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Optech v Sharma: a call for a practical approach to summary judgment

It has been over a year since Ontario's summary judgment rule was significantly changed to encourage more litigants to dispose of actions before trial. But are the reforms working as intended? At least one Ontario Superior Court Judge believes they are not. In the recent case of *Optech Inc v Sharma*,[1] Justice David Brown put forward a comprehensive critique of the court's new powers, arguing that they may actually increase the costs and complexity of litigation.

As a practical solution, Justice Brown suggests that judges hearing summary judgment motions should be asking, "How much more would I need to decide this case?" The *Optech* decision represents some of the most significant judicial guidance on the new summary judgment rule to date.

the 2010 amendments: expanded powers for motion judges

On January 1, 2010, significant amendments to Ontario's *Rules of Civil Procedure* came into effect, aimed at improving the accessibility and affordability of the civil justice system. In particular, the old summary judgment test under Rule 20 was viewed as too strict, which discouraged parties from seeking summary judgment. Further, the utility of Rule 20 was impaired by case law holding that a motions judge could not assess credibility, weigh evidence, or find facts on a motion for summary judgment.

[1] 2011 ONSC 680.

The 2010 amendments changed the test for granting summary judgment from a finding that there is "no genuine issue for trial" to the similar sounding but more permissive "no genuine issue requiring a trial" test. Most significantly, courts were given enhanced powers under the new rule to weigh evidence, evaluate the credibility of deponents, and draw any reasonable inference from the evidence. Courts were also given the power to order "mini-trials" as a second phase of the summary judgment motion in which the court may "order that oral evidence be presented by one or more parties, with or without time limits on its presentation."

The intended effect of these new powers was to make it easier for litigants to obtain summary judgment.

Optech Inc v Sharma and Justice Brown's critique of the new summary judgment rule

In *Optech,* the plaintiff, a manufacturer, alleged a former employee (one of the named defendants) hatched a kickback scheme by which the defendants reaped over $800,000 in secret commissions. The plaintiff moved for summary judgment to recover the commissions, and the former employee defendant brought a counter-motion for summary judgment in respect of unpaid invoices. Justice Brown dismissed both motions.

In coming to his decision, Justice Brown discussed the role of the court on a summary judgment motion in contrast to a regular trial. While both procedures offer parties the opportunity to adduce evidence, to make legal arguments on material issues, to test the evidence proffered by one another and for judges to make findings of fact, Justice Brown pointed out that summary judgment motions have considerable procedural drawbacks compared to a trial.

For instance, in a trial both parties will receive a final adjudication on the merits. Summary judgment, by contrast, lacks this "adjudicative symmetry." Further, Justice Brown argued that the out-of-court examinations used for summary judgment motions make counsel more likely to get away with improper conduct, and

can deprive judges of the opportunity to observe witnesses and to take into account subtle factors useful to assessing their credibility.

mini trial, major headache?

The latter factor is somewhat mitigated by the availability of the "mini-trial" under Rule 20.04(2.2). Justice Brown noted, however, that the mini-trial is not mandatory, and is deployed only at the discretion of the motion judge. Even if it is ordered, however, the reality that a summary judgment "mini-trial" will act as an expensive surrogate for a regular trial, which has troubling implications since the purpose of summary judgment is to ascertain whether a trial is required in the first place.

Ultimately, the mini-trial may operate contrary to the principles of judicial access and economy that the rule change was meant to promote:

> Why go to the time, trouble and expense of hearing *viva voce* evidence unless there exists a realistic prospect that by the end of the mini-trial a final decision on the merits of a claim or defence can be made? If the mini-trial simply operates as a screening device, a kind of "look-see" before the real "regular" trial, without finally disposing of an action, then Rule 20.04(2.2) would have the perverse effect of saddling litigants with an extra layer of costs in an already expensive contemporary litigation process. Hardly what was intended by the recommendations of the Osborne Report. The mini-trial must have the potential to serve as the "regular trial" if its expense is to be justified.[2]

a practical approach: "How Much More Would I Need To Decide This Case?"

In light of these concerns, Justice Brown proposed a practical approach to provide further guidance to the "genuine issue

[2] *Ibid* at para 40.

requiring a trial" test and promote the responsible use of mini-trials. He suggested that at various points in the motion judge's decision-making process, he or she should ask, "How much more would I need to decide this case?"

If, when looking at the quality of the record from that perspective, the judge is able to conclude that "the nature of the factual dispute, assessed in light of the quality of the written evidentiary record," would enable him or her to " make findings of fact with the same degree of certainty, and subject to the same requirements of the law of evidence, as could be done at a regular trial…the case would be ripe for determination and final disposition on the basis of a summary judgment motion."

Finally, Justice Brown suggested that the mini-trial should only be considered in certain circumstances, and set out a number of factors for courts to consider when deciding to order a mini-trial:

- the number of witnesses who would have to testify (if there are a large number, then a regular trial is appropriate);
- the likelihood that the adjudication of the factual dispute on the mini-trial will result in the granting of the motion for summary judgment (if it is unlikely, a regular trial is appropriate);
- when scheduling the hearing of a summary judgment motion, consideration should be given to whether *viva voce* evidence will be required at the hearing of that motion to avoid holding mini-trials as a second phase of a summary judgment motion; and
- the complexity of the motion (if the case is very complex, then a regular trial is appropriate).

conclusion

Since the January 2010 amendments of the *Rules of Civil Procedure* came into force, courts in Ontario have debated the parameters of the motion judge's powers on summary judgment. The decision in *Optech* provides courts with some practical

guidance in exercising their enhanced powers under the new Rule 20. Arguably, *Optech* may even signal a shift back to a restrictive approach to summary judgment. Whatever the effect of Justice Brown's decision, the limits of summary judgment in Ontario will be a topic of judicial debate for the foreseeable future.

By Geoff Moysa and Diana Bloom, Student-At-Law

For more information on this topic, please contact:

Geoff Moysa	416.865-7235	geoff.moysa@mcmillan.ca