SUMMARY JUDGMENT IN THE FEDERAL COURT AND IN THE FEDERAL COURT OF APPEAL

A Discussion Paper of the Rules Subcommittee on Summary Judgment

I. INTRODUCTION

The purpose of summary judgment is to dispose of actions, in whole or in part, where a trial to hear a full range of evidence is unnecessary. Summary judgment can conserve the resources of the parties, in terms of the costs of litigation, and the courts, in terms of judicial time necessary to hear trials, and can result in the expeditious resolution of litigation.

Recently opinions have suggested that the present Rule 216[1], addressing summary judgment, as interpreted by the Federal Court of Appeal, may be too restrictive in scope.

The purpose of this paper is to discuss possible alternatives to the present Rule 216.

It should be noted, at the outset, that discussion surrounding summary judgment are not exclusive to the Federal Court nor are they limited to Canadian courts, rather it concerns civil litigators in Superior Courts of Justice as well as being the subject of discussion worldwide.

In an effort to guide discussion, a document prepared by Paul F. Monahan and T.J. Adhihetty of *Fasken Martineau Dumoulin LLP* titled Summary disposition of Cases is attached to the present discussion paper.

In addition, it is also worth noting that it appears from the *Advocates Society Final Report titled Streamlining the Ontario Civil Justice System – A Policy Forum* that there was a broad consensus that Rule 20, the summary judgment rule, was not working and that the majority of the group favoured a summary judgment/trial rule, similar to Rule 18A in British Columbia, which at a minimum would allow the parties to narrow the issues for trial and, in many cases, would result in summary judgment in advance of trial. British Columbia's Rule 18A is much more permissive in encouraging summary judgment and summary trials.

II. POSSIBLE CHANGES TO RULE 216

The view has been advanced that there may be a need for a summary judgment rule that allows parties to move for and courts to grant summary judgment in a greater range of circumstances than under present Rule 216. This view has been reinforced by recent

[1] *Federal Court Rules*, SOR 98/106.

decisions of the Federal Court of Appeal that have interpreted the scope of Rule 216 rather restrictively.

Under subsection 216(1) of the Rules, if there is no genuine issue for trial, a judge must grant summary judgment. If there is a genuine issue, a judge, under subsection 216(3), may, nevertheless, still grant summary judgment if the Court is able, on the whole of the evidence, to find the facts necessary to decide the questions of fact and law.

In *MacNeil Estate v. Canada (Indian and Northern Affairs Department)*[2] and *Trojan Technologies, Inc. v. Suntec Environmental Inc.*[3] the scope of these rules was considered by the Federal Court of Appeal. It was noted that once a judge declines to grant summary judgment because there is a genuine issue for trial, the same judge may be asked to grant summary judgment under subsection 216(3). If a judge then grants judgment, the party who has already established that there is a genuine issue is thus deprived of a trial.[4] Where there are conflicts in the evidence, where the case turns on the drawing of inferences, or where an issue of credibility is at stake, a judgment under subsection 216(3)may be inappropriate.[5]

Nevertheless, it has been suggested that summary judgment should be available in a wider set of circumstances than those contemplated by the *MacNeil* and *Suntec* decisions.[6]

In particular, there may be a need to amend Rule 216 so as to make clear that:

a) The Court may grant summary judgment, in some circumstances, even when there are disputed issues of fact; and

b) In determining whether or not to grant summary judgment the Court should be able to order various procedures, such as cross-examination before it of deponents of affidavits relevant to the motion, in order to facilitate its disposition.

Discussion Point #1

Is there a need for Rule 216 to be amended so as to make clear that there is to be a broader scope for summary judgment?

II. ALTERNATIVES AVAILABLE REGARDING AMENDMENTS TO RULE 216

There are two existing rules in the rules of the courts of the provinces that provide for summary judgment in a greater range of circumstances than Rule 216.[7] The intention in

[2] [2004] 3 F.C.R. 3, 2004 FCA 50 [*MacNeil*].
[3] (2004), 239 D.L.R. (4th) 536, 2004 FCA 140 [*Suntec*]
[4] *Supra* note 2 at para. 36.
[5] *Ibid* at para. 46.
[6] *Henkel Canada Corp.* v. *Conros Corp.*, [2005] F.C.R. 470, 2004 FC 1747.

adopting one of those rules would be to make it clear that there should be a greater scope for summary judgment in the Federal Courts.

A. Manitoba Rule 20

Manitoba Rule 20.03(4)[8] permits the Court to grant summary judgment even when there is a "genuine issue" unless the Court is unable "…on the whole of the evidence… to find the facts necessary…" or the Court considers that "…it would be unjust to decide the issues…"

When summary judgment was introduced into the Federal Courts, Manitoba Rule 20 was essentially adopted.[9] For reasons that are unclear the summary judgment rule was altered in 1998 rules.[10]

Manitoba Rule 20 has been interpreted to be given a wide scope by Manitoba Courts. An application under Rule 20 requires that the person moving for summary judgment must establish with evidence a *prima facie* case for the entering of summary judgment.[11] Once the moving party raises a *prima facie* case for the relief sought, the responding party then has an obligation to satisfy the court that there is an issue which requires determination at trial.[12] This must be a triable issue which realistically could result in a judgment in the responding party's favour; there must be sufficient evidence on the record to enable the court to conclude that that party has a "real chance" of success.[13]

The court may draw inferences and may look at the overall strength of the plaintiff's action. However, genuine or real issues of credibility (i.e. those which must be determined in order to decide the case), creating real conflicts in the evidence, require

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[7] Ontario Rule 20 (Rules of Civil Procedure, R.R.O. 1990, Reg. 194) is not a model for amending Rule 216. Rule 20.04(2)(a) confines summary judgment to situations where "there is no genuine issues for trial": see *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1; *Pizza Pizza Ltd. v. Gillespie* (1990), 75 O.R. (2d) 225, 45 C.P.C. (2d) 168 (Gen. Div.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257, 20 R.P.R. (3d) 545 (Ont. C.A.); *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545, 83 D.L.R. (4th) 734 (C.A.)
However, note that Ontario Rule 76, dealing with *Simplified Procedure* (essentially for actions in which the plaintiff claims $50,000 or less), contains a test for summary judgment similar to the one found in Manitoba Rule 20.03(4): see Ontario Rule 76.07.

[8] *Court of Queen's Bench Rules*, Man. Reg. 553/88.

[9] Rule 432.1-432.7 (Amending Order #16); in force January 1994. Rule 432.3(4) reproduced *verbatim* the wording of Manitoba Rule 20.03(4).

[10] As part of Comprehensive Revision of the Rules the Rules Committee indicated its intention, in the widely circulated Discussion Paper (1995), that Rules 432.1-432.6 would be incorporated into the new rules. Summary judgment is addressed in the *Federal Court Rules, 1998* by Rule 216. However, Rule 216(3), the counterpart to former Rule 432.3(4), is not precisely the same: "if" has been substituted for "unless" and paragraph (b), indicating that the Court should not grant summary judgment if it would be unjust to decide the issues on the motion for summary judgment, has been omitted. A search of the files/archives of the Rules Committee has not revealed any explanation for the modification.

[11] *Pearson v. Plester et al* (1995), 100 Man.R. (2d) 162 at para. 23, 91 W.A.C. 162 (C.A.).

[12] *Atlas Acceptance Corp. Ltd. et al. v. Lakeview Development of Canada Ltd. et al.* (1992), 92 D.L.R. (4th) 301 at 309, 78 Man.R. (2d) 161 (C.A.).

[13] *Blanco v. Canada Trust Co.*, [2003] 9 W.W.R. 79 at para. 24, 173 Man.R. (2d) 247 (C.A.).

determination at a trial based upon *viva voce* evidence and assessments of credibility by a trial judge.[14]

B. British Columbia Rule 18A

British Columbia Rule 18A[15] is the most expansive of the rules on summary judgment. The test in Rule 18A(11)(a) is the same as Manitoba Rule 20.03(4).

However, in addition, the judge is equipped with a variety of procedures to conduct a "summary trial"; for example, Rule 18A(10)(b) provides that the Court may order that a deponent "attend for cross-examination…before the Court."

Rule 18A has been interpreted by the courts to allow for summary trials and judgments in a broad range of circumstances. A judge should only decline to hear an application for a summary trial where he or she is unable to make critical findings of fact necessary for a determination of the issues and where cross-examination of the affidavits or other means of clarifying the evidence would not remedy this problem, or where it would be unjust to determine the issues raised in the application.[16] The chambers judge should consider the amount involved, the complexity of the matter, and any prejudice due to delay if the matter is set down for trial under the normal procedure, including the costs consequences of so ruling.[17]

The Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* stated that Rule 18A was designed for the express purpose of permitting summary trials even though there was conflicting affidavit evidence.[18] The ability of judges to find the necessary facts and to decide if it is just to resolve the issues before them will to a large extent depend on the nature and quality of the material before them. There will be a variety of circumstances when it will not be appropriate for the motions judge to do so. Nevertheless, the rule contemplates that the chambers judge may decide disputed questions of fact when dealing with factual disputes that are not central to the issue under concern.[19]

Discussion Point #2

If Rule 216 were to be amended should the amendments reflect Manitoba Rule 20 or British Columbia Rule 18A?

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[14] *Bellboy Corp. v. 3763383 Manitoba Ltd. (c.o.b. Premium Canadian Pet Supplies and Premium Canadian Pet Products)* (2002), 164 Man. R. (2d) 17 at para. 9, 2002 MBQB 69 (Q.B.).
[15] *Supreme Court Rules*, B.C. Reg. 221/90.
[16] *Inspiration Management Ltd.* v. *McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at paras. 40-42, 36 C.P.C. (2d) 199 (C.A.) [*Inspiration*].
[17] *Ibid* at para. 48.
[18] *Ibid* at para. 55.
[19] *Canada Wide Magazines Ltd. v. Columbia Publishers Ltd.* (1994), 55 C.P.R. (3d) 142 at para. 49, [1994] B.C.J. No. 929 (QL) (S.C.).

Please submit your written comments to the Rules Committee Secretary before Friday, November 17, 2006 at the following address :

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