NUTS AND BOLTS OF A MINI-TRIAL, AND OTHER REFLECTIONS ON THE STATE OF SUMMARY JUDGMENT MOTIONS

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Ontario Bar Association, *"Post Combined Air and the New Summary Judgment Test – What's Happened so Far and Next Steps"*

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I. Introduction

[1] One of the 2010 amendments made to the summary judgment rule in the Ontario *Rules of Civil Procedure* was the expansion of the powers of the motion judge by including the power to direct oral evidence on the motion. Rule 20.04(2.2) provides as follows:

> (2.2) A judge may, for the purposes of exercising any of the powers set out in subrule (2.1), order that oral evidence be presented by one or more parties, with or without time limits on its presentation.

The new Rule 20.04(2.1) granted summary judgment motion judges extensive powers to weigh evidence and make findings of fact:

> (2.1) In determining under clause (2) (a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
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> 1. Weighing the evidence.
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> 2. Evaluating the credibility of a deponent.
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> 3. Drawing any reasonable inference from the evidence.

[2] So how has this new power to direct oral evidence on the motion, which the Rules dubbed the "mini-trial", fared in practice? Not well, in fact. More precisely, the "mini-trial" virtually has been ignored. Why, I cannot say for sure; I will hazard a few guesses later in this paper. But before doing so, I would like to take the opportunity of this conference to place before the Bar some information about the use of the "New Rule 20"; I will then make some general comments, from the perspective of a motion judge, about the use and misuse of the New Rule 20; and, finally, I will address the topic I was assigned – the "mini-trial".

II. The experience of the Superior Court of Justice with the New Rule 20

[3] In an article on justice system reform which appeared in the August, 2012 issue of *The Canadian Lawyer* magazine, Lee Akazaki, a former president of the OBA, suggested that judicial skepticism about the merits of the New Rule 20 has partly frustrated this attempt at justice reform:

> Lee Akazaki…says judicial skepticism has also partly frustreated an earlier attempt at justice reform on the civil side. In his 2007 Civil Justice Reform Project, Ontario's former associate chief justice Coulter Osborne said summary judgment was an underused tool that should be made more available through rule changes. But Akazaki says the province's judiciary has historically opposed summary judgment, and never changed its judicial allocation to meet the higher demand as a result of the new rule. "There has not been, for example, a specialized summary judgment motions court. You would have thought that if you were going to encourage the bringing of summary judgment motions to have more efficient judicial determinations for people who are litigating, you would actually divert judges away from short trials," he says. Instead, he says a recent decision of the province's appeal court has limited the role of summary judgment even further making it difficult to obtain prior to discoveries.[1]

[4] These are interesting comments. I do not agree with Mr. Akazaki's analysis of the current state of affairs, but his comments are a welcome example of the type of discussion which must take place between the Bench and the Bar about the use of summary judgment motions because, at least in the Toronto Region, Rule 20 motions are placing an enormous strain on fixed, limited judicial resources. When litigants in Toronto have to wait nine months for a date for a one-day hearing for a summary judgment motion, supply and demand are out of whack, and all participants need to discuss a solution. So I welcome Mr. Akazaki's comments, and I would encourage more from members of the Bar.

[5] What has the experience been with New Rule 20 motions? In preparing this paper I requested information from the Office of the Chief Justice of the Superior Court of Justice about the number of summary judgment motions dealt with by our Court since 2009, both under Rule 20 and in Rule 76 actions.[2] Although the information provided concerned "events", which included all scheduled events dealt with by a judicial officer, including adjournments, and therefore might over-state, to an extent, the actual number of summary judgment motions heard by judges, the data allowed for a year-over-year comparison of the number of summary

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[1] Michael McKiernan, *Helping or hindering?,* The Canadian Lawyer, August, 2012, p. 42, at p. 44.

[2] I wish to thank Ms. Roslyn Levine, Executive Legal Officer, Superior Court of Justice, for her assistance, and that of her staff, in generating the data.