

# Case Law Update: Combined Air Mechanical Services Inc v Flesch

December 20, 2011

By Richard Ogden

2011 ONCA 764 (Released December 5, 2011)

## **Ontario *Rules of Civil Procedure* Summary Judgment**

The Court of Appeal for Ontario has used the principle of proportionality to inform what the Court calls a “new departure and a fresh approach” to summary judgment motions. Motion judges must deny a request for summary judgment if only a trial will give the “full appreciation” of the evidence and issues necessary to resolve the dispute. The likely practical effect of the ruling is as perhaps the Court desired not apparent.

*Combined Air Mechanical Services Inc. v. Flesch* (“**Flesch**”) (and four other appeals) provided a panel of five the opportunity to consider recent changes to Rule 20 of the *Rules of Civil Procedure* (“**Rule 20**”), which were designed to improve the efficiency of and access to the civil justice system. Rule 20 now states that courts shall grant summary judgment unless there is a “genuine issue requiring a trial”. Judges also now have explicit authority to weigh evidence, evaluate credibility, and draw reasonable inferences, and may order the presentation of oral evidence.

The Court stated its test for summary judgment as follows: “can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?”

The Court drew this test from the advantages which trials have over summary judgment motions. A trial judge sits in a “privileged position” because the judge can observe witnesses and view a developing “trial narrative”. This makes trials particularly helpful when there is: a voluminous record; many witnesses; different theories of liability against different defendants; numerous factual issues; credibility issues at the dispute’s heart; and the absence of documentary yardsticks to evaluate credibility. The effect of the test may be that judges must rely on their experience and sense of the need for a trial, and must do so with reference to the “touchstone of proportionality”.

The Court also held that the judge and not the moving party must initiate oral evidence at a summary judgment motion. A moving party must present a case that is capable of decision on the paper record. This restrictive conclusion gives light weight to the words “mini-trial” in Rule 20.

This “full appreciation” test acknowledges that trials generally give a better appreciation of factual issues than do summary judgment motions. However, in the author’s opinion a judge in a summary judgment motion will almost invariably have, on any absolute assessment, a *less full* appreciation than at trial. The real issue, therefore, is whether a motion judge has a *sufficient* appreciation of facts and issues to determine the issues. A judge should ask whether a trial could alter the inferences that, in reliance on ordinary logic and experience, he or she otherwise draws from the evidence available on the summary judgment motion. Any such conclusion must

itself be informed by consideration of proportionality between the complexity of the factual issues and their importance to the resolution of the case.

*Flesch* leaves much to the experience of motions judges. It delivers a tone rather than a test: summary judgment motions are helpful; judges shall be guided by proportionality. *Flesch* should be evaluated for this tone rather than the practical applicability of the new test. On this basis, it is easy to feel disappointment at the failure of the changes to Rule 20 to increase substantially access to justice and efficiency of the civil justice system.

**WeirFoulds**<sup>LLP</sup>

[www.weirfoulds.com](http://www.weirfoulds.com)

**Toronto Office**

4100 – 66 Wellington Street West  
PO Box 35, TD Bank Tower  
Toronto, ON M5K 1B7

Tel: 416.365.1110  
Fax: 416.365.1876

**Oakville Office**

1320 Cornwall Rd., Suite 201  
Oakville, ON L6J 7W5

Tel: 416.365.1110  
Fax: 905.829.2035