcing parties to go to trial or settle unmeritorious cases because of the sheer cost of trying a case. It also left parties who had brought a motion for summary judgment, and failed, with a large legal bill (for both their lawyer and the other side's lawyer) and put them farther behind in getting the matter resolved than if they had not brought the motion in the first place.

In an effort to reverse the line of cases that restricted the powers of a judge deciding a motion for summary judgment, the rules were amended effective January 1, 2010, and judges were specifically given the power when reviewing the written record to "weigh the evidence", "evaluate credibility" of a witness and "draw any reasonable inference from the evidence". It was expected that this would make it

easier for judges to grant summary judgment in many cases where their hands had been tied previously. This would allow a larger number of weak cases to be weeded out at an early stage, saving the parties and the court system a lot of time and money.

In a recent decision by a five-judge panel of the Court of Appeal (it's usually three judges) in a case called *Combined Air*, however, the scope of the new rule changes has been limited.

The Court of Appeal has created a new test called the "full appreciation" test. The court has said that in deciding whether to use their powers to weigh evidence, assess credibility and draw inferences from the evidence, motions judges are required to ask the following question: "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?"

In trying to explain what is meant by "full appreciation", the court indicated that in "cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process". It suggested that cases that were more appropriate for summary judgment were document-driven cases with limited testimonial evidence or cases that had very limited contentious factual issues that could be determined following hearing from perhaps only one or two live witnesses at the motion on very discrete issues.

In my view, the result of this decision will be to inhibit judges from using the powers that the new rules gave them in deciding motions for summary judgment. Rather than tell judges to look at all the evidence and determine whether they have a reasonable appreciation of all the evidence and issues to be able to render judgment, thereby promoting the intent of the rule amendments to allow for a speedy and cost-effective resolution where possible, the Court of Appeal has told judges that before they grant summary judgment they must be confident that they have just as good an appreciation of the evidence and issues having read the documentary record as they would have if they had sat through a one week or one month trial hearing live witnesses. My expectation is that such instances will be rare and motions for summary judgment will continue to be considered too risky to be worthwhile in many cases.

It remains to be seen whether the Supreme Court of Canada will choose to look at the *Combined Air* decision. Meanwhile, it will be interesting to see how motions judges interpret the guidance given to them by the Court of Appeal. ■