On January 1, 2010, Rule 20 of the *Rules of Civil Procedure*, Ontario's Summary Judgment Rule was amended. The amendments incorporated 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 summary judgment is provided with enhanced powers to weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence in reaching his or her decision on the merits of the motion.

In the months following the amendments to Rule 20, a considerable body of jurisprudence developed from the Superior Court of Justice interpreting the changes to the summary judgment rule. On December 5, 2011, a rare five member civil panel of the Ontario Court of Appeal released the decision of *Combined Air Mechanical Services Inc. v. Flesch*[1], providing guidance to the profession on the amendments to Rule 20. Although the Court of Appeal reviewed the conflicting jurisprudence from the Superior Court, it chose "not to comment on the relative merits of the various interpretative approaches found in this body of case law because our decision marks a new departure and a fresh approach to the interpretation and application of Rule 20". The Court emphasized that the purpose of the new rule is to eliminate *unnecessary* trials, not to eliminate trials. The guiding consideration is whether the summary judgment process, in the circumstances of a given case, will provide an appropriate means for effecting a fair and just resolution of the dispute before the court.[2]

The Full Appreciation Test

In general, there are three types of cases which are amenable to summary judgment:

1. Cases where the parties agree that it is appropriate to determine the action by way of a motion for summary judgment although the court maintains its discretion to refuse summary judgment where the test is not met (Rule 20.04(2)(b));

2. Claims or defences that are shown to be without merit; and

3. Cases where there is "no chance of success" and the trial process is not required in the "interest of justice".

In addressing cases which fall under the third type of case, the Court of Appeal rearticulated the test for summary judgment by adopting what it calls the "full appreciation test". In order to determine whether the full appreciation test has been met, the Court of Appeal says:

> The motions judge must ask the following question: Can the full appreciation of the evidence and issues that is required to make

1 2011 ONCA 764
2 *Ibid* at para. 38

> dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?[3]

The Court went on to provide further direction on the "full appreciation test"[4]:

> We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.
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> In contrast, in document-driven cases with limited testimonial evidence, a motion judge would be able to achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Similarly, the full appreciation test may be met in cases with limited contentious factual issues.

The Court of Appeal's reasoning in *Combined Air* does not change previous law on a motion for summary judgment which allows the court to assume that the parties have respectively advanced their best case and that the record contains all the evidence that the parties will present at trial. The onus remains on the moving party to show that there is no genuine issue requiring a trial, however the responding party must present its best case or risk losing. The responding party can not rest on the allegations or denials in the pleadings but must set out in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.

The Court of Appeal added an important *caveat* to the "best foot forward" principle in cases where a motion for summary judgment is brought early in the litigation process stating that it would not be in the interest of justice for a judge to exercise his or her powers to weigh evidence, assess credibility or draw inferences in cases where the nature and complexity of the proceeding require the completion of the discovery process before a party is required to respond to a summary judgment motion. This statement from the Court of Appeal is likely to have a chilling effect on summary judgment motions brought at an early stage of a proceeding in all but the clearest of cases.

Summary

While the decision of the Court of Appeal in *Combined Air* brings some clarity to Ontario's summary judgment rule it is too soon to tell whether obtaining summary judgment will become more elusive under the new test especially in the early stages of an action. To increase the chance of success when bringing a motion for summary judgment, parties will want to frame their case as document driven with a limited evidentiary record and/or limited contentious factual issues and few if any credibility

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3 *Ibid* at para. 50.
4 *Ibid* at para. 51-52.

issues to provide the motion judge with a level of comfort that he or she can "fully appreciate" the evidence and issues as required to make a dispositive finding.