SUMMARY DISPOSITION OF CASES

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I. Introduction

The purpose of this paper is to outline the current state of the law with respect to summary disposition of cases in Ontario and, in particular, the law with respect to summary judgment. The paper will also briefly examine the law of summary judgment in British Columbia, the United States and England.

Underlying rules 20 and 21.01(1)(b) of the *Rules of Civil Procedure*[1] is the premise that little purpose is achieved by having an unnecessary trial.[2] Rule 20 is the mechanism for deciding cases where it has been demonstrated clearly that a trial is unnecessary.[3] However, the courts have maintained that the rule is not intended to deprive plaintiffs and defendants of their day in court absent demonstrated compliance with its requirements.[4] Rule 21.01(1)(b) provides for a motion to strike out a pleading on the ground that it discloses no reasonable cause of action or defence.

Although summary disposition of cases is available through these rules, it is apparent that the test or means to achieve such relief is a source of controversy. The debate focuses on balancing the disposition of unnecessary trials with protecting the rights of litigants. This raises a number of questions. Does the bar for summary judgment go beyond what is necessary for a fair and just resolution? Does the current rule for summary judgment favour an overcautious concern limiting the application of summary judgment? Have the circumstances that existed in 1985 when Rule 20 was introduced changed such that the current rule should also be changed? Will lowering the bar or changing the means to achieve summary disposition improve access to justice and increase the efficiency of the court system?

II. Rule 20 (Appendix A)

Rule 20, which came into force on January 1, 1985 as part of the *Rules of Civil Procedure*, substantially expanded the potential scope of a litigant's right to move for summary judgment beyond that provided for in the former *Rules of Practice*[5] [6]. Under the former rules only a plaintiff could move for summary judgment and only in actions where the writ of summons was specially endorsed.[7] Now, either party may so move (rules 20.01(1) and 20.01(3)).[8] Furthermore, the current rule contemplates both parties "delivering affidavit material or other evidence", as opposed to only the defendant under the previous rules.[9]

The key provisions of Rule 20 are found in rules 20.04(2)(a) and 20.04(4), which state:

> (2) The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue for trial with respect to a claim or defence;
>
> …
>
> (4) Where the court is satisfied that the only genuine issue is a question of law, the court may determine the question and grant summary judgment accordingly, but where the motion is made to a master, it shall be adjourned to be heard by a judge.

The expression "genuine issue" was borrowed from the third sentence in rule 56(c) of the *Federal Rules of Civil Procedure* in the United States, which was adopted in 1938.[10] It reads in part:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

In 1999, the Supreme Court of Canada cited the Ontario Court of Appeal in its consideration of the appropriate test to be applied on a motion for summary judgement. The test is satisfied when

the applicant has shown that there is no genuine issue of material fact requiring trial.[11] Once the moving party has made this showing, the respondent must then establish his claim as being one with a real chance of success.[12] Essentially, what is, and is not, a genuine issue for trial is central to the operation of Rule 20.[13]

In ruling on a motion for summary judgment, the Ontario Court of Appeal has stated that a motions judge should never assess credibility, weigh the evidence, or find the facts because these functions are reserved for the trier of fact.[14] A motions court judge is restricted to a narrow role and should not assume the role of a trial judge and, before granting relief, must be satisfied that it is clear that a trial is unnecessary.[15] 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.[16] It is not for the motions judge to resolve the issue.[17] However, an examination of the evidence, which constitutes the record, is central to determining the existence of a genuine issue in respect to material facts.[18]

Under rule 20.06(1) if a moving party obtains no relief, the court shall fix the opposite party's cost of the motion on a substantial indemnity basis, unless the court is satisfied that the making of the motion was reasonable. The costs implications of a failed motion for summary judgment are a significant deterrent to parties seeking such relief and reflect a view that summary judgment motions are to be discouraged.

III. Rule 21.01(1)(b) (Appendix B)

A rule 21.01(1)(b) motion focuses on the substantive adequacy of a claim, or a defence, as opposed to Rule 20 where a substantive claim or defence has been pleaded, but cannot be proved.[19] The test for a motion to strike out a pleading requires an examination of whether it is

"plain and obvious" that the pleading in question discloses no cause of action or defence.[20] For example, the essence of a defendant's motion to strike is that the "wrong", described in the statement of claim, is not recognized as a violation of the plaintiff's legal rights, with the result that the court would be unable to grant a remedy, even if the plaintiff proved all the facts alleged.[21] However, the length and complexity of the issues, the novelty of the cause of action, or the potential for the defendant to present a strong defence should not prevent the plaintiff from proceeding with his or her case.[22]

IV. Alternative Tests for Summary Judgment

1) Test in rule 76.07 - Simplified Procedures (Appendix C)

The purpose of rule 76.07 is to allow the parties to bring forward a relatively inexpensive application for summary judgment.[23] Evidence to be considered includes the affidavits of the parties, any supporting material that can properly be placed before the court and the affidavits of witnesses.[24] The test is found at rule 76.07(9). It states:

> (9) The presiding judge shall grant judgment on the motion unless,
>
> (a) he or she is unable to decide the issues in the action without cross-examination; or
>
> (b) it would be otherwise unjust to decide the issues on the motion.

The rule establishes a lower threshold than that applied under rule 20.04.[25] Unlike a Rule 20 motion, where the determinant is whether there is a genuine issue for trial, the focal point here is whether the court can fairly and justly decide the action on the motion and without trial.[26] It would be proper for the court, on a rule 76.07 motion, to determine a genuine issue if the motions judge is able to do so without cross-examination and it would not be unjust to decide the issue on the motion.[27] Furthermore, the court may make findings of fact including credibility

findings if that can be done fairly and justly.[28] In circumstances where the case is not clear or where it dictates that justice and fairness would suggest otherwise, it is appropriate for the judge to refer the matter to trial.[29] Lastly, the cost implications in rule 20.06 for an unsuccessful moving party do not apply to rule 76.07 motions (rule 76.07(3)).

2) Rules 18 & 18A in British Columbia (Appendix D)

Rules 18(1) and 18(6) of the British Columbia *Rules of Court*[30] govern applications for summary judgment. The test to be applied on a Rule 18 application is well-settled: is there a *bona fide* triable issue?[31] The applicant for judgment bears the burden of proving beyond a reasonable doubt that no such issue exists.[32] For example, if the defendant is bound to lose, the application should be granted, but if he is not bound to lose, then the application should be dismissed.[33]

The British Columbia courts found that artful pleaders were usually able to set up an arguable claim or defence, and an affidavit that raised any contested question of fact or law was enough to defeat a motion for judgment.[34] Rule 18 was often ineffective in avoiding unjust delay or unnecessary expense in the determination of many cases.[35] As a consequence, Rule 18A was added in 1983 in an attempt to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any case where he can decide disputed questions of fact on affidavits or by any of the other proceedings authorized by the rule unless it would be unjust to decide the issues in such a way.[36] A judge has discretion as to whether to order cross-examinations on the affidavits filed (rule 52(8)). *A party may seek to cross-examine an affiant by application on or before the 18A hearing (rule 18A(10)(b)).* (emphasis added)

Rule 18A(11)(a) sets out the test for granting judgment in a summary trial. It reads:

> (11) On the hearing of an application under subrule (1), the court may

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

Rule 18A is a compromise. In evaluating the rule, the British Columbia courts stated that the elusive and unattainable goal of perfect justice in every case could not always be assured even after a conventional trial and the safeguards furnished by the Rule and the common sense of the chambers judge were sufficient for the attainment of justice in any case likely to be found suitable for this procedure.[37] Chambers judges were cautioned to be careful, but were encouraged not to be timid in using the Rule for the purpose for which it was intended.[38]

3) Summary Judgment in U.S. Federal Court (Appendix E)

Despite the similarity between Rule 20 and Rule 56 of the U.S. *Federal Rules of Civil Procedure*, they have produced divergent results. Commentators purport and studies indicate that the percentage of civil cases proceeding to trial in the U.S. federal courts has decreased significantly in the last two decades.[39] Topping the list of reasons for this phenomenon is the established use of summary judgment to resolve cases.[40] The 1986 trilogy of Supreme Court cases are cited as signalling a greater judicial acceptance of summary judgment.[41]

In its three decisions, the Supreme Court reinforced the legitimate and effective use of summary judgment. The procedure, in the eyes of the Court, is properly regarded not as a disfavoured procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action".[42] In regards to balancing rights, Rule 56 is to be construed with due regard not only for the rights of persons

asserting claims and defences that are adequately based in fact to have those claims and defences tried to a jury, but also for the rights of persons opposing such claims and defences to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defences have no factual basis.[43]

A party opposing a summary judgment motion must do more than simply show that there is some metaphysical doubt as to the material facts.[44] The purpose of summary judgment is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.[45] Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.[46] Factual disputes that are irrelevant or unnecessary will not be counted.[47] The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.[48]

Although the moving party has the burden to show that there is no genuine issue as to any material fact, the non-moving party also has a procedural obligation to set forth specific facts showing that there is a genuine issue for trial (rule 56(e)). The Rule mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.[49] A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.[50]

4) Summary Judgment in the United Kingdom (Appendix F)

In July 1996, Lord Woolf presented his final report to the Lord Chancellor recommending reforms to the civil justice system to improve access to justice while maintaining a fair and just process.[51] In his report, the test for summary judgment would be satisfied when a court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue.[52] A party seeking to resist such an order would have to show more than a merely arguable case; it would have to be one which he had a real prospect of winning.[53] Exceptionally the court could allow a case or an issue to continue although it did not satisfy this test, if it considered that there was a public interest in the matter being tried.[54]

Lord Woolf's recommended test was encapsulated in rule 24.2 of the *Civil Procedure Rules*. It reads:

> The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if
>
> (a) it considers that
>
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial.

Prior to the amendment, applications for summary judgment were restricted to plaintiffs who could apply on the ground that the defendant had no defence to the claim included in the writ, or to a particular part of such a claim.[55] The intent of the change in the rule was to raise the standard and make it more difficult for plaintiffs and defendants to satisfy the court that there was an issue or dispute which ought to be tried.[56] The new rule allows the court to give

summary judgment against a broader range of cases and to have regard to the likely outcome not simply the respondent's case.[57]

V. Rule 14 - Applications in Ontario

Rule 14.05 of the Ontario *Rules of Civil Procedures* permits an application by way of a notice of application and accompanying affidavit evidence in the case of, among other things, the "determination of rights that depend on the interpretation of a deed, will, contract or other instrument". An application may also proceed "in respect of any matter where it is unlikely that there will be material facts in dispute".

Rule 38.10 provides that the court can order that the application, in whole or in part, proceed by way of a trial of an issue. Where this occurs the parties will be entitled to discovery rights unless the court orders otherwise.

Complex commercial disputes are sometimes resolved through the use of Rule 14 applications, particularly in cases on the "Commercial List" in Toronto. As a matter of practice (rather than pursuant to a rule of practice) and often with the consent of the parties, *viva voce* evidence is sometimes heard by the applications court judge where credibility issues or substantial factual disputes arise.

The question arises as to whether the practice that exists in some cases on the Commercial List ought to be codified in the rules to permit the court to resolve cases not only where "it is unlikely that there will be any material facts in dispute" but also in cases where there are "material facts" in dispute but the applications court judge is in a position, on the totality of the evidence, to decide the case. Further, should the rules be amended to permit the hearing of *viva voce*

evidence at the application if the court, in its discretion, considers it necessary to resolve the issues on the application?

VI. Topics for Discussion

1. Should Rule 20 of the Ontario *Rules of Civil Procedure* be amended?
2. Should we move towards the British Columbia model?
3. Should we include in the summary judgment rule the possibility of a summary trial on important but contested issues?
4. Should the cost sanctions in Rule 20 be maintained?
5. Should the "plain and obvious" test in Rule 21 motions be amended to make it easier for the moving party to meet its burden?
6. Should the U.K or U.S. test be adopted?
7. Should the test in Rule 76.07, or one similar to it, be instituted for all summary judgment motions?
8. Should the current application rule in Ontario (Rule 14) be expanded? If so, how?

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[1] R.R.O. 1990, Reg. 194.
[2] *Dawson v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. No. 3240 (C.A.) at paras. 8 and 20 [*Dawson*].
[3] *Ibid*.
[4] *Dawson*, *supra* note 2 at para. 29; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 (Ont. C.A.) at para. 35 [*Aguonie*].
[5] R.R.O. 1980, Reg. 540, as amended.
[6] *Irving Ungerman Ltd. v. Galanis* (1991), 4 O.R. (3d) 545 (C.A.) at 549 [*Ungerman*].
[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ungerman*, *supra* note 6 at 549-550.
[11] *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 27; *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 15.
[12] *Ibid*.
[13] *Ford Motor Co. of Canada, Ltd. v. Ontario Municipal Employees Retirement Board* (1997), 153 D.L.R. (4th) 33 (Ont. C.A.) at para. 63.
[14] *Aguonie*, *supra* note 4 at para. 32.
[15] *Dawson*, *supra* note 2 at para. 20.
[16] *Ibid*. at para. 28.
[17] *Ibid*.
[18] *Ibid*. at para. 20.
[19] *Ibid*. at para. 14.
[20] *Hunt v. Carey Canada Inc.*, [1990] S.C.J. No. 93 at para. 33 [*Hunt*].
[21] *Dawson*, *supra* note 2 at para. 8.
[22] *Hunt*, *supra* note 20 at para. 33.
[23] *Bendix Foreign Exchange Corp. v. Integrated Payment Systems Canada Inc.*, [2005] O.J. No. 2241 (C.A.) at para. 8 [*Bendix*]; *McGill v. Broadview Foundation*, [2001] O.J. No. 108 (C.A.) at para. 4 [*McGill*]
[24] *Ibid*.

[25] *Consolidated Bottle Co. v. Italfina Products Ltd*., [2005] O.J. No. 4018 (S.C.J.) at para. 1 [*Consolidated*]; *Giardino v. Frum Development Group*, [1998] O.J. No. 6561 (Gen. Div.) at para. 3; *Newcourt Credit Group Inc. v. Hummel Pharmacy Limited et al*. (1998), 38 O.R. (3d) 82 (Gen. Div.) at 86 [*Newcourt*].
[26] *Bendix*, *supra* note 23 at para. 8; *McGill*, *supra* note 23 at para. 4; *Consolidated*, *supra* note 25 at para. 2.
[27] *Masini USA Inc. v. Simsol Jewellry Wholesale Ltd*., [2003] O.J. No. 576 (S.C.J.) at para. 17.
[28] *Consolidated*, *supra* note 25 at para. 2; *Newcourt*, *supra* note 25 at 86.
[29] *Bendix*, *supra* note 23 at para. 8; McGill *supra* note 23 at para. 4.
[30] B.C. Reg. 221/90.
[31] *HSBC Bank Canada v. Tahvili*, [2004] B.C.J. No. 42 (C.A.) at para. 13.
[32] *Ibid*.
[33] *Firstar Investment & Financial Co. v. Ridgewood Development Corp*., [2003] B.C.J. No. 2918 (C.A.) at para. 3.; *Montroyal Estates Ltd. v. D.J.C.A. Investments Ltd*., [1984] B.C.J. No. 3189 (C.A.) at para. 12.
[34] *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd*., [1989] B.C.J. No. 1003 (C.A.) at para. 38 [*Inspiration*].
[35] *Ibid*.
[36] *MacMillan v. Kaiser Equipment Ltd*., [2004] B.C.J. No. 969 (C.A.) at para. 23; *Inspiration*, *supra* note 34 at para. 39.
[37] *Foreman v. Foster* (2001), 196 D.L.R. (4th) 11 (B.C.C.A.) at para. 14 [*Foreman*]; *Inspiration*, *supra* note 34 at para. 47.
[38] *Ibid*.
[39] Martin H. Redish, "Summary Judgment and the Vanishing Trial: Implications of the Litigation Matrix" (2005) 57 Stan. L. Rev. 1329 at 1329-1330, 1333, 1335 (HeinOnline) [Redish]; Jack H. Friedenthal & Joshua E. Gardner, "Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging" (2002) 31 Hofstra L. Rev. 91 at 103 (HeinOnline) [Friedenthal]; Paul W. Mollica, "Federal Summary Judgment at High Tide" (2000) 84 Marq. L. Rev. 141 at 141-145 (HeinOnline) [Mollica].
[40] Redish, *supra* at 1330, 1333-1335; Friedenthal, *supra* at 101, 103; Mollica, *supra* at 141-145.
[41] Redish, *supra* at 1330, 1333; Friedenthal, *supra* at 101; Mollica, *supra* at 152-153.
[42] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) at para. 8 [*Celotex*].
[43] *Ibid*.
[44] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574 (1986) at para. 10.
[45] *Ibid*.
[46] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242 (1986) at para. 4.
[47] *Ibid*.
[48] *Ibid*. at para. 10A.
[49] *Celotex*, *supra* note 42 at para. 1B.
[50] *Ibid*.
[51] U.K., Department of Constitutional Affairs, *Access to Justice Final Report* by The Right Honourable the Lord Woolf (1996), online: Department of Constitutional Affairs <http://www.dca.gov.uk/civil/final/index.htm> at s. 1.
[52] *Ibid*. at ch. 12, para. 34.
[53] *Ibid*.
[54] *Ibid*.
[55] Derek O'Brien, "The New Summary Judgment: Raising the Threshold of Admission" (1999) 18 C.J.Q. 132 at 135.
[56] *Ibid*. at 136.
[57] Australia, The Australian Law Reform Commission, *Managing Justice: A review of the federal civil justice system* Report No. 89 (2000), online: The Australian Law Reform Commission <http://www.austlii.edu.au/au/other/alrc/publications/reports/89/index.html> at para. 7.209.