SUMMARY JUDGMENT

The First Year Under the New Rule in Ontario

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On January 1, 2010, the most significant amendments to the Ontario *Rules of Civil Procedure* since 1985 came into force (the "Amendments"). The amendments were introduced in response to the Civil Justice Reform Project (the "Osborne Report"),[1] which was chaired by the former Associate Chief Justice of Ontario, the Honourable Coulter A. Osborne. The Osborne Report was commissioned in response to a growing realization that the litigation system in Ontario had become too slow and expensive, and was failing to meet the needs of civil litigants.

One of the most significant recommendations in the Osborne Report involved changes to the summary judgment under Rule 20 of the *Rules of Civil Procedure*. The Osborne Report recognized that although the summary judgment procedure was received with great enthusiasm when it was introduced in 1985, a number of judicial decisions from the Ontario Court of Appeal eviscerated the effectiveness of the rule by holding that the role of the Court was "narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial."[2] These decisions were based on the assumptions that a plenary trial is usually the most appropriate manner for resolving a dispute, and that a litigant's "day in court" would be denied unless he or she went to trial.

However, as any new litigator quickly learns, a trial is not always necessary to resolve civil disputes fairly. The budding litigator also quickly learns that the costs and delays associated with a trial often discouraged parties from having their disputes resolved by the Court. Indeed, many litigants elect to settle before trial and never see their day in court, not because of the merit of their case, but because of the cost and time of getting to trial. Certainly, this too is a real barrier to access to justice. This concern is not new. Justice Morden recognized the problem in *Irving Ungerman Ltd. v. Galanis*,[3] and 20 years later, his concern remains relevant:

> A litigant's "day in court", in the sense of a trial, may have traditionally been regarded as the essence of procedural justice and its deprivation the mark of procedural injustice. There can, however, be proceedings in which, because they do not involve any genuine issue which requires a trial, the holding of a trial is unnecessary and, accordingly, represents a failure of procedural justice.

The fact that many cases settle without questions of law being decided also raises another concern – the development of the law suffers when legal issues are settled and not decided by the Court. Precedent is not established, jurisprudence does not develop, and unresolved issues of law that require guidance from the Court linger to perplex future litigants.

The Osborne Report concluded that in many cases, a trial is no better than a summary judgment motion for resolving disputes fairly, and that the problems endemic to the current litigation system necessitates a different attitude and approach to dispute resolution in the courts. Fortunately, most of the Osborne Report's recommendations concerning summary judgment were implemented by the Amendments. In particular, the Amendments:

(i) introduced a new, and arguably lower, threshold for granting summary judgment (Rule 20.04(2)(*a*)); and

(ii) increased the powers of the motions judge to weigh evidence, evaluate credibility, draw reasonable inferences from the evidence and order mini-trials of discreet issues (Rules 20.04(2.1)).

[1] The Honourable Coulter A. Osborne, *Civil Justice Reform Project: Summary of Findings & Recommendations* (Toronto: Ontario Attorney General, 2007).

[2] *Aguonie v. Galion Solid Waste Material Inc.*, (1998), 38 O.R. (3d) 161 (Ont. C.A.) ["*Aguonie*"] at paragraph 32 and *Dawson v. Rexcraft Storage and Warehouse Inc*., [1998] 164 D.L.R. (4th) 257 (Ont. C.A.) ["*Dawson*"] at paragraph 28.

[3] (1991), 4 O.R. (3d) 545 (Ont. C.A.) at 550-551.

The effectiveness of the new summary judgment rules in increasing access to justice may depend on whether the courts decide that, in addition to the new powers granted to judges under Rule 20.04(2.1), the threshold for summary judgment has been lowered by the amendments to Rule 20.04(2)(*a*). While the Court's new powers to weigh evidence, evaluate credibility, draw reasonable inferences from the evidence and order mini-trials of discreet issues and other mini-trials appear straightforward, there is a dispute as to whether or not the Amendments lowered the threshold for granting summary judgment. The effectiveness of the new powers may be neutered if the Court continues to apply the old, rigid test that imposed a remarkably high threshold for summary judgment. As of the time of writing, while there have been some decisions from the Divisional Court or the Court of Appeal for Ontario under the new rules, those decisions have upheld the motions' judge's decisions without providing any guidance on whether or not there is now a lower threshold under the amended Rule 20. It remains to be seen whether the Court of Appeal will fully embrace the new paradigm called for by the Osborne Report, or whether the Court will again attempt to rein in the use of the summary judgment procedure by finding that there has been no substantive change in the summary judgment test.

The New Test for Summary Judgment

Rule 20.04(2)(*a*) was amended to provide that: "The court shall grant summary judgment if, the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." Although it has been one year later after the Amendments came into force, the meaning and import of the reformulated test remains unsettled. Two lines of cases have emerged: one line holds that the addition of the word "requiring" in the test reflects a lower threshold to obtain summary judgment (or, inversely, that a higher threshold will be required before a matter is sent to trial); the other line of cases holds that, despite the addition of the word "requiring" to Rule 20.04(2)(*a*), the amendment is merely a codification of the test for summary judgment as articulated under the existing case law and that the amendments did not substantively change the test for summary judgment. It is the authors' view that the introduction of the word "requiring" signifies a lower threshold for granting summary judgment motions, and that the changes to Rule 20 are not simply limited to the new powers given to judges.

A New Test – Healey v. Lakeridge Health Corp.

The line of cases holding that the Amendments introduced a lower threshold begins with the decision of Justice Perell in *Healey v. Lakeridge Health Corp.*[4] In *Healey*, the plaintiffs commenced a class action suit against the defendant hospital for failing to properly diagnose active tuberculosis in two patients, and for exposing others in the hospital to the contagious disease. The defendants moved for summary judgment against two of the three proposed classes on the grounds that there was no duty of care, damages were too remote, and an aggregate assessment of damages was inappropriate in the circumstances.

Justice Perell extensively reviewed the history of the summary judgment rule and the impetus for the new amendments. In discussing whether or not the Amendments introduced a new test for summary judgment, Justice Perell noted the following:

> a. Despite the fact that semantically, there is little difference between the two formulations of the test, as a matter of statutory interpretation, one should focus on the purpose or intention behind the Civil Rules Committee in recommending the amendments to the summary judgment rules, and
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> b. The problems that the Amendments sought to address were that: (1) the former test was regarded as too strict with the result that the rule was not achieving its purposes; and (2) the utility of the rule was being impaired by case law that had held that a motions judge could not assess credibility, weigh evidence, or find facts on a motion for summary judgment, citing the previous leading cases of *Aguonie* and *Dawson*.[5]

Justice Perell held that the Amendments addressed these problems in two distinct ways. First, the Amendments were introduced as a "statutory reversal of the case law" that limited the powers of the judge on a summary

[4] 2010 ONSC 725, [2010] O.J. No. 417 (Ont. S.C.J.) ["*Healey*"].

[5] *Aguonie*, supra note 2 and *Dawson*, supra note 2.

judgment motion.[6] Second, Justice Perell held that in considering the threshold test in the context of the other amendments, the introduction of the word "requiring" relaxed the test for granting summary judgment:

> Placed in the context of the other amendments to Rule 20, the purposes of the change from "no genuine issue for trial" to "no genuine issue requiring a trial" in the test for a summary judgment are: (1) to make summary judgment more readily available; and (2) to recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment.[7]

Justice Perell also rejected the defendants' argument that one of the most important features of the administration of justice was the litigant's "right" to a trial, and that, therefore, the fact that a trial was historically favoured as the means of resolving a dispute meant that the paradigm under the old case law still applied. Justice Perell noted that while the former case law did indeed give preference to the trial as the means of giving litigants their day in court, the Amendments changed the presumption that a trial was to be preferred to a summary judgment motion:

> I agree with the Defendant Doctors that the former case law gave preference to the trial as the means for a litigant to have his or her day in court and that the availability of a summary judgment was narrowly subscribed. However, this truth does not answer the problems of interpreting the new language of or the test for summary judgment and applying the new powers that are designed to expand the availability of summary judgments with a corresponding diminishment of the role of the trial in the administration of justice.
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> ... a factor in interpreting and applying the new rules about summary judgment is the determinant of whether a trial is genuinely necessary, not because it is to be given some preferred status in the administration of justice, but because the issues to be resolved cannot be truthfully, fairly, and justly resolved without the forensic machinery of a trial.[8]

Justice Perell concluded that the Amendments have ushered in a regime in which the trial is no longer accorded a special place in our litigation system as a dispute resolution mechanism.

A full panel of the Court of Appeal upheld Justice Perell's decision, but without commenting on Justice Perell's discussion regarding the test for summary judgment.[9]

A number of decisions have followed the *Healey* decision, or have reached similar conclusions independently.[10] For example, in *Descartes Systems Group Inc. v. TradeMerit Corp.*,[11] Justice McLean held that the Amendments have been seen "as effectively lowering the threshold for summary judgment."

Justice Pepall reached a similar conclusion in *Canadian Premier Life Insurance Company v. Sears Canada Inc.*[12] In that case, Justice Pepall, without reference to *Healey*, reviewed the purpose of the Amendments and held that the Amendments introduced both a lower threshold to finding summary judgement and new powers to address the previous limitations with summary judgment motions. In addition, she held that prior case law was of little to no assistance in interpreting the Court's new powers:

> Rule 20 of the Rules of Civil Procedure was amended effective January 1, 2010. There are two key changes. Firstly, the court is to grant summary judgment if satisfied that there is no genuine issue requiring a trial. Previously, the Rule had spoken of a genuine issue for trial. Secondly, a judge hearing a motion for

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[6] *Healey*, supra note 4 at paragraph 22.
[7] Ibid. at paragraph 23.
[8] Ibid. at paragraphs 27-28.
[9] 2011 ONCA 55.
[10] See *Descartes Systems Group Inc. v. TradeMerit Corp*., 2010 ONSC 1628, [2010] O.J. No. 2231 (Ont. S.C.J.) ["*Descartes*"], *Morrison v. Hooper*, 2010 ONSC 4394, [2010] O.J. No. 3421 (Ont. S.C.J.), *Jagosky v. Huntsville (Town)*, 2010 ONSC 4590 [2010] O.J. No. 3562 (Ont. S.C.J.). For a case which reached a similar conclusion without citing *Healey*, refer to *Canadian Premier*, infra note l2.
[11] *Descartes*, ibid. at paragraph 19.
[12] *Canadian Premier Life Insurance Company v. Sears Canada Inc.* (2010), 2010 ONSC 3834, [2010] O.J. No. 3987 (Ont. S.C.J.) ["*Canadian Premier*"].

> summary judgment is provided with enhanced powers.[13]

Justice Pepall concluded that Rule 20 should be interpreted with an eye towards the Osborne Report, in a manner which remained consistent to the language but distinct from the prior case law. In particular, Justice Pepall expressly warned against relying on pre-Amendment case law in interpreting the new summary judgment rules, as doing so would undermine the purpose of the new summary judgment regime:

> In my view, new Rule 20 should be interpreted with this provenance in mind. For that reason and consistent with the language of Rule 20, a motions judge is not precluded from making findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment ...
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> The amended Rule does not place a limit on fact finding. Such a limitation was the product of case law under the former Rule. Now the limitations are twofold: is there a genuine issue requiring a trial and is it in the interest of justice for the enhanced powers to be exercised only at a trial. ... *While from an analytical viewpoint it is tempting to interpret the new Rule in light of prior case law, such an approach runs the risk of limiting the impact of the new Rule and defeating its objectives. In considering summary judgment, judicial refuge should not be taken in the historical restrictive case law that previously limited the scope of the Rule.* [emphasis added]

The Same Test – New Solutions Extrusion Corp. v. Gauthier

The line of cases holding that the test for granting summary judgment following the Amendments remains the same begins with the decision of Justice Karakatsanis (as she then was) in *New Solutions Extrusion Corp. v. Gauthier*,[14] which was decided around the same time as *Healey*.

In *New Solutions*, the plaintiff alleged that the defendant lawyers conspired with their client to trespass and unlawfully disable an industrial machine in an attempt to force the plaintiff to settle litigation regarding the machine. In considering the new wording of Rule 20.04 for summary judgment, Justice Karakatsanis held that notwithstanding the introduction of the word "requiring" into the Rule 20.04(2)(*a*), the test for summary judgment remained that as stated by the Court of Appeal in *Aguonie*:

> The test for summary judgment – whether there is a genuine issue of material fact that requires a trial for its resolution as first articulated in *Irving Ungerman Ltd. v. Galanis* 1991, 4 O.R. (3d) 545 (C.A.) – has not changed. However, the cases that restricted a motions judge in assessing credibility, weighing evidence or drawing factual inferences have been superseded by the powers set out in the new Rule. Both the analytical review and the availability of oral evidence have considerably broadened the motions judge's tools in a summary judgment motion. Nonetheless, although a motions judge may weigh the evidence, evaluate the credibility and draw reasonable inferences from the evidence, it does so for the purpose of determining whether a trial is required to resolve a genuine issue. Although a summary judgment motion may, if the motions judge so directs, resemble a summary trial, the task of the judge is different. ... The motions judge must take "a hard look" at the evidence to determine whether it raises a genuine issue requiring a trial ... Simply put, the test remains largely the same as it was under *Irving Ungerman* where the issue was whether the evidence "requires a trial." The new Rule 20.04 provides the judge with more tools to determine if this test is met.[15]

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[13] Ibid. at paragraph 64.

[14] 2010 ONSC 913, [2010] O.J. No. 661 (Ont. S.C.J.) ["*New Solutions*"].

[15] In *Cuthbert v. TD Canada Trust*, 2011 ONSC 830, released within a week of *New Solution*s, Justice Karakatsanis phrased the issue in the following manner: "Nonetheless, although a motions judge may weigh the evidence, evaluate the credibility and draw reasonable inferences from the evidence, it is 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 a motion for summary judgment. This change in the Rule does not substitute a summary trial for a summary judgment motion. Although a summary judgment motion may, if the motions judge so directs, resemble a summary trial, the test and the decision are different." However, while *New Solutions* and *Cuthbert* may be correct to the extent that they stand for the proposition that the purpose of Rule 20 has not changed, they go too far in suggesting that the test for

New Solutions has been followed in a number of cases.[16] However, most of the cases following *New Solutions* do not engage in a detailed review of the background or purpose of the Amendments, in contrast to the decisions in both *Healey* and *Canadian Premier*.

Opportunity to Reconcile Healey and New Solutions

Although most decisions following *New Solutions* have not engaged in a review of the purpose of the Amendments, two notable exceptions are Justice Echlin's decision in *Cunningham v. Moran*[17] and Justice Beaudoin's decision in *595799 Ontario Ltd. v. Galpin.*[18] In *Cunningham*, Justice Echlin cited both *Healey* and *New Solutions*, but appears to have adopted Justice Karakatsanis' view that the summary judgment test itself has remained largely the same.

First, Justice Echlin reviewed the purpose behind the Rule 20 changes, including reviewing the discussion within the Osborne Civil Justice Reform Project. The judge then noted the lack of an Ontario appellate decision clarifying the changes to the summary judgment rules, and the delicate balance between access to justice and the right to a fair trial:

> Often those who argue against a wider interpretation of Rule 20 frame their worries in terms of "access to justice" concerns. The opponents argue that litigants should have their "day in court".
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> As is the case in many aspects of the law, our Courts must find the correct balance between these two competing interests. Not every lawsuit merits a full blown trial accompanied by tens of thousands of dollars in expense and years, if not decades, of heartache. The provisions of Rule 20 are meant to promote judicial economy and litigation efficiency by preventing unmeritorious cases or issues from proceeding to trial.[19]

Following this review, Justice Echlin agreed with Justice Perell in *Healey*, holding that "having regard to the [judge's] new powers ... the moving party must provide a level of proof that demonstrates that a trial is unnecessary to truly, fairly, and justly resolve the issues."[20] On the other hand, he also concurred with Justice Karakatsanis in *New Solutions*, holding that "the tests have remained largely the same."[21]

In *Galpin*, the Court cited both *Healey* and *New Solutions*, but appears to have relied upon the *Healey* test for determining when summary judgment may be granted.[22] Nonetheless, it is evident from a review of *Cunningham* and *Galpin* that the appropriate approach remains unsettled.

Which Approach Should Be Adopted?

The principal difficulty with the Court's approach in *New Solutions* is that it effectively reads out the word "requires" from the new Rule, which is inconsistent with both the legislative history of and purpose behind the Amendments. It is arguable that, as a matter of statutory interpretation, the *New Solutions* approach, which holds that the legislature's choice to insert the word "requiring" is merely a codification of the prior case law, is incorrect given that the Amendments were specifically designed to overturn that non-active case law. As Justice Pepall noted in *Canadian Premier*, there is no need to attempt to rationalize the prior "anti-summary judgment" case law with a new regime that was borne of the need and desire to expand the availability of summary judgment. There is no

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summary judgment has not also been relaxed or modified. Indeed, it was previously very easy for litigants to show that there was a "genuine issue" for trial, and certainly no new powers were required to assist courts in finding that a genuine issue existed. The Amendments are principally, if not exclusively, designed to make it easier to show that a genuine issue does not exist. As a result, while the purpose of Rule 20 may not have changed, the test or threshold for granting summary judgment has necessarily been modified by the new Rule 20 regime.

[16] See *Dudgeon v. Canadian Career College*, 2010 ONSC 3598, [2010] O.J. No. 2790 (Ont. S.C.J.) ["*Dudgeon*"], *Schumm v. A-1 Storage Space Ltd.*, 2010 ONSC 4088, [2010] O.J. No. 3127 (Ont. S.C.J.) and *Kingspan Insulated Panels Ltd. v. Brantford (City)*, 2010 ONSC 4610, 2010 CarswellOnt 6748 (Ont. S.C.J.).

[17] 2010 ONSC 4310, [2010] O.J. No. 3711 (Ont. S.C.J.) ["*Cunningham*"].

[18] 2010 ONSC 2083, [2010] O.J. No. 1955 ["*Galpin*"].

[19] *Cunningham*, supra note 17 at paragraphs 47-48.

[20] Ibid. at paragraph 55.

[21] Ibid. at paragraph 56.

[22] *Galpin*, supra note 18 at paragraph 7, citing paragraphs 23, 27, 28 and 31 of the judgment in *Healey*.

utility in reverting to previous case law that was designed to curb the use of the summary judgment procedure when the purpose of the Amendments is, as Justice Perell noted, to statutorily overrule the restrictive nature of the prior case law. Without a change in the threshold for granting summary judgment, the full potential of the Amendments risk being diminished.

What, then, is the appropriate test? The insertion of the word "requiring" suggests that the focus of the inquiry is not simply on whether a genuine issue exists, but whether a trial is required to resolve any genuine issues that do exist. Accordingly, the Court is now compelled to determine whether or not a case can be decided in a fair and just manner on a summary judgment motion using any or all of the powers provided under the new Rules; only if a case cannot be justly resolved using the new powers will a trial be "required" to resolve the matter. Stated differently, before sending the matter to a full trial, the Court should conclude that it is not capable of deciding a case, truthfully, fairly and justly after using all available fact finding powers – including the powers to weigh evidence, make findings of credibility, draw inferences from the facts, and order a mini-trial. If the Court does not reach this conclusion, the Court should not direct a trial, because the trial would not be "required."

This approach is consistent with the Court's decision in *Schneider v. State Farm Mutual Automobile Insurance Co.*,[23] where Justice Code described the new test as the "necessity test:"

> The test for Rule 20 summary judgment is whether there is any "genuine issue requiring a trial." Rule 20 has recently been strengthened by allowing the judge on the Motion to weigh evidence, evaluate credibility and draw any reasonable inference unless it is in the interest of justice that such powers be exercised only at trial. The earlier Rule 20 case law, and the effect of the recent amendments to the rule, are helpfully analyzed by Perell J. in *Healey v. Lakeridge Health Corp.* (2010), 72 C.C.L.T. (3d) 261 (Ont. S.C.J.) at paras. 16-33. As Perell J. notes, it is important to begin by precisely identifying the issue or issues to be resolved, either on the Motion or at a trial. The necessity test in Rule 20 requires a determination as to whether some particular issue requires a trial or whether it can be resolved justly by using the new powers available on the Motion.[24] [emphasis added]

Justice Perell appears to have alluded to such an approach in *Healey*, noting that the determination of whether or not a trial is genuinely necessary should not be based on the outdated assumption that a trial is to be given some preferred status in the administration of justice, but on the fact that the issues to be resolved cannot be truthfully, fairly, and justly resolved without the "forensic machinery" of a trial:[25]

> 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.[26]

Under this approach, the term "requires" is read harmoniously with the amended Rule 20 and the legislative history of the Amendments. If the Court of Appeal interprets the Amendments in this manner, the new summary judgment rule will avoid the same fate as its predecessor, and the Amendments will be successful in providing litigants with greater access to justice and their day in court.

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[23] 2010 ONSC 4734, 2010 CarswellOnt 6820 ["*Schneider*"]. See, also, *Canadian Premier*, supra note l2 at paragraph 68.

[24] *Schneider*, ibid. at paragraph 39.

[25] *Healey*, supra note 4 at paragraphs 27-28.

[26] Ibid. at paragraph 30.