IT WAS DEJA VU ALL OVER AGAIN

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1. Introduction

This paper follows an earlier paper written shortly after the Court of Appeal's decision in Combined Air. Combined Air promised a "new departure and a fresh approach to the interpretation and application of the amended Rule 20". Our first paper looked at the history of summary judgment in Ontario under the pre-1985 Rules of Practice and the evolution of jurisprudence under Rule 20 after 1985. A comparison was also made with the application of summary judgment in Canada's Federal Courts. We then considered how Combined Air might affect the law of summary judgment.

In our earlier paper we found that each summary judgment rule amendment was followed by a predictable phenomenon which we called "interpretive erosion": initial wide and enthusiastic application of the newly revised rule gave way to increasingly narrow interpretation and consequent decreasing frequency of use.

The most recent summary judgment rule amendment was designed to address just this problem in the application of a narrowly interpreted and under-used summary judgment rule. The "Osborne Report" on civil justice reform confirmed that Rule 20, as it was being applied in 2007, was not fulfilling its purpose of providing a mechanism to dispose of cases early where, in the opinion of the court, a trial is unnecessary. The failure of the pre-2010 summary judgment

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* McMillan LLP, Toronto, Ontario.
3. Ibid. at para. 35.
4. As our earlier paper noted, the Federal Courts adopted the restrictive Ontario jurisprudence in interpreting its own rules, notwithstanding differences in their wording and that the federal rules were derived from rules in British Columbia.
It was evidenced in its lack of usage; in 2005-2006 summary judgment motions were commenced in only 642 of Ontario’s 63,251 Superior Court civil cases (1%).

Justice Osborne made several recommendations to revise Rule 20 and permit greater scope for Rule 20 motion judges and masters to grant summary judgment. Likely the most significant amendment, made on Justice Osborne’s recommendation, expressly overturned case law that prevented judges from weighing evidence, evaluating the credibility of a deponent and drawing reasonable inferences from the evidence.

The revised summary judgment Rule became effective January 1, 2010.

Unfortunately, we have found that the revised Rule has improved neither the availability nor the scope of summary judgment. Our quantitative assessment of summary judgment motions has shown a failure of the 2010 amendments, as interpreted following Combined Air, to lead to any measurable increase in the rate of successful summary judgment motions.

Problems with summary judgment rates are not new. In Vaughan v. Warner Communications Inc., a 1986 summary judgment decision, Justice Boland referred to “Summary Judgment: A Comparative and Critical Analysis” written by Professor Bogart of the University of Windsor’s Faculty of Law. Today, over 30 years after it was written, this paper and, in particular, its recommendations and conclusions, is still relevant to the summary judgment debate. In this work, Professor Bogart noted a tendency against granting summary judgment in British and Canadian cases. In his view, the norm that “every person is entitled to their day in court” tipped the scales heavily away from summary judgment.

We believe that the failure of the 2010 Rule change is due, in part, to this idea. We posit that the “every person is entitled to their day in court” norm is deeply ingrained and sufficiently powerful to neutralize language plainly intended to increase the rates at which summary judgment is granted. We suggest this idea ought to be critically revisited. We advocate for the norm proposed by Professor Bogart in which every person has an entitlement to access the courts but not necessarily to access a trial.

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6. Ibid. at p. 33.
We also suggest revisions to both the appellate review structure of summary judgment decisions and a case management approach to all summary judgment motions. We believe these changes will allow the law of summary judgment to develop more evenly and will address the waste of judicial resources that is an unfortunate result of unsuccessful summary judgment motions. The direction of rule 1.04(1) is that: “These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.” These goals must be looked at in a balanced way. While a trial may be more likely to deliver a just determination of a proceeding on the merits, it is almost always deficient in meeting the goals of expedition and least expense.9

It is our hope that these proposals, if adopted, will produce an effective, efficient, fair and accessible summary judgment process for Ontario litigants.

2. In Search of the “Goldilocks Moment”

Unfortunately, subsequent to Combined Air, the bench, the bar and litigants fell back into familiar debates about what sort of evidentiary record is appropriate and not appropriate for deciding a matter summarily. Although none of these cases expressly states as much, post-Combined Air attempts to avoid summary judgment motions all seem to be animated by a preference to determine matters only following a full trial rather than by a summary procedure such as that contemplated under Rule 20.

Specifically, attempts to prevent summary determinations post-Combined Air have continued to focus on the evidentiary record; either it is too spare, too complicated or best left to be evaluated and determined by the trial judge. One judge referred to such objections as advocating for “Exit 51”.


10. Justice Belobaba is referring to para. 51 of Combined Air, which states:

   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
The “full appreciation” test provides a comfortable exit for a busy or disinterested motions judge. By shifting the focus from issues requiring trial to concerns about the number of witnesses and the volume of filed material, the Court of Appeal has unintentionally provided responding counsel with a game-winning strategy: overwhelm the motions judge with a voluminous amount of material, throw in some references to the “interests of justice”, and he or she may happily take Exit 51 and send the case to trial. 11

One way in which these concerns with the evidentiary record have been expressed is in debates discussing the timing of summary judgment relative to discovery. This debate has focussed, in particular, on whether summary judgment motions should generally be brought pre- or post-discovery. There are cases that hold that a motion before discovery is too early and cases that suggest that once discovery is concluded, a summary judgment motion is too late. 12

(1) Pre-Discovery is Too Early

Some cases suggest that summary judgment motions brought prior to discovery may be premature. For instance, in Livingston v. Gravel13 the plaintiff brought a motion for directions, in reliance on para. 58 of Combined Air.14 The plaintiff sought to stay the defendants’ summary judgment motion on the basis that it was inappropriate because it required extensive evidence and testing of credibility.

Justice Perell dismissed the motion on the basis that discoveries were complete and, accordingly, “there should be no additional test is not met and the “interest of justice” requires a trial.

12. Professor Bogart has noted that litigants in the United States have also provided the need for discovery as a reason to adjourn summary judgment motions. See Bogart, supra note 8 at p. 577.
14. Combined Air, supra note 2 at para. 58. Paragraph 58 reads, in its entirety:
   Moreover, the record built through affidavits and cross-examinations at an early stage may offer a less complete picture of the case than the responding party could present at trial. As we point out below, at para. 68, counsel have an obligation to ensure that they are adopting an appropriate litigation strategy. A party faced with a premature or inappropriate summary judgment motion should have the option of moving to stay or dismiss the motion where the most efficient means of developing a record capable of satisfying the full appreciation test is to proceed through the normal route of discovery. This option is available by way of a motion for directions pursuant to rules 1.04(1), (1.1), (2) and 1.05. [Emphasis added.]
hurdle in the way of the summary judgment motion”. In so finding he suggested that the timing of summary judgment motions is generally an issue only where the motion is brought pre-discovery: “As I read the Combined Air case, the court intended motions for directions for cases where the action had not proceeded to discoveries and it was therefore arguable that a motion for a summary judgment would be premature”.

(2) Post-Discovery is Too Late

However, there exist other decisions suggesting that, once discovery has been completed, a summary judgment motion is often not appropriate. This opposing view is rooted in concerns about court resources and judicial economy: why bring a summary judgment motion, which may or may not resolve some or all of the actions in a matter, when the entire action can be fully and finally determined if taken to trial?

Justice Brown has commented in George Weston Ltd. v. Domtar Inc. that he has observed a “motions culture” in which lawyers prefer to “consume court time with process-related interlocutory motions, instead of proceeding to a timely adjudication of a case on the merits”. In his view, there is such a culture among the bar in the Toronto Region in particular, in which lawyers seem to prefer summary judgment motions over trials. Justice Brown states that judges must “find ways to manage civil litigation more efficiently” and use their case management powers to encourage final determinations on the merits of matters and to adjudicate urgent requests for interim relief to preserve the status quo until a final determination can be made. The fact is, a successful summary judgment motion does result in a final determination. This is the reason an appeal of such a decision is to the Court of Appeal as of right. The difference between trial and summary judgment is that on a motion for summary judgment a judge may decide that the matter must proceed to trial because the motion record does not provide the

15. Livingston, supra note 13. [Emphasis added.]
17. Ibid. at para. 13.
18. Ibid. at para. 30.
19. Ibid. at para. 31.
20. Ibid. at para. 21.
21. Apart, of course, for cases in which the amount is less than $50,000, in which case the appeal is as of right to the Divisional Court. See Courts of Justice Act, R.S.O. 1990, c. C.43, s. 19(1.2).
means for a full appreciation of the case. After trial, whatever the shortcomings of the record or its complexity, the trial judge must render a decision.

(3) Response: Motions to Stay Motions

In response to these concerns about inappropriate summary judgment motions and in reliance on para. 58 of Combined Air, counsel have now started to bring motions to stay summary judgment motions.22 There now exists a test to stay a summary judgment motion pre-discovery23 and a test to stay a summary judgment motion post-discovery.24 A further case suggests that aspects of the previous two tests are particular to the Commercial List, have limited application in regular Superior Court actions and that the long-standing “clearest of cases” test should be applied in the case of regular Superior Court actions.25

In the experience of one of the authors, some Toronto counsel are now even threatening to oppose the scheduling of summary judgment motions at Motions Scheduling Court on the basis that the motion is premature or otherwise inappropriate.26

In the wake of all of these conflicting directions and decisions, counsel are left asking: when is that perfect “Goldilocks moment” during which the time is ripe to bring a summary judgment motion? When is it not too early, not too late and the record is just right?

22. For an excellent discussion of the practical implications of the stay tests outlined in Justice Brown’s decision in the Weston case see W. Brad Hanna, “Motions to Stay Summary Judgment Motions – Recent Developments” (Paper delivered at the 2nd Annual Civil Litigation Summit, June 11, 2013), [unpublished].


24. Ibid. at para. 56.


26. It is questionable if there is any basis for counsel to oppose the scheduling of a summary judgment motion at a time when, presumably, the record has not been prepared and, in any event, is not before the Motions Scheduling Judge. It would seem to the authors that, in all but the most extraordinary cases, a party has a right to at least schedule its summary judgment motion. If it turns out that such a motion was inappropriately brought, counsel may move to stay the motion and/or seek to recover their costs.
(4) The Big Picture

Instead of engaging in this debate, we decided to take a step back. Are these discussions generated by new problems caused by the 2010 rule amendments and the decision in Combined Air? Is it actually the case that under the new Rule there has been a flood of summary judgment motions? Are many more “inappropriate” summary judgment motions now being brought? Has there been a dramatic increase in summary judgment motions? If so, has this increase been focussed in particular judicial regions, such as Toronto? What is the current success rate of summary judgment motions?

And, perhaps most importantly, has the revised rule and the Court of Appeal’s guidance in Combined Air resulted in a change in the success rate of summary judgment motions? That was the purpose of the 2010 rule change.27 And, after all, a party considering a motion for summary judgment usually wants to know one thing: “What are my chances?”

3. Methodology

In order to assess the impact of the Combined Air decision, we decided that a quantitative approach would be more useful than a qualitative one.

In order to compare the operation of Rule 20 before the amendments and after the Court of Appeal decision in Combined Air we collected data for 2009 and 2012. The data in 2009 represent the operation of Rule 20 prior to the rule amendments coming into force. The data in 2012 represent the operation of Rule 20 after the decision in Combined Air, which was decided on December 5, 2011.

All our data were collected in Microsoft Excel. We recorded every Ontario summary judgment case reported on CANLII that was determined in 2009 and 2012. We determined the outcome of each case, and identified the month of the decision and the region where the case was decided.28 However, the counts for some outcomes were too low to provide a reliable basis for statistical analysis. Consequently, the data were collapsed into outcomes by quarter29 and outcomes for the Toronto region compared to all other regions.30

27. Osborne Report, supra note 5 at p. 33.
28. Region was determined based on the region to which the motion judge was currently assigned, according to the Superior Court of Justice website.
29. The quarter variable refers to quarters of the calendar year: January-March (“Q1”), April-June (“Q2”), July-September (“Q3”), and October-December (“Q4”).
We also recorded whether the decision was an application for leave to appeal to the Divisional Court, and whether the appeal was to a judge from the Master, to the Divisional Court or to the Court of Appeal. In the case of appeals, the case was assigned to the region where the case originated and the outcome of the summary judgment was assigned based on the decision on appeal. Thus, where the Court of Appeal overturned a decision that had granted summary judgment, we recorded this as a denial of summary judgment, but also as an allowed appeal. Thus, our statistics on the rates at which such motions have been granted, partially granted or dismissed include appellate decisions.

With respect to appeals, the counts for some outcomes were also too low to provide a reliable basis for statistical analysis. Accordingly, we collapsed motions for leave, appeals heard by the Court of Appeal and appeals heard by the Divisional Court into a single data set of appeals allowed or denied in each of 2009 and 2012.

The data gathered as described were analyzed by statisticians Derrick Gray and Ricardo Gomez-Insausti.

The data are set out in Tables 1-3. We have also charted these data to provide a visual representation of the results. While there are apparent differences in the basic data, our discussion of the conclusions that can be reliably drawn from these data is based on the statistical analysis of the data, including the underlying probability of particular outcomes.31

(1) A Short Note on Statistics

Because lawyers come from a variety of backgrounds, not everyone has the same familiarity with statistical analysis. The ability of people to assess statistical questions by instinct is notoriously bad. Many people who buy lottery tickets would never give a second thought about going outside in a storm even though the likelihood of being struck by lightning is much greater than the chance of buying the winning ticket.32

30. The seven other regions include Central East, Central South, Central West, Northeast, Northwest, East, Southwest.
31. For example, while a particular outcome in 2009 may be 3.57 and in 2012 may be 3.64, this difference may not be statistically significant and the underlying probability of that outcome may be 3.60 in both years.
32. The chance of any individual being struck by lightning in a year has been estimated by the United States National Weather Service of being between 1 in 500,000 to 1 in 750,000. See United States National Weather Service, “Lightning”, available at: <http://www.srh.noaa.gov/jetstream/lightning/lightning_faq.htm#2>. The chance of buying the winning ticket in the Lotto
This is a short explanation on the purpose of the statistical analysis of the data discussed in this paper. When there are two different values for something being measured, the most important question is whether the difference means anything; in other words, is the difference significant. Assume three different people measure the thickness of a particular book with the same ruler. Each of them will probably get a slightly different number. Since we all know that the thickness of the book has not changed between measurements, without any detailed statistical analysis, we know that the differences among the values are not significant. A more difficult problem arises if someone wants to know if the average temperature on June 20 over the last one hundred years is significantly different from the average temperature on June 21. A statistician would be able to look at the distributions of temperatures for those two days over the one hundred years, and determine whether the difference in the average is significant. A statistician could also determine the conditional probability that the temperature will exceed 20°C on those two days.

With the data we collected, the most important question we sought to answer was whether the amendment to Rule 20, as explained in Combined Air, had any impact on the rate of success for summary judgment motions. While there may be observable differences in the outcomes between 2009 and 2012, the purpose of the analysis is to tell us whether there is a real statistical difference. Statistics is the discipline that lets us derive from experience only the wisdom that is in it, and no more. 33

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33. Mark Twain wrote: “We should be careful to get out of an experience only the wisdom that is in it – and stop there; lest we be like the cat that sits down on a hot stove-lid. She will never sit down on a hot stove-lid again – and that is well; but also she will never sit down on a cold one anymore.” See Mark Twain, Following the Equator (American Publishing Company, 1897).
4. The Data

Table 1 – Outcomes by Quarter

<table>
<thead>
<tr>
<th></th>
<th>2009</th>
<th></th>
<th></th>
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<th>2012</th>
<th></th>
<th></th>
<th></th>
</tr>
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<tbody>
<tr>
<td></td>
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<td>Partial</td>
<td>Denied</td>
<td>Total</td>
<td>Granted</td>
<td>Partial</td>
<td>Denied</td>
<td>Total</td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Q1</td>
<td>38</td>
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<tr>
<td>Q2</td>
<td>32</td>
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<td>7</td>
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<td>4</td>
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<td>56.2</td>
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<tr>
<td>Q4</td>
<td>25</td>
<td>46.3</td>
<td>8</td>
<td>14.8</td>
<td>21</td>
<td>38.9</td>
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<td></td>
<td>122</td>
<td>55.2</td>
<td>25</td>
<td>11.3</td>
<td>74</td>
<td>33.5</td>
<td>221</td>
<td>56.1</td>
</tr>
</tbody>
</table>

Chart 1 – Outcomes by Quarter

For both 2009 and 2012, the analysts identified differences in counts between quarter and year. However, they determined the differences in the likelihood of outcome are not significant.

The analysts also observed that many more summary judgment motions were determined in 2012 (319) compared to 2009 (221), and that more motions were determined in the first half of the year (123 in 2009 and 189 in 2012) compared to the second half (98 in 2009 and 130 in 2012). The analysts determined that this increase was statistically significant.
The analysts also determined that the conditional probability of a given outcome within a specific quarter and year were equivalent across all years and quarters; namely, no matter when during 2009 or 2012 the motion was determined, the probability of a motion being granted was 55.7%, the probability of partial summary judgment being granted was 9.4% and the chance of a motion being denied was 34.8%. Put another way, a party rolling the dice on a summary judgment motion had the same probability of success regardless of the year or quarter in which the motion was determined.

Table 2 – Outcomes by Region

<table>
<thead>
<tr>
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<th>2009</th>
<th>2012</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td>Partial</td>
</tr>
<tr>
<td>Reg.</td>
<td>N %</td>
<td>N %</td>
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<tr>
<td>T.O.</td>
<td>70 58.3</td>
<td>14 11.7</td>
</tr>
<tr>
<td>All Oth.</td>
<td>52 51.5</td>
<td>11 10.9</td>
</tr>
<tr>
<td></td>
<td>122 55.2</td>
<td>25 11.3</td>
</tr>
</tbody>
</table>

Chart 2 – Outcomes by Region

In 2009, Toronto had more summary judgment determinations than all other regions combined: 120 compared to 101. In 2012, it had fewer than all other regions combined: 134 compared to 185. However, the analysts found that the growth in cases in Toronto was not significant, while the growth in cases in the balance of the Province was significant.
With respect to motion outcomes, the analysts again calculated the conditional probability of a particular outcome given a specific region and year, and determined that the probability of a given outcome was equivalent across all years and regions; namely, that the probability of a motion being granted was 55.7\%, the probability of partial summary judgment being granted was 9.4\% and the chance of a motion being denied was 34.8\%. This is identical to the result obtained in the analysis by quarter and year discussed with respect to outcome by quarter. Again, a party had the same probability of success regardless of when or where the motion was determined.

### Table 3 – Appeals

<table>
<thead>
<tr>
<th>Year</th>
<th>Allowed</th>
<th>Denied</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>2009</td>
<td>12</td>
<td>31.6</td>
<td>26</td>
</tr>
<tr>
<td>2012</td>
<td>12</td>
<td>23.5</td>
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<tr>
<td></td>
<td>24</td>
<td>27.0</td>
<td>65</td>
</tr>
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</table>

### Chart 3 – Appeals

The analysts calculated the conditional probability of a particular outcome given the year and determined that, in both 2009 and 2012, the probability of an appeal being allowed was 27.0\%, and the probability of it being denied was 73.0\%. Differences between the years were not statistically significant.

(1) **The Rate of Summary Judgment in the United States**

Professor Bogart discusses an earlier study by W. P. McLAUCHLAN. This study examined the United States experience with its summary
The purpose of Mclauchlan's study was somewhat different than our attempt to measure the impact of the 2010 amendment to Rule 20 and the subsequent Combined Air decision setting out the guidelines for putting the amended rule into practice. He looked at two different data sets. The first data set included all reported federal cases between 1938 and 1968 dealing with summary judgment. The second data set examined all cases filed in the District Court for the Northern District of Illinois in 1970.

While the observations and conclusions Mclauchlan made are not directly relevant to the current situation in Ontario, the data on the rates of success of summary judgment motions in the United States federal system are worth considering. We present a summary of the data from Table 2 of Mclauchlan's paper restated to be comparable to our own data.

35. Mclauchlan explained his paper as "a first attempt to examine the summary judgment motion in terms of how it functions in the federal judicial system".
36. Among the things Mclauchlan attempted to measure were the rates of allowance of summary judgment depending upon the type of case. In our study we did not attempt to categorize our data in this way. Mclauchlan's Table 2 contains a couple of insignificant errors that can likely be attributed to the fact that the paper predates the widespread adoption of spreadsheet programs on personal computers. We have corrected these errors in our presentation of the data.
Table 4 – United States District Court Disposition Rates 1938-1968

<table>
<thead>
<tr>
<th>Type of Action</th>
<th>One Party Moved</th>
<th>Both Parties Moved</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Granted</td>
<td>Denied</td>
</tr>
<tr>
<td></td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>Contract</td>
<td>62.3%</td>
<td>86</td>
</tr>
<tr>
<td>Real Estate</td>
<td>73.9%</td>
<td>17</td>
</tr>
<tr>
<td>Tort</td>
<td>67.0%</td>
<td>69</td>
</tr>
<tr>
<td>Statutory</td>
<td>50.4%</td>
<td>127</td>
</tr>
<tr>
<td>Other</td>
<td>73.3%</td>
<td>11</td>
</tr>
<tr>
<td>Total</td>
<td>58.4%</td>
<td>310</td>
</tr>
</tbody>
</table>
The rates of full and partial summary judgment are slightly higher than our data show is the case in Ontario and, consequently, the rate at which summary judgment is completely denied is lower than our data show is the case in Ontario. We acknowledge there is an additional factor in the United States that would tend to work against the grant of summary judgment: the right to a jury trial. Given that the jury trial is far less prevalent in Ontario, we believe Ontario's comparatively lower rates of summary judgment are being caused by some other factor. Given the historically great resistance to summary judgment that we have seen in Ontario, we believe a factor may be that, in Ontario, the "every person is entitled to their day in court" norm is particularly ingrained in the consciousness of Ontario litigants and that this norm is at least partially the cause of Ontario's low rate of summary judgment.

5. Discussion

(1) What Do the Numbers Tell Us?

- There was a significant increase in the overall number of summary judgment motions determined in 2012 compared to 2009. This increase is due primarily to the greater number of cases commenced outside the Toronto region. In the same period, the change in the distribution of population and judicial resources was almost unchanged.  

37. Professor Bogart notes in his paper that "the mystique of the jury in the United States does not exist in . . . Canada". See Bogart, supra note 8 at p. 579. In Ontario, 23% of civil cases were tried by jury in 2005-2006. See Ministry of the Attorney General, Civil Juries, available at: <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/090_civil.asp>. In the United States, approximately 70% of civil cases were tried by jury in 2005. See Lynn Langton and Thomas H. Cohen, Civil Bench and Jury Trials in State Courts, 2005 (U.S. Department of Justice, Bureau of Justice Statistics, 2008).

38. We felt it worth considering the distribution of summary judgment motions between Toronto and the other judicial regions of Ontario in comparison to the distribution of its population and the distribution of Superior Court Judges and Masters. We found that the proportion of summary judgment motions brought in Toronto is greater than its proportion of the population or its proportion of judicial officers of the Superior Court. We also noted that between 2009 and 2012 there are no apparent shifts in population distribution or the distribution of judges and masters. However, without an analysis of the total caseload of the Superior Court in all matters it is not possible to come to a firm conclusion whether the higher proportion of summary judgment motions being brought in Toronto is statistically
While the number of summary judgment motions in Toronto did not increase significantly, outside Toronto did see a significant increase in the number of summary judgment motions. (Toronto is not a "hotbed" of summary judgment motions.)

- The outcomes of summary judgment motions in 2009 and 2012 were not affected by year or region.
- There is no significant difference in the likelihood that a summary judgment motion will be granted, partially granted or denied as between 2009 and 2012.
- There is no significant difference in the likelihood that a summary judgment motion will be granted, partially granted or denied across all regions, in both years.
- The likelihood that an appeal from a summary judgment motion will be allowed or denied is statistically identical in 2009 and 2012.

(2) In Other Words, the More Things Change . . .

The title for this paper is taken from a remark attributed to the famous New York Yankees’ catcher Yogi Berra.³⁹ It seems fitting given the insignificant impact of all the effort that went into debating the 2010 amendments to Rule 20 and the five cases argued in Combined Air before a rare five judge panel of the Court of Appeal.

We anticipate that many Ontario lawyers will be surprised to learn that more than 50% of summary judgment motions brought in 2009 succeeded. But it is shocking to discover that a rule change that was expressly designed to make summary judgment more available as a means of finally determining litigation has not made any measurable difference in the anticipated outcome of such a motion.

The significant increase in the number of motions brought in 2012 compared to 2009 suggests that the profession certainly thought that the likelihood of success was greater under the new Rule. It is worth considering whether the 2009 motion determination outcome percentages (a 55.7% probability of a motion for summary judgment being completely successful and a further 9.4% probability of it being partially successful) are actually unsatisfactory, requiring a rule change to make summary judgment

more available. If this combined "success rate" of 65.1% is acceptable, then no amendment was required to Rule 20.

Why did the amendment to Rule 20 and the decision in Combined Air have no impact on the rate of successful summary judgment motions? We conclude that Professor Bogart was correct to identify the "every person is entitled to their day in court" norm as a major factor. This is a compelling concept, deeply rooted and sufficiently powerful to neutralize language plainly intended to increase the rates at which summary judgment is granted.

It is our view that if we want to see a summary judgment rule in Ontario that reliably resolves cases that do not require a trial, more than a change to Rule 20 needs to occur. What follows are our recommendations about how such change might be achieved.

6. Recommendations and Conclusions

(1) Access to the Courts, Not to Trials, Must Be Promoted

Professor Bogart was correct to emphasize that the right to be present in court to argue one's case need not mean that every litigant is entitled to a full trial. In 2007, the year the Osborne Report was published, the Toronto Star estimated that a three-day civil trial in Ontario was likely to cost at least $60,738.40 Neither the state nor the parties can afford such high costs.

In many cases individual litigants are forced by financial circumstances to settle short of a trial. Would these individuals prefer a decision from a judge argued on a written record to a decision imposed by financial constraints? We are concerned that the pursuit of evidentiary "perfection" in the form of a full trial effectively imposes decisions on litigants that are dictated by the financial resources of the parties, rather than by the merits of the case.

How such a shift in thinking might be encouraged is a topic that is well beyond the scope of this paper. However, for a change in the rate of summary judgment to occur, this shift must be universal and occur in the minds of litigants, members of the Bar and members of the Bench. Unless we truly want to change, nothing will.

(2) Promote a More Balanced Development of the Law of Summary Judgment

We noted in our earlier paper that the Ontario Rules respecting appeals are asymmetrical and may favour narrowing the scope of the summary judgment Rule over time. That is because an appeal from an order dismissing a motion for summary judgment lies to the Divisional Court with leave but an appeal from summary judgment goes to the Court of Appeal as of right. An appeal from the Divisional Court to the Court of Appeal also requires leave. Accordingly, the Court of Appeal is unlikely to hear an appeal from a decision in which summary judgment has been refused. Any "new law" that is made by the Court of Appeal will tend to be in circumstances where summary judgment is overturned or partially overturned and the Rule is more narrowly or restrictively applied. The factual circumstances that might suggest that a broader interpretation of the rule is required are unlikely to come to the Court of Appeal. These circumstances create a situation in which Ontario's highest court is more likely to create law reversing rather than affirming summary judgment. Lower courts, bound to follow these appellate decisions, may be directly as well as unconsciously influenced to apply the summary judgment rule more restrictively.

In order to ensure that the development in the law is balanced, we propose that all appeals of summary judgment decisions would be to the Divisional Court as of right. The record for the summary judgment motion would be the record in the Divisional Court. Apart from the cost of reproducing two extra copies there would be no additional cost incurred for preparing the record. In addition to the memoranda of fact and law filed on the summary judgment motion, the parties would be required to deliver a shorter supplementary memorandum to address the specific points raised in the notice of appeal. The usual standard of review would apply to these appeals.

41. For our full comments on this point, please see our earlier paper. Wells, Boudreau and Forristal, supra note 1 at footnote 93.
43. The point is illustrated in the recent decision of the Court of Appeal in Canaccord Capital Corp. v. Roscoe, 2013 ONCA 378, 115 O.R. (3d) 641, 306 O.A.C. 382 (Ont. C.A.), an appeal from a dismissal of a motion for summary judgment brought by the defendant based on a limitations defence. The trial decision is reported at 2012 ONSC 5714, and is included in our data for 2012. The parties and the Court of Appeal appear to have treated the decision dismissing the motion for summary judgment as a final order, and the Court of Appeal reversed and granted summary judgment.
Any further appeals would be in accordance with the rules that apply to all other appeals from the Divisional Court. Cases involving $100,000 or less (for which an appeal after a trial would lie to the Divisional Court) would have the appeal heard by a single judge of the Divisional Court.

This process would ensure that all types of summary judgment dispositions would be subject to appellate review in the same court, encouraging a more balanced development of appellate case law in this area. It would simplify the steps needed to prepare the appeal and thus reduce the cost to the parties.

(3) Case Manage Summary Judgment Motions to Promote Effective Use of Judicial Resources

Some judges, notably Justice Brown, have acknowledged the considerable waste of resources when a summary judgment motion is brought, but fails.\footnote{Weston, supra note 16 at para. 30.}

A summary judgment motion may result in the grant of full summary judgment, or it may not. By contrast, a trial will always result in a final determination on the merits. From the perspective of the allocation of scarce judicial resources, the trial exerts a strong attraction because the amount of judicial time devoted to hearing a trial always will result in a final determination on the merits, whereas devoting an equal amount of time to dealing with a complex summary judgment motion may or may not result in a final adjudication.

These are significant concerns but they can be addressed. One solution is to have the motion judge case-manage the matter going forward. In other words, a judge dismissing a motion for summary judgment will be assigned the responsibility for having that case brought to trial as efficiently and expeditiously as possible. The motion judge will have spent many hours familiarizing himself or herself with the evidence in support of that motion. If that judge is not able to grant summary judgment because the record does not permit a full appreciation of the case, the same judge can then put that familiarity to good use. For instance, they can take steps to ensure that the discovery is completed as quickly as possible and focuses on those areas where the record was found to be deficient.\footnote{We assume that in most cases the motion judge will convene a case conference to discuss with counsel what discovery is necessary to ready the case for trial and set a schedule for the completion of the steps necessary to have a trial.}

We further propose that the record from the summary judgment motion would form part of the evidence at the trial. Additional
evidence would be introduced at the trial, but presumably would be concentrated on those areas where the motion record failed to permit the motion judge to form a full appreciation of the case. Ideally the motion judge would also try the case. The sooner the trial takes place after the hearing of the motion the better for the parties and for the judge in terms of making use of the effort and preparation that was expended for that motion.

We appreciate that this proposal is not without practical difficulties. The longer a case takes to come to trial after a summary judgment motion the less valuable the motion judge’s initial familiarity with the case becomes. The use of the motion record as trial evidence also poses a risk of duplication of evidence and parties trying to split their case between the written record and the conventional trial evidence. On the other hand, the current system that effectively requires all the evidence from the motion to be resubmitted at a trial entails significant cost and waste of resources. Few movie sequels are as good as the original, and the same is doubtless true of evidence. Furthermore, we acknowledge that case management may pose problems in specific judicial regions, depending on the number of judges available and the number of summary judgment motions commenced in that centre. However, despite these difficulties we believe that taking advantage of the motion judge’s investment of time and the parties’ efforts of creating the motion record is preferable to simply discarding the fruits of that time and effort.

7. Conclusion

The increasing cost of litigation is having a profound effect on access to justice. It is pointless to say that the halls of justice are open to all if a significant number of citizens cannot afford to enter. To preserve access to justice, we must rethink what it means to have access to the judicial system. Access to justice should mean that the courts are accessible to all for the adjudication of civil disputes, not that everyone’s dispute will be determined following a trial. Adjusting our concept of access to justice, encouraging a more even development of the law of summary judgment and case-managing actions in which summary judgment motions are brought, will improve access to the courts and make the judicial system more efficient and effective. History has shown us that such goals cannot be accomplished by tinkering with the summary judgment Rule. It is time to try another approach.
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