Court File No. C51986

COURT OF APPEAL FOR ONTARIO

BETWEEN

COMBINED AIR MECHANICAL SERVICES INC., DRAVO MANUFACTURING INC., COMBINED AIR MECHANICAL SERVICES

Plaintiffs/Appellants

-and-

WILLIAM FLESCH, WJF INVESTMENTS INC., SERVICE SHEET METALS INC., JAMES SEARLE

Defendants/Respondents

Court File No. C52912

AND BETWEEN

FRED MAUDLIN, DAN MYERS, ROBERT BLOMBERG, THEODORE LANDKAMMER, LLOYD CHELLI, STEPHEN YEE, MARVIN CLEAIR, CAROLYN CLEAIR, RICHAHRD HANNA, DOUGLAS LAIRD, CHARLES IVANS, LYN WHITE, ATHENA SMITH

Plaintiffs/Respondents

-and-

CASSELS BROCK & BLACKWELL LLP, GREGORY JACK PEEBLES, ROBERT HRYNIAK

Defendants/Appellant

Court File No. 52913

AND BETWEEN

BRUNO APPLIANCE AND FURNITURE INC.

Plaintiff/Respondent

-and-

CASSELS BROCK & BLACKWELL LLP, GREGORY JACK PEEBLES, ROBERT HRYNIAK

Defendants/Appellant

Court File No. 53035

AND BETWEEN

394 LAKESHORE OAKVILLE HOLDINGS INC.

Plaintiff/Respondent

-and-

CAROL ANNE MISEK, JANET PURVIS

Defendants/Appellant

Court File No. 53395

AND BETWEEN

MARIE PARKER, KATHERINE STILES, SIAMAK KHALAJABADI

Plaintiffs/Appellants

-and-

ERIC CASALESE, GERARDA DINA BIANCO CASALESE,
PINA SCARFO, ANTONIETTA DI LAURO, MAURO DI LAURO

Defendants/Respondents

FACTUM OF THE AMICUS CURIAE

ONTARIO TRIAL LAWYERS ASSOCIATION

PART I – OVERVIEW STATEMENT

1. In these important appeals, this Honourable Court is faced with the difficult task of determining the circumstances in which a civil proceeding in Ontario should be concluded without the necessity of a trial. When the *Rules of Civil Procedure* were amended on January 1, 2010 judges were given expanded powers to assist in making such determinations, however the Rules did not spell out the circumstances in which those powers should be exercised. Given the range of cases that come before the Courts, it may be that the formulation of a general legal standard and guidance on the types of claims that are either suitable or not suitable for summary judgment is the most that

can be achieved. In this factum, the Ontario Trial Lawyers Association ("OTLA") will respectfully offer some suggestions to the Court in this regard. Before doing so, it is helpful to review some of the historical background to the summary judgment procedure in Ontario.

PART II – ISSUES AND LAW

Historical Overview of the Summary Judgment Rule

2. When the *Rules of Civil Procedure* underwent revision in January 1985, one of the most significant amendments was to the summary judgment procedure provided for in Rule 20. A procedure that had previously been available only to plaintiffs and only in claims that were specially endorsed was now available to either party, and the respondent was warned it could not rest on the pleadings but must set out "specific facts showing that there is a genuine issue for trial." The significance of this language was quickly recognized. In *Vaughan v. Warner Communications*, Boland J. stated the Court now had a duty to take "a hard look at the merits" of a claim or defence.

Vaughan v. Warner Communications Inc. (1986), 56 O.R. (2d) 242 (H.C.J.)

3. Shortly thereafter, in *209991 Ontario Ltd. v. C.I.B.C.*, Anderson J. commented on the reach of the amended rule. "As a matter of present impression, I see nothing in the language of the rule, or in the review of the law contained in *Vaughan*, to suggest any clear or arbitrary limit, although it seems safe to say that, where there are contested issues of fact involving the credibility of witnesses, the only appropriate forum remains a trial court. A lawyer or judge schooled in the tradition that almost any substantial issue was to be determined at trial requires a material change in attitude to give appropriate effect to the rule."

209991 Ontario Ltd. v. C.I.B.C. (1988), 24 C.P.C. (2d) 248 (H.C.J.)

4. *Masciangelo v. Spensieri* involved a claim against a solicitor for misrepresentation and misappropriation of funds. The plaintiff's evidence was inconsistent with documentary evidence and his cross-examination revealed material inconsistencies. Faced with a motion for summary judgment, Doherty J. (as he then was) also had occasion to comment on the reach of Rule 20:

> Where the outcome of a lawsuit hinges on the assessment of credibility, a trial in which evidence is called and the competing stories are told and challenged before the trier of fact has traditionally been viewed as the ideal forum. This is so, not only because the trier of fact has the advantage of hearing and seeing the witnesses, but also because the parties are given their day in court during which they have the opportunity to present their entire case, face their judge, and tell their story. The quality of justice is measured not only by the accuracy of the result reached but by the way the result is reached. That quality may suffer if litigants are judged unworthy of belief by someone who has never seen them or heard them, but instead has examined only written material.
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> Masciangelo v. Spensieri (1990), 1 C.P.C. (3d) 124 (H.C.J.)

5. In *Pizza Pizza Ltd. v. Gillespie*, Henry J. provided a thoughtful and comprehensive analysis of Rule 20 and granted judgment in an action involving claims of breach of a non-competition agreement and breach of fiduciary duty. He said:

> In my opinion there is a lower threshold that is contemplated by the new Rule 20 and the case law developing. It is that the court, in taking a hard look at the merits, must decide whether the case merits reference to a judge at trial. It will, no doubt, have to go to trial if there are real issues of credibility, the resolution of which is essential to determination of the facts. That aside, however, the rule now contemplates that the motions judge will have before him sworn testimony in the affidavits and other material required by the rule in which the parties put their best foot forward. The motions judge, therefore, is expected to be able to assess the nature and quality of the evidence supporting 'a genuine issue for trial'; the test is not whether the plaintiff might possibly succeed at trial; the test is whether the court reaches the conclusion that the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial; if so, then the parties 'should be spared the agony and expense of a long and expensive trial after some undetermined wait' (per Farley J. in *Avery*).
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> Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225 (H.C.J.)

6. This Honourable Court had occasion to review the summary judgment rule in *Irving*

Ungerman Ltd. v. Galanis. The case involved a claim on an Agreement of Purchase and Sale and a dispute about the payment of a $10,000.00 deposit as part of an option to purchase. The Defendant insisted the cheque was paid and the motions judge granted judgment, finding the evidence to the contrary to be unworthy of belief. In his careful review of the issues, Morden A.C.J.O. noted that the words "genuine issue for trial" emanated from Rule 56(c) of the U.S. Federal Rules of Civil Procedure and quoted with approval the intention of the rule to enable a party to "pierce the allegations of fact" in the other party's pleading. He went on to state:

> It would be convenient if the term 'genuine issue' could be expressed in a precise formula for the ease of its application. Having regard, however, to the varied and unpredictable ways in which issues under Rule 20 may arise, it cannot – and the experience with Rule 56(c) in the United States has shown it can be harmful to gloss the wording of the rule with expressions that fail to capture its meaning. It is safe to say that 'genuine' means not spurious and, more specifically, that the words 'for trial' assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists." (Citations omitted.) (Emphasis in original.)
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> Irving Ungerman Ltd. v. Galanis (1991), 4. O.R. (3d) 545 (C.A.)

7. In the result, the Court held that question marks in the evidence surrounding the tendering of the cheque meant that the motion had to be dismissed: "The motions court judge obviously thought that the level of probability was such that Mrs. Haut's evidence could be rejected as incredible. With respect, on the basis of the evidence to which I have referred, including that of Mrs. Haut, I do not think that the materials before the court were such that the court could properly be 'satisfied' that there was no genuine issue requiring a trial."

> Irving Ungerman Ltd. v. Galanis (1991), 4 O.R. (3d) 545 (C.A.)

8. In the 1998 decisions of *Aguonie v. Galion Solid Waste* and *Dawson v. Rexcraft*, the Court

appeared to narrow the circumstances in which summary judgment could be granted. In the reasons of Borins J. (ad hoc) in *Aguonie*, it was stated: "In ruling on a motion for summary judgment, the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial." In *Dawson*, Borins J.A. elaborated on the point: "If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attacked by the moving party, the case must be sent to trial. It is not for the motions judge to resolve the issue."

Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161 (C.A.)

Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont.C.A.)

9. In his inquiries for the 2007 Civil Justice Reform Project, the Honourable Coulter A. Osborne identified dissatisfaction with the approach of the Court of Appeal as expressed in *Aguonie* and *Dawson*. Consequently, he recommended that judges be given the authority to do what those decisions had precluded the Court from doing: weighing evidence, evaluating credibility and drawing inferences. The result was the 2010 amendments to Rule 20.

> Rule 20.04(2) states: "The court shall grant summary judgment if, (a) the court is satisfied there is no genuine issue requiring a trial with respect to a claim or defence."
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> Rule 20.04(2.1) states: "In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial: 1. Weighing the evidence. 2. Evaluating the credibility of a deponent. 3. Drawing any reasonable inference from the evidence."
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> Rule 20.04(2.2) states: "A judge may, for the purpose of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation."
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> Coulter A. Osborne, Civil Justice Reform Project: A Summary of Findings and

Recommendations (Toronto: Ontario Attorney General, 2007)

10. The extent to which, and the circumstances in which, a judge should exercise these expanded powers is at the heart of these appeals. Several interpretive issues should be noted. First, the search for whether there is a genuine issue requiring a trial is the same task that motions judges had before the amendments. Second, "the purpose" for which the expanded powers in Rule 20.04(2.1) exist is the determination of whether there is a genuine issue requiring a trial. Third, it must be in the interests of justice for those powers to be exercised. Accordingly, while the tools available to make that determination have expanded, the purpose of the exercise remains the same. For this reason, the legal traditions expressed in some of the cases referred to above remain relevant to a judge's task under amended Rule 20.04(2.1). It is safe to say that the previous restrictions on the resolution of issues by a judge on a motion for summary judgment have been removed. The question thus becomes: In what circumstances should contested issues be resolved without a trial?

A Survey of Decisions Under Rule 20.04(2.1)

11. As with the 1985 amendmens, the 2010 amendments to the summary judgment rule have sparked diverging lines of authority. The more narrow approach is exemplified in several decisions of Karakatsanis J. (as she then was). In *Cuthbert v. TD Canada Trust*, Karakatsanis J. held that the role of the Court was not to make findings of fact on a motion for summary judgment. She made a similar point in *Hino Motors v. Kell* and *New Solutions Extrusion Corp. v. Gauthier*. Nevertheless, in both *Cuthbert* and *New Solutions*, Karakatsanis J. undertook an extensive review of the evidence and granted the motions, finding in *Cuthbert* that the defendant's evidence was unworthy of belief and in *New Solutions* that the evidence could not support a claim of conspiracy.

Cuthbert v. TD Canada Trust, [2010] O.J. No. 630 (S.C.J.)

Hino Motors Canada Ltd. v. Kell, [2010] O.J. No. 1105 (S.C.J.)

New Solutions Extrusion Corp. v. Gauthier, [2010] O.J. No. 661 (S.C.J.)

12. A more expansive approach is found in the decision of D.M. Brown J. in *Lawless v. Anderson*. He stated: "The radical change introduced by the new Rule 20 was to arm judges with greater powers in performing their review of the evidence. No longer is the motion judge confined to identifying whether disputed material facts exist. Rule 20.04(2.1) enables the judge to resolve disputed facts by weighing evidence, evaluating credibility and drawing reasonable inferences from the evidence. In a very real sense, Rule 20.04(2.1) vests in a motion judge the powers typically exercised by a trial judge." Based on admissions made on the plaintiff's examination for discovery, D.M. Brown J. was satisfied the claim for medical malpractice had been commenced out of time.

Lawless v. Anderson, [2010] O.J. No. 2017 (S.C.J.), aff'd 2011 ONCA 102

13. A similar view to that of D.M. Brown J. was expressed in *Canadian Premier Life v. Sears Canada*, in which Pepall J. stated: "A judge is now able to weigh the evidence, evaluate credibility and draw reasonable inferences from the evidence and order oral evidence. Implicit in these powers is the ability to make a finding of fact. If a motions judge using these powers can safely make a determination without the need for a trial, he or she is authorized to do so." In the result, Pepall J. declined to grant summary judgment or order a mini-trial as the evidence was contradictory and the record complex: "In my mind, there is a real issue as to the parties' true intentions, what they did, and why they did what they did. These facts are difficult to assess on a paper record."

Canadian Premier Life Insurance Co. v. Sears Canada Inc., [2010] O.J. No. 3987 (S.C.J.)

14. A thorough analysis of the issue is found in the decision of Perell J. in *Healey v. Lakeridge*:

> It is informative to note that Rule 20.04(2.1) envisions that the motions judge may use the powers of a trial judge unless it is in the interest of justice for such powers to be exercised only at a trial. The reference to the interests of justice suggests that

> the motions judge will have to assess whether the search for truth requires the forensic machinery of a trial. To go back again to the language of Justice Morden in *Irving Ungerman Ltd. v. Galanis*, the motions judge will have to determine whether the particular proceeding in which a summary judgment is sought is one where requiring the parties to go to trial would be a failure of procedural justice because the holding of a trial is unnecessary. Put into practical terms, these insights mean that having regard to the new powers to weigh the evidence, evaluate the credibility of a deponent, and draw any reasonable inference from the evidence, the moving party must provide a level of proof that demonstrates that a trial is unnecessary to truly, fairly and justly resolve the issues. In this regard, it is important to precisely identify the issues to be resolved because the nature of the particular issues to be resolved both qualitatively and quantitatively will be relevant to determining whether a trial is necessary.
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> Healey v. Lakeridge Health Corporation, 2010 ONSC 725 (S.C.J.), aff'd 2011 ONCA 55

15. D.M. Brown J. returned to the issue in *Optech Inc. v. Sharma*. In a thoughtful discussion, he reflected on what a judge should be asking him or herself in the course of deciding a motion for summary judgment: "How much more would I need to decide this case?" He went on to state:

> If conflicts of material fact are present in the record, the enhanced powers of rule 20.04(2.1) now authorize the judge to engage in a standard fact-finding exercise but, in my view, at this stage a judge needs to ask, yet again, 'how much more do I need to determine that conflicting evidence and thereby decide this case?' The nature of the factual dispute may be such that the written evidence affords a sufficient basis to engage his or her fact-finding powers without the need for *viva voce* evidence. For example, the documentary evidence may be overwhelmingly in favour of one side, rendering any explanation advanced by the other completely implausible. If the judge concludes that the nature of the factual dispute, assessed in light of the quality of the written evidentiary record, would enable the judge to make findings of fact with the same degree of certainty, and subject to the same requirements of the law of evidence, as could be done at a 'regular' trial, then, in my view, Rule 20.04(2.1) authorizes the judge to do so. The nature of the issues and the quality of the record combine so that it is not 'in the interest of justice for such [fact finding] powers to be exercised only at a trial.'

In the result, D.M. Brown J. held a trial was necessary: "On a review of the written record I cannot say that the position advanced by the defendants on this issue has no chance or hope of success." This test is the same as the one expressed by this Court in a decision made before the amendments.

> Optech Inc. v. Sharma, [2011] O.J. No. 377 (S.C.J.)
>
> Aronowicz v. Emtwo Properties Inc. (2010), 98 O.R. (3d) 641 (C.A.)

OTLA's Proposed Approach to the Summary Judgment Rule

16. Of the various formulations referred to above, OTLA submits that the approach of Perell J. in *Healey v. Lakeridge* best captures the proper interpretation of the rule. The statement that the moving party must provide a satisfactory "level of proof" and the resulting focus on the quality of the evidentiary record, accords with prior jurisprudence and reflects the fact that the determination is being made in the absence of a trial. The statement that the moving party must demonstrate that a trial is unnecessary to truly, fairly and justly resolve the issues accords with the reasons of Morden A.C.J.O. in *Irving Ungerman v. Galanis* that it must be clear a trial is unnecessary. The formulation of Perell J. properly focuses on the extent and nature of the issues before the Court as significant factors in deciding whether summary judgment should be granted. As emphasized by Perell J., it is important for motions judges to define the issues in dispute with precision, since the qualitative and quantitative nature of the issues will determine whether the forensic machinery of a trial is required. It is at the point of defining the disputed issues that the motions judge can decide whether the issues lend themselves to summary determination.

17. Undoubtedly, the parties must put their best foot forward and the motions judge has the full range of powers found in Rule 20.04(2.1) to determine whether there is a genuine issue requiring a trial or order a mini-trial to supplement the evidence. At the end of the day, since the determination is being made without a trial, the quality of the evidentiary record must be such that the judge is able to conclude with a very high degree of confidence that the interests of justice do not require a trial. In OTLA's submission, this legal standard takes proper account of the stage of the proceeding at which the determination is being made and balances the rights of the parties. Apart from the formulation of a legal standard, OTLA respectfully considers that it can be of assistance for this Honourable Court to set out the types of circumstances in which summary judgment may or may not be appropriate. The following are offered as suggestions to the Court in this regard.

The Types of Claims where Summary Judgment Appears to be Inappropriate

18. In OTLA's submission, there are claims which by reason of the nature of the issues involved are not well suited for determination by summary judgment, even with the expanded powers available under Rule 20.04(2.1) or a mini-trial. These include the following:

(a) complex claims in occupiers liability, product liability and other negligence claims in which competing expert witnesses in engineering or other technical subjects on liability and damages are arrayed on both sides. The conduct of the parties may have to be judged against the standard of the reasonable man, there may be issues of contributory negligence and there is likely to be competing evidence on the issue of damages. Given the range and complexity of the issues, summary judgment would not appear to be appropriate in such cases;

(b) claims for medical malpractice or other professional negligence claims in which competing expert witnesses on complex medical issues on the standard of care, causation and damages are arrayed on both sides. Given the range and complexity of the issues, summary judgment would not appear to be appropriate in such cases;

(c) as a subset of these cases, issues of discoverability for limitation purposes might arise in these types of claims. Those issues typically involve detailed evidence concerning the state of the plaintiff's knowledge, the medical or psychological circumstances of the plaintiff or difficulties encountered by the plaintiff in identifying potential defendants. For example, in *Zurba v. Lakeridge Health Corp.*, Lauwers J. found himself unable to say with confidence that one date for discoverability was to be preferred over another, and consequently a trial was necessary. E.M. Macdonald J. reached a similar conclusion in *Dudgeon v. Canadian Career College*. Given the range of contentious issues that are likely to exist, it would be rare that summary judgment would be appropriate in such cases.

Zurba v. Lakeridge Health Corp., [2010] O.J. No. 368 (S.C.J.)

Dudgeon v. Canadian Career College, [2010] O.J. No. 2790 (S.C.J.)

19. The common feature of these cases are the number of issues involved and the likelihood of competing expert evidence. The insight of Perell J. in *Healy v. Lakeridge* as to the qualitative and quantitative nature of the issues is relevant in this regard. In OTLA's submission, it would be rare that a judge would be able to resolve competing expert evidence without the forensic machinery of a trial. It is noteworthy that the mini-trial option provides only for the evidence of parties to be presented, not witnesses or experts. Claims involving competing expert evidence are unlikely to have a sufficiently discrete number of issues to make summary judgment a suitable option.

20. In considering the types of claims that may be suitable for summary judgment, it is also well to refer to the admonition of D.M. Brown J. in *Lawless v. Anderson*. He stated that cases involving multiple, complex issues requiring evidence from a large number of witnesses would not ordinarily be suitable for summary judgment, and that "More often than not, the strategic goal in such cases should be to move the case along quickly to trial." OTLA respectfully agrees with these comments. D.M. Brown J. went on to state that "discrete issues in complex cases might be appropriate for summary judgment motions, but the cost/benefit analysis now required by the principle of proportionality no doubt will play a key role in any decision to bring a Rule 20 motion under these circumstances. By contrast, cases involving a few discrete, focused contentious issues most likely will continue to form the largest group of candidates for motions for summary judgment."

Lawless v. Anderson, [2010] O.J. No. 2017 (S.C.J.), aff'd 2011 ONCA 102

21. In OTLA's submission, it would be wise to discourage the use of summary judgment for discrete issues in complex cases, and to encourage it where there is a real likelihood the motion will bring the action to a conclusion. Otherwise, there is a danger that summary judgment will become another costly step on the road to trial. This approach is consistent with the long-standing view of the Court that disputed issues should not be split up, but rather should be dealt with in one trial.

Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills (1986), 55 O.R. (2d) 56 (C.A.)

The Types of Claims Where Summary Judgment Appears to be Appropriate

22. Based on the foregoing, there are a large number of claims in which the issues in dispute may lend themselves to summary determination, examples of which include the following:

(a) employment law claims involving issues of reasonable notice or discrete issues of termination for cause. Where a judge is able to conclude with a sufficient degree of confidence that a trial is unnecessary as a result of the quality of the evidentiary record, summary judgment may be appropriate;

(b) commercial claims on invoices or instruments such as a guarantee. Where the evidence of a party is flatly inconsistent with documentary evidence or is severely undermined in cross-examination, it may be possible, as a result of the quality of the evidentiary record, for the judge to conclude with a sufficient degree of confidence that a trial is unnecessary;

(c) family or estate law claims where the range of issues are limited and the documentary evidence or evidentiary record enables the judge to say with a sufficient degree of confidence that a trial is unnecessary.

The Ordering of a Mini-Trial

23. Rule 20.04(2.2) provides that, for the purposes of exercising the powers under Rule 20.04(2.1) the judge may order that oral evidence be presented by one or more parties. In OTLA's submission, it might be appropriate to order oral evidence where narrow contested issues emerge from the evidence filed on the motion for summary judgment, and there is a strong prospect that hearing the evidence of one or more of the parties will result in the judge being able to resolve the issues. The mini-trial would not be appropriate where complexities in the evidence preclude the granting of summary judgment in the first place. As stated by D.M. Brown J.: "If the mini-trial

simply operates as a screening device, a kind of 'look-see' before the real 'regular' trial, without finally disposing of an action, then Rule 20.04(2.2) would have the perverse effect of saddling litigants with an extra layer of costs in an already expensive contemporary litigation process."

Optech Inc. v. Sharma, [2011] O.J. No. 377 (S.C.J.)

The British Columbia Experience

24. British Columbia has had a summary trial procedure in place since 1983. The procedure is similar to amended Rule 20.04(2.1), and appears to have been enacted due to long wait times for a conventional trial. While the Court of Appeal has said that judges should not be timid in the use of the rule, the experience there has shown that complex claims and cases involving strongly disputed credibility issues are not suitable for summary determination. Concern has also been expressed about the effects of the rule on scarce judicial resources, and the use of the rule in cases where the determination will not bring the entire action to a conclusion.

Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.)

North Vancouver (District) v. Lunde (1998), 162 D.L.R. (4th) 402 (B.C.C.A.)

Prevost (Committee) v. Vetter (2002), 210 D.L.R. (4th) 649 (B.C.C.A.)

Chu v. Chen (2002), 22 C.P.C. (5th) 73 (B.C.S.C.)

Uppal v. Rawlins, 2009 BCSC 127 (B.C.S.C.)

HP and OM Enterprises Ltd. v. Badesha Enterprises Ltd., 2009 BCSC 1429 (B.C.S.C.)

Rain Coast Water Corp. v. British Columbia, 2010 BCSC 54 (B.C.S.C.)

Conclusion

25. The summary judgment procedure provides a useful mechanism for screening out cases that are unworthy of the full resources of a trial. With the expanded powers available to judges under

Rule 20.04(2.1) it is to be expected that greater use will be made of the procedure. It was not intended, however, that trials would be eliminated by summary judgment or that our legal traditions in favour of trials would be discarded. Where the issues are not sufficiently discrete, trials have been and should continue to be the norm. Experience has shown that the best method of bringing civil actions to resolution is to move them along efficiently to trial. If used inappropriately, the summary judgment procedure can increase the cost of litigation and create delay in the progress of civil claims. It is therefore of importance that, before the procedure is utilized, a moving party litigant has available the level of proof that will satisfy a judge to a very high degree of confidence that a trial is unnecessary in the interests of justice.

PART IV – ORDER REQUESTED

26. It is respectfully requested that the amendments to Rule 20 of the *Rules of Civil Procedure* be interpreted in a manner consistent with the factum herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ALLAN ROUBEN
Solicitor for the Amicus Curiae
Ontario Trial Lawyers Association

CERTIFICATE

The Solicitor for the Ontario Trial Lawyers Association certifies that: (a) the records and original exhibits are not required; (b) the time required for oral argument is 20 minutes.

SCHEDULE A – LIST OF AUTHORITIES

1. Vaughan v. Warner Communications Inc. (1986), 56 O.R. (2d) 242 (H.C.J.)
2. 209991 Ontario Ltd. v. C.I.B.C. (1988), 24 C.P.C. (2d) 248 (H.C.J.)
3. Masciangelo v. Spensieri (1990), 1 C.P.C. (3d) 124 (H.C.J.)
4. Pizza Pizza Ltd. v. Gillespie (1990), 75 O.R. (2d) 225 (H.C.J.)
5. Irving Ungerman Ltd. v. Galanis (1991), 4. O.R. (3d) 545 (C.A.)
6. Aguonie v. Galion Solid Waste Material Inc. (1998), 38 O.R. (3d) 161 (C.A.)
7. Dawson v. Rexcraft Storage & Warehouse Inc. (1998), 164 D.L.R. (4th) 257 (Ont.C.A.)
8. Coulter A. Osborne, Civil Justice Reform Project: A Summary of Findings and Recommendations (Toronto: Ontario Attorney General, 2007)
9. Cuthbert v. TD Canada Trust, [2010] O.J. No. 630 (S.C.J.)
10. Hino Motors Canada Ltd. v. Kell, [2010] O.J. No. 1105 (S.C.J.)
11. New Solutions Extrusion Corp. v. Gauthier, [2010] O.J. No. 661 (S.C.J.)
12. Lawless v. Anderson, [2010] O.J. No. 2017 (S.C.J.), aff'd 2011 ONCA 102
13. Canadian Premier Life Insurance Co. v. Sears Canada Inc., [2010] O.J. No. 3987 (S.C.J.)
14. Healey v. Lakeridge Health Corporation, 2010 ONSC 725 (S.C.J.), aff'd 2011 ONCA 55
15. Optech Inc. v. Sharma, [2011] O.J. No. 377 (S.C.J.)
16. Aronowicz v. Emtwo Properties Inc. (2010), 98 O.R. (3d) 641 (C.A.)
17. Zurba v. Lakeridge Health Corp., [2010] O.J. No. 368 (S.C.J.)
18. Dudgeon v. Canadian Career College, [2010] O.J. No. 2790 (S.C.J.)
19. Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills (1986), 55 O.R. (2d) 56 (C.A.)
20. Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202 (B.C.C.A.)
21. North Vancouver (District) v. Lunde (1998), 162 D.L.R. (4th) 402 (B.C.C.A.)

22. Prevost (Committee) v. Vetter (2002), 210 D.L.R. (4th) 649 (B.C.C.A.)

23. Chu v. Chen (2002), 22 C.P.C. (5th) 73 (B.C.S.C.)

24. Uppal v. Rawlins, 2009 BCSC 127 (B.C.S.C.)

25. HP and OM Enterprises Ltd. v. Badesha Enterprises Ltd., 2009 BCSC 1429 (B.C.S.C.)

26. Rain Coast Water Corp. v. British Columbia, 2010 BCSC 54 (B.C.S.C.)