The Revised Queen's Bench Rules,
Part 7: Resolving Claims Without a Full Trial

Contributors:

Jason Mohrbutter, MacPherson Leslie & Tyerman LLP

Lynsey Gaudin, Student at Law, MacPherson Leslie & Tyerman LLP

Michelle J. Ouellette, Q.C., McKercher LLP

Robert Affleck, Student at Law, McKercher LLP

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PART 7 OF THE NEW QUEEN'S BENCH RULES

Part 7 - Resolving Claims Without a Full Trial

This part of the Revised Queen's Bench Rules is designed to provide options for expediting legal proceedings, as demonstrated by the explanatory notes preceding the rules:

> ***What this Part is about:*** This Part allows a claim to be resolved through processes to expedite proceedings or avoid a full trial. These processes include applications:
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> • to resolve a particular issue or question, including a question of law;
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> • to apply for summary judgment; and
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> • to strike out a pleading or other document.

Rule 7-1 Application to Resolve Particular Question or Issues

Introduction

Rule 7-1 sets out the framework for determinations of "questions or issues". The closest equivalents in the current Queen's Bench Rules are Rules 188 and 189 (Part 16 – Raising Points of Law) and Rules 263 to 268 (Part 24 – Special Case).[1]

The full text of Rule 7-1 is set out below:

> 7-1 (1) On application, the Court may:
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> (a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of:
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> (i) disposing of all or part of a claim;
>
> (ii) substantially shortening a trial; or
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> (iii) saving expense;
>
> (b) in the order mentioned in clause (a) or in a subsequent order:
>
> (i) define the question or issue or, in the case of a question of law, approve or modify the issue agreed to by the parties;

[1] As noted in the Annotated Queen's Bench Rules under Part 24, "This Part remained basically unchanged since the 1912 rules (in 1991 rule 266 was deleted and rule 267 amended)."

(ii) fix time limits for the filing and service of briefs, an agreed statement of facts or any other materials required for the hearing; and

(iii) set out any other direction to organize the hearing;

(c) stay any other application or proceeding until the question or issue has been decided; or

(d) direct that different questions of fact in an action be tried by different modes.

(2) If the question is a question of law, the parties may:

(a) agree on the question of law for the Court to decide;

(b) agree on the remedy resulting from the Court's opinion on the question of law; and

(c) agree on the facts or agree that the facts are not in issue.

(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of an issue unnecessary, it may:

(a) strike out a claim or order a pleading to be amended;

(b) give judgment on all or part of a claim and make any [order] it considers necessary;

(c) make a determination on a question of law; and

(d) make a finding of fact.

(4) Division 2 of Part 5 applies to an application pursuant to this rule unless the parties agree otherwise or the Court orders otherwise.

(5) A determination of a question or issue mentioned in subrule (1) is final and conclusive for the purposes of the action, subject to it being varied on appeal.

Intended Scope of the Rule

The information note to Rule 7-1 suggests that the term, "question or issue", should be broadly interpreted:

In subrule 7-1(1), "a question or an issue" may include:

- questions of law,

- questions of fact,

- questions of mixed law and fact,

- questions of jurisdiction,

- questions of the legal capacity of the parties,

- questions of admissibility of evidence, and

- questions of the effect of other pending proceedings between the same parties in respect of the same subject matter.

Examples of the application of similar rules, upon which Rule 7-1 was modeled, include:

- whether a fee under a Federal Statute applied to a defendant (*Canada v MV Stormont*[2]);
- whether certain limitation periods were applicable and whether they barred the plaintiff's action (*Zolotow v Canada (Attorney General)*[3]); also see *Envision Edmonton Opportunities v. Edmonton (City)*[4] for another limitations issue;
- whether liability should be severed and determined separately from damages in a personal injury claim (*Nowicki v Price*[5]);
- whether entitlement of a claimant under dependant's relief legislation should be severed and determined separately from quantification of benefits (*Ponich Estate Re*,[6]).

Depending on the nature of the question or issue, a determination under Rule 7-1 has the potential to dispose of the whole of an action. As explained in *Schilling v Canada (Minister of Natural Resources)*[7] by Rothstein J.A. (as he then was) in reference to Federal Court Rule 220:[8]

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[2] *Canada v MV Stormont* 2011 FC 531.
[3] *Zolotow v Canada (Attorney General)* 2011 FC 816.
[4] *Envision Edmonton Opportunities v. Edmonton (City)* 2011 ABQB 29.
[5] *Nowicki v Price* 2011 ABQB 133.
[6] *Ponich Estate Re*, 2011 ABQB 33.
[7] *Schilling v Canada (Minister of Natural Resources)*, 2004 FCA 416.
[8] **220**. (1) A party may bring a motion before trial to request that the Court determine
(*a*) a question of law that may be relevant to an action;
(*b*) a question as to the admissibility of any document, exhibit or other evidence; or
(*c*) questions stated by the parties in the form of a special case before, or in lieu of, the trial of the action.
(2) Where, on a motion under subsection (1), the Court orders that a question be determined, it shall
(*a*) give directions as to the case on which the question shall be argued;
(*b*) fix time limits for the filing and service of motion records by the parties; and
(*c*) fix a time and place for argument of the question.
(3) A determination of a question referred to in subsection (1) is final and conclusive for the purposes of the action, subject to being varied on appeal.

> [15] To the extent that the answer to the preliminary question of law resolves all issues in the action, it determines the outcome of that action. There is nothing left after the preliminary question to go to trial. I acknowledge that a preliminary question may be relevant to only certain issues in an action and, in such case, the remaining issues may be reserved for a trial.

Comparison to Current Rules

Both Parts 16 and 24 of the current rules are expressly limited to either a "question of law" (Rules 263 & 264) or a "point of law" (Rules 188 & 189). Further, Part 24 expressly requires the parties to "concur in stating the question of law" and Rule 188 states "either party may make application to a chambers judge, supported by an agreed statement of facts".

The Court will usually require an agreed statement of facts before it will consider applying Rule 188. If there is no agreed statement of facts, the Court must be confident that accepting the allegations in the Statement of Claim will be a sufficient substitute. Generally, though, if there is *any* dispute as to the facts upon which a Rule 188 ruling must rest, the legal question should be resolved at trial. See, *Sampson v Allianz Insurance Co of Canada*[9] and *Reidy v Leader Star News Services*[10]. Also see *Insurance Co of the State of Pennsylvania v Cameco Corp*[11] at para. 5 for the general proposition that questions of mixed law and fact are not susceptible to determination under Rule 188.

Further, questions of great complexity are generally not considered suitable for determination under Rule 188. See, *Shield (Resort Village) v TD Bank*[12]and *John Deere v Watson Tractor*[13]. This is an understandable limitation given that Rule 188 determinations occur within a typical chambers setting with affidavits providing the evidentiary basis.

As will be discussed, Rule 7-1 arguably allows for a more expansive process within which to hear and determine questions or issues.

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[9] *Sampson v Allianz Insurance Co of Canada*, 2006 SKQB 410.
[10] *Reidy v Leader Star News Services*, 2001 SKQB 338.
[11] *Insurance Co of the State of Pennsylvania v Cameco Corp* 2010 SKCA 95.
[12] *Shield (Resort Village) v TD Bank*, [1989] 2 WWR 163 (C.A.).
[13] *John Deere v Watson Tractor* 2001 SKQB 107.

Two Step Process

Initial Application

Rule 7-1 envisions, at minimum, a two-step process. The first step involves an initial application to consider whether a particular issue or question is appropriately determined under the rule. If such a determination is appropriate, the Court may also consider the manner in which the question or issue should be determined at a subsequent hearing.[14]

The rule begins "On application, the Court may (a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of (i) disposing of all or part of a claim, (ii) substantially shortening a trial, or (iii) saving expense…."

As noted, Rule 7-1 is similar to Rule 220 of the Federal Court Rules. In *Canadian Private Copying Collective v J & E Media Inc*[15] the court noted at paragraph 43 that "it is only on consent of the parties that the Rule 220 procedure may be collapsed into a single hearing."

Further, Rule 7-1 closely follows Rule 7.1 of the Alberta Rules of Court.[16] In *Manson Insulation Products Ltd v Crossroads C & I Distributors*[17] at paragraph 21, Poelman J. noted

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[14] Generally see *Canadian Private Copying Collective v. J & E Media Inc.* 2010 FC 102 at paragraph 42.
[15] *Ibid*.
[16] 7.1(1) On application, the Court may
(a) order a question or an issue to be heard or tried before, at or after a trial for the purpose of
(i) disposing of all or part of a claim,
(ii) substantially shortening a trial, or
(iii) saving expense,
(b) in the order or in a subsequent order
(i) define the question or issue, or
(ii) in the case of a question of law, approve or modify the issue agreed by the parties,
(c) stay any other application or proceeding until the question or issue has been decided, or
(d) direct that different questions of fact in an action be tried by different modes.
(2) If the question is a question of law, the parties may agree
(a) on the question of law for the Court to decide,
(b) on the remedy resulting from the Court's opinion on the question of law, or
(c) on the facts or that the facts are not in issue.
(3) If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of the issue unnecessary, it may
(a) strike out a claim or order a commencement document or pleading to be amended,
(b) give judgment on all or part of a claim and make any order it considers necessary,

that "reasons of economy" lay behind the concept of a two stage procedure given that "the court should not be required to determine separately every question or issue in an action that the parties put before them, without first considering whether it would dispose of all or part of a claim, substantially shorten a trial or save expense. Similarly, a responding party should not be put to the expense of contesting on evidence and law the very question or issue proposed to be separately heard or tried, before having the opportunity to make submissions on whether there should be a separate determination."

The Court went on to note that a two stage procedure is "consistent with the purpose and intention of the new rules as set out in [Alberta's] Rule 1.2, which emphasize resolution of claims in a timely and cost-effective way and discourage applications that do not achieve that purpose. Preserving a two-stage procedure enables the court to ensure that separate determination of issues will occur only in proper cases."[18] (Alberta's Part 1 rules were used as the model for Saskatchewan's Part 1 "Foundational Rules" and are substantially similar, in particular Saskatchewan's 1-3 and Alberta's 1.2, both of which set out the purpose and intention of the Rules.)

The test to meet on the initial application will be discussed in greater detail later in this paper.

Manner of Determination

As part of the initial application, if the applicant is able to persuade the Court that an issue is appropriately heard or tried, the Court has the discretion to:

- define the question or issue, or in the case of a question of law, approve or modify the issue agreed to by the parties,[19]
- set out any other direction to organize the hearing;

(c) make a determination on a question of law, or
(d) make a finding of fact.

(4) Part 5 [Disclosure of Information] Division 2 [Experts and Expert Reports] applies to an application under this rule unless the parties otherwise agree or the Court otherwise orders.

[17] *Manson Insulation Products Ltd v Crossroads C & I Distributors* 2011 ABQB 51.

[18] An application to obtain judgment on the admissions obtained in the course of discovery, or otherwise, should be brought solely pursuant to rule 6-52 (the new version of current rule 247). Rule 6-52 allows a single application to determine whether judgment can be obtained based on facts that have been admitted.

[19] The reason why there is an apparent distinction between a "question or issue" and a "question of law" is that, as will be discussed further, Rule 7-1(2) appears to suggest that the parties should reach agreement on a question of law. Even where agreement is reached, the Court still has discretion to modify that agreement.

- stay any other application or proceeding until the question or issue has been decided;
- direct that different questions of fact in an action be tried by different modes.[20]

Under this part of the rule, the Court has greater discretion to determine the manner in which the question or issue should be determined. These applications could resemble a typical chambers motion. However, with the discretion to provide any direction that is necessary to organize the hearing, the Court will be able to craft an expanded hearing (assuming it is consistent with the intent of Rule 7-1 and the Foundational Rules).

Although these types of directions could be provided as part of the initial application, it is clear that the Court could defer certain details or arrangements until further input or submissions are received. Depending on the nature of the application, the Court could choose to concentrate on the initial threshold determination of whether the potential resolution of the question or issue will dispose of all or part of a claim, substantially shorten a trial, or save expense (and as will be discussed further, whether any determination made under Rule 7-1 is consistent with the Foundational Rules).

It may be that once the Court considers the threshold determination, the procedure or manner of determining the question or issue can be easily dealt with. However, the Court may desire further submissions regarding the procedure and manner of determination. Given the overriding principles set out in the Foundational Rules, parties should attempt to deal with these issues as much as possible in the initial application. While a two-step process is likely going to be the norm, the rule is flexible enough to allow for a modification of that template. That is likely the intent behind subrule (b) which says the order to determine a question or issue, or "*a subsequent order*" may include various provisions regarding the hearing to determine the question or issue.

[20] Rule 7-1(1)(b), (c) & (d).

Second Application

If an applicant convinces the Court that it is appropriate to resolve a question or issue, and the nature of the hearing is determined, then the second stage is based upon subrule (3):

> If the Court is satisfied that its determination of a question or issue substantially disposes of a claim or makes the trial of an issue unnecessary, it may
>
> (a) strike out a claim or order a pleading to be amended;
>
> (b) give judgment on all or part of a claim and make any order it considers necessary;
>
> (c) make a determination on a question of law;
>
> (d) make a finding of fact.

In order to get to the second stage the applicant must initially demonstrate, as required by subrule (1), that the resolution of the question or issue will dispose of all or part of a claim, substantially shorten a trial, or save expense. Subrule (3) seems to indicate that at the actual determination it should only provide a remedy where doing so "substantially disposes of a claim or makes the trial of an issue unnecessary." Query whether this ought to be determined as part of stage 1, such that subrule 7-1(3) may lead to a rehearing of the question.

A true two-step process ought not to involve a rehearing of the same issues heard in the initial application. Further, any finding made in the initial application which has not been overturned on appeal should be respected in the second application. Thus, the primary intent of subrule (3) must be to set out the remedies the Court can consider in its determination of the question or issue. The sentence prefacing the remedies merely reiterates the finding that has already been made in subrule (1).

In *Manson Insulation, supra*, Poelman J. interpreted Alberta's rule 7.1(1) and (3) in that fashion. These subsections are worded identically to Saskatchewan's Rule 7-1(1) and (3):

> [20]…Rule 7.1(3) is premised upon there having been an order under rule 7.1(1) and a determination made, and speaks only to the remedies available…rule 7.1(3) is part of the overall system that rule 7.1 provides for determination of particular questions and issues; it does not operate independently as it own procedure.

Further Interpretation and Application of Rule 7-1

As noted, Saskatchewan's Rule 7-1 and Alberta's Rule 7.1 share some identically worded subsections. The only differences are that Saskatchewan provides the Court with greater discretion to organize the second application through subrule 7-1(1)(b)(iii) (which does not exist in Alberta's rule). Saskatchewan's subrule 7-1(5), which confirms that a decision made on the second application is a final decision, also does not exist in Alberta's rule. In all other aspects, the rules are the same.

Alberta's Rule 7.1 has been in force for approximately one year. Several reported decisions are available to assist with the interpretation of the rule, primarily in respect of what factors are relevant to the initial determination of whether a question or issue is appropriately determined.

Disjunctive Nature of the Three Part Test in the Initial Application

In *Nowicki, supra,* Madam Justice Moen emphasized the disjunctive nature of the three factors that support determinations of questions or issues – disposing of all or part of a claim, substantially shortening a trial **or** saving expense. She noted the following in the context of determining whether to sever liability from damages in a personal injury/MVA trial:

> [26] As in *Envision*, I point out that the test is in three parts and those parts are disjunctive. That is, I only need to find one of them *to move on to considering the impact of the Foundational Rules…* (emphasis added)

Foundational Rules

As noted above, although only one part of the three part test in Rule 7.1(1) must be met, the Alberta Courts are of the view that the Foundational Rules must be separately considered. The extent to which the Foundational Rules should be considered a separate test or merely a guide to interpreting the three part test in Rule 7.1(1) is not clear.

In *Nowicki, supra,* Justice Moen focused on the following underlined portions of Alberta's Foundational Rules and separately considered each element, almost as a separate test to meet:[21]

> 1. Purpose and intention of these rules
>
> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> (2) In particular, these rules are intended to be used:
>
> (a) to identify the real issues in dispute,
>
> (b) to facilitate the quickest means of resolving a claim at the least expense,
>
> (c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable, ... (court's emphasis)

The role and function of the Foundational Rules, as discussed in *C(L) v Alberta*[22], suggest that even if one part of the three part test is seemingly met in isolation, that finding can be overridden after considering the Foundational Rules:

> [75] Rule 1.2 is clearly intended to guide the interpretation of the New Rules and might be described as the New Rules' guiding principles. Any application for relief under a Rule may bring Rule 1.2 into play, which will influence any interpretation issues. Rule 1.2 may be described as the lens through which all Rules must be interpreted. I expect that where there are competing interpretations, the interpretation closest to the intentions expressed in Rule 1 will prevail. However, there are competing interests identified in Rule 1.2: a fair and just result does not automatically equate with a timely and cost-effective one. Our system has long entitled a defendant to know the case it has to meet, which often requires extensive discovery that is both time-consuming and expensive. However, limiting discovery in the interests of timeliness and cost-effectiveness may be viewed as impairing a party's entitlement to a fair and just result.

In *Hunka v Dreger,*[23] Gill J. put it more generally:

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[21] See paragraphs 40 to 60. Justice Moen also engaged in a similar analysis in the *Envision* case.
[22] *C(L) v Alberta* 2011 ABQB 12.

> [30] In exercising discretion under Rule 7.1(1) the Court must be guided by the purpose and intention of the Rules as set out in Rule 1.2(1).

Similarly, Veit J. noted in *Ponich Estate, supra*, at paragraph 32: "Rule 7.1 must be interpreted in light of the Foundational Rules, which themselves encourage adoption of processes that will allow fair trials to be held more quickly and more cheaply."

Evidentiary Standard on the Initial Application

In describing the evidentiary standard Justice Moen in *Nowicki*, at paragraph 28, noted that a proper finding "does not require a finding to a certainty. If it were, then one would never sever. Rather, I must find that there *is a good chance* than an expense will be saved, or all or part of a claim will be disposed of, or that a trial will be substantially shortened." (emphasis added).

"A good chance" could be construed as more demanding than a balance of probabilities. Practically, Justice Moen seems to suggest that counsel should be able to cogently show how the determination of questions or issues will meet the purposes behind Rule 7-1 and the Foundational Rules before the Court sanctions the second application where time and expense will be incurred in determining those particular questions or issues.

In *Envision, supra*, at paragraph 121, Justice Moen also acknowledged that "the Court must consider the likelihood of a win." She went on to note that the applicant must at least prove a prima facie case in the initial application.[24]

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[23] *Hunka v Dreger*, 2011 ABQB 195.

[24] Also note *Canada (Minister of Citizenship and Immigration) v Obodzinzky* [2002] FCT 669 at paragraph 14 where the Court refused to reformulate the questions posed by the application on an initial application since "in view of the applicable case law in the Court and in the Supreme Court of Canada, the answers to the questions suggested by the defendant will not be in his favour and so the determination before trial sought by the defendant will in no way dispose of the case in whole or in part."

Application of the Test

It is trite to suggest that the context of each application will impact the application of the test. For example, in a breach of contract and fiduciary duty action, *Hunka v Degner*, *supra*, the applicant sought to sever the issue of a share valuation. The court refused to do so, noting that there would be a significant "overlap of witnesses" and any time saving would be minimal.

In *Nowicki*, however, Justice Moen drew upon her experience in addition to the application record in the context of a motor vehicle and personal injury claim to find differently: "It is our experience that the liability portion of a motor vehicle accident claim is by far the shortest part of the trial. The quantum portion of that claim is usually by far the longest and most expensive portion because of the numerous experts involved. Where liability is a live issue, settlement of an action becomes remote."[25]

Justice Moen then concluded that "severance of the liability portion of these actions will most likely dispose of part of a claim, could substantially shorten a trial because settlement will then be possible for the second and third actions, and save expense for Nowicki in the first action. If settlement is achieved by two of the plaintiffs, expense will be saved for them as well."[26]

Specific Considerations in Relation to Questions of Law

Rule 7-1(2) sets out further specific considerations in relation to questions of law. "If the question is a question of law, the parties *may* (a) agree on the question of law for the Court to decide, (b) agree on the remedy resulting from the Court's opinion on the question of law; and (c) agree on the facts or agree that the facts are not in issue." (emphasis added)

If the purpose of the initial application is to determine whether an appropriate issue *can* be determined, nothing in subrule (2) should be considered a prerequisite for a preliminary determination. This is especially so given the parties simply "may" do these things and that

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[25] *Nowicki*, *supra*, note 5 at paras 35 and 36.
[26] *Ibid* at para 38.

under 7-1(1)(b)(i) the Court has discretion to modify or define the question or issue put forward.

Obviously, the determination of questions or issues will be facilitated by an agreed statement of facts. Subrule (2) encourages parties to attempt to reach agreement but Rule 7-1 as a whole is not restricted to applications in which the facts are agreed upon.

Rule 58 of the Tax Court of Canada Rules shares some similarities with Rule 7-1.[27] In *Webster v Canada*[28] the Federal Court of Appeal stated that an agreed statement of facts was not necessary to determine a point of law, but if any dispute exists on a fact material for the determination of the point of law then the Court will not determine the issue under the Rule.

Rule 7-1, however, allows for the possibility of determining factual questions or issues. If such facts are material to a point of law and are conducive to determination under Rule 7-1, then related questions of law may also be determinable under Rule 7-1 regardless of whether an agreed statement of facts exists. Theoretically, Rule 7-1 might be available if there were a question of law that could dispose of a very complex claim, even though certain facts needed to be determined before that question of law itself could be determined.

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[27] 58. (1) A party may apply to the Court,

(*a*) for the determination, before hearing, of a question of law, a question of fact or a question of mixed law and fact raised by a pleading in a proceeding where the determination of the question may dispose of all or part of the proceeding, substantially shorten the hearing or result in a substantial saving of costs, or

(*b*) to strike out a pleading because it discloses no reasonable grounds for appeal or for opposing the appeal, and the Court may grant judgment accordingly.

(2) No evidence is admissible on an application,

(*a*) under paragraph (1)(*a*), except with leave of the Court or on consent of the parties, or

(*b*) under paragraph (1)(*b*).

(3) The respondent may apply to the Court to have an appeal dismissed on the ground that,

(*a)* the Court has no jurisdiction over the subject matter of an appeal,

(*b*) a condition precedent to instituting a valid appeal has not been met, or

(*c*) the appellant is without legal capacity to commence or continue the proceeding, and the Court may grant judgment accordingly.

[28] *Webster v Canada* 2002 FCA 205.

It is likely, though, that Rule 7-1 will be deployed more easily where the issues are discrete and can be determined without undue complexity. In other words, as the complexity of questions or issues increases, it may become more difficult to meet the tests under Rule 7-1 and the Foundational Rules.

Rule 7-2 - Application for Summary Judgment

Introduction

Saskatchewan is the last province in Canada to develop a comprehensive summary judgment procedure. Although summary judgment is not entirely new to the Queen's Bench Rules, its current application is extremely limited, being restricted to cases of debt or liquidated demand.[29] The Revised Rules bring Saskatchewan in line with the remainder of the country:

> **Application for summary judgment**
>
> **7-2 A party may apply, with supporting affidavit material or other evidence, for summary judgment on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed.**

Under the new rule, there are no limits to the types of claims that may be subject to a summary judgment application, and an application is available to any party to the proceeding, provided they bring themselves within the timeline set out in the Rule. Of note is the fact that a summary judgment application need not address the entire claim; the new rule allows a party to seek judicial assistance in focusing the proceeding.

Responding to an Application

An application for summary judgment requires the respondent to expand upon its pleadings by way of affidavit evidence providing personal knowledge of contested facts:

> **Evidence on application**

[29] Queen's Bench Rule 129(1); subrule 129(2) allowed the Court to strike any part of a claim that did not relate to a debt or liquidated damages, and deal with the application.

> **7-3(1) A response to an application for summary judgment must not rely solely on the allegations or denials in the respondent's pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial.**
>
> (2) The Court may draw an adverse inference from the failure of a party to cross-examine on an affidavit or to file responding or rebuttal evidence.
>
> (3) An affidavit for use on an application for summary judgment may be made on information and belief as provided in rule 13-30, but, on the hearing of the application, the Court may draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

A respondent to an application for summary judgment must be prepared to provide evidentiary support for the assertions in its pleading. An application for summary judgment should be a useful tool for disposing of clearly unmeritorious claims or defences based on unsubstantiated or "boilerplate" pleadings. Although subrule 7-3(3) allows affidavits "on information and belief", it carries the explicit caution that such evidence may be of little persuasive assistance, and may do a party "more harm than good", given the Court's ability to draw an adverse inference. The tone of the rule is an expectation of rigor in pleading and preparing one's case.[30]

Judicial Disposition

Rule 7-5 provides two routes to summary judgment:

> **Disposition of application**
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> **7-5(1)** The Court may grant summary judgment if:
>
> (a) the Court is satisfied that there is *no genuine issue requiring a trial* with respect to a claim or defence; or
>
> (b) the parties agree to have all or part of the claim determined by summary judgment and the Court is satisfied that it is appropriate to grant summary judgment. (emphasis added)

[30] See also Rule 7-4 which requires each party to a summary judgment application to file a brief supporting its respective position, and sets out procedural requirements (including an option for reply) as well as time-lines for filing. Subrule 7-5(8) provides that an applicant cannot bring a subsequent application for summary judgment without leave of the court.

Determining whether or not there is a "genuine issue requiring a trial" is the essence of the application; the interpretation of this key phrase will undoubtedly comprise the majority of judicial decision-making, as it has in other jurisdictions. This phrase will be discussed at some length later in this paper. Subrule 7-5(2) guides the judicial approach to determining whether there is a genuine issue requiring a trial:

> **7-5**(2) In determining pursuant to clause (1)(a) whether there is a genuine issue requiring a trial, the Court:
>
> (a) shall consider the evidence submitted by the parties; and
>
> (b) may exercise any of the following powers for the purpose, unless it is in the interest of justice for those powers to be exercised only at a trial:
>
> (i) weighing the evidence;
>
> (ii) evaluating the credibility of a deponent;
>
> (iii) drawing any reasonable inference from the evidence.

Thus, the Court is required to consider the evidence put forward by the parties, but may exercise considerable discretion in how it does so. The rule empowers the Court with relatively unrestrained discretion in its assessment of the evidence provided that it in fact considers the evidence. In addition, the Court has the authority to require oral evidence[31], or make a determination on a question of law where that is the only genuine issue before the Court.[32] Finally, if the Court is satisfied that the only issue for trial is a determination of an amount owed to a party, the Court may order a trial of that issue, or grant judgment with a reference or an accounting to determine the amount.[33]

While the pith of a summary judgment application will likely be the determination of whether or not there is a genuine issue requiring a trial, a finding that there is such an issue does not automatically defeat the application:

> **7-5**(6) If the Court is satisfied that there is a genuine issue requiring a trial with respect to a claim or defence, the Court may nevertheless

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[31] Subrule 7-5(3).
[32] Subrule 7-5(4).
[33] Subrule 7-5(5).

> grant judgment in favour of any party, either on an issue or generally, unless:
>
> (a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or
>
> (b) the Court is satisfied that it would be unjust to decide the issues on the application.

Provided that the evidence supports the necessary findings of fact, and it would not be unjust to do so, the Court has the discretion to expedite the process by deciding a matter, regardless of whether or not there is a genuine issue requiring a trial. This provision dovetails with section 7-5(1)(b) in which the parties agree to proceed by summary judgment. At the same time, the provision appears to provide a significant qualification to section 7-5(1)(a), in that in order to defeat an application for summary judgment, one would not only need to demonstrate that there is a genuine issue requiring a trial, but would also need to establish that the evidence on the application is insufficient to decide the issue, or convince the Court that it would be unjust to decide the matter.

If the Application Fails

As noted previously, subrule 7-5(8) confines an applicant to one summary judgment application, unless the Court grants leave for further consideration. Keeping in mind that a summary judgment may relate to the entirety of the claim, or a part of it, a judge may allow a trial to proceed in the ordinary way.[34] Upon dismissing part, or all, of a summary judgment application the Court may impose further terms, or offer such further direction, as outlined quite extensively in section 7-6(1) of the new Rules:

> **Directions and terms**
>
> **7-6**(1) If an application for summary judgment is dismissed, either in whole or in part, and the action is ordered to proceed to trial, in whole or in part, a judge may give any directions or impose any terms that the judge considers just, including an order:
>
> (a) specifying what facts are not in dispute;

[34] Section 7-5(7).

(b) defining the issues to be tried;
(c) establishing a time line for pre-trial procedures;
(d) regulating disclosure or production of documents or other evidence;
(e) permitting evidence on the application for summary judgment to stand as evidence at trial;
(f) specifying that the evidence of a witness be given in whole or in part by affidavit;
(g) specifying that any experts engaged by or on behalf of the parties in relation to the action meet on a without prejudice basis in order to identify the issues on which the experts agree and the issues on which they do not agree, to attempt to clarify and resolve any issues that are the subject of disagreement and to prepare a joint statement setting out the areas of agreement and any areas of disagreement and the reasons for them if, in the opinion of the Court:
(i) the cost or time savings or other benefits that may be achieved from the meeting are proportionate to the amounts at stake or the importance of the issues involved in the case; and
(ii) either:
(A) there is a reasonable prospect for agreement on some or all of the issues; or
(B) the rationale for opposing expert opinions is unknown and clarification on areas of disagreement would assist the parties or the Court;[35]
(h) directing payment into Court of all or part of the claim; and
(i) directing security for costs.

It is worth noting that, pursuant to the goal of expediting proceedings and requiring parties to be rigorous in defending or prosecuting applications for summary judgment, findings of fact

[35] One can anticipate some lively debate among members of the Bar as to the application of this subrule!

made in a summary judgment application are deemed to be established unless the trial judge orders otherwise to prevent injustice.[36] The rule provides additional procedural directives in subrules 7-6(3) to 7-6(6), and the Court has the authority to stay the enforcement of a summary judgment pending the determination of any other issue, on terms that the Court considers just.[37]

Genuine Issue Requiring a Trial

Both Manitoba and Ontario have provisions in their respective Rules of Court allowing for summary judgment in certain instances, although the language of the two rules is slightly different. They will be helpful in anticipating how the Revised Rules on summary judgment will apply in Saskatchewan, and will likely be of some influence in shaping how our Courts apply these provisions.

Manitoba

Rule 20.03 of the Manitoba Court of Queen's Bench Rules states:

> **Where no genuine issue**
>
> 20.03(1) Where the court is satisfied that there is *no genuine issue for trial* with respect to a claim or defence, the court shall grant summary judgment accordingly. (emphasis added)
>
> …
>
> **Trial on affidavit evidence**
>
> 20.03(4) Where the court decides there is a genuine issue with respect to a claim or defence, a judge may nevertheless grant judgment in favour of any party, either upon an issue or generally, unless
>
> (a) the judge is unable on the whole of the evidence before the court on the motion to find the facts necessary to decide the questions of fact or law; or
>
> (b) it would be unjust to decide the issues on the motion.

[36] Subrule7-6(2).
[37] Subrule 7-7.

This wording may be seen as an effort to achieve the same objectives as our new Rule 7-5(1)(a). A series of recent decisions from the Manitoba Court of Appeal sheds light on how applications for summary judgments have been approached in that jurisdiction.

The Manitoba Court of Appeal affirmed the approach taken in that province, in *Jane Doe 1 v Manitoba*.[38] The case involved a class action *Charter* challenge of a regime that only provided funding for therapeutic abortions that were performed in public hospitals rather than private clinics. In dismissing the government's application to strike the claim, and alternatively its application for summary judgment, the Court drew upon a previous decision, *Chaves et al v Shum et al*[39]:

> The principles to be applied in this province on applications for summary judgment are now well established and little purpose will be served on this appeal in discussing them at any length. Simply stated, once the moving party raises a *prima facie* case for the relief sought, then there is an obligation upon the responding party to satisfy the court that there "is an issue which requires determination at trial". In order to answer this question, the court must take "a hard look at the merits of an action" and determine whether there is a "real chance" that it will be successful.[40] [citations omitted]

In Manitoba, summary judgment applications follow a two stage approach.[41] Once the moving party establishes a *prima facie* case for summary judgment, the respondent must demonstrate why summary judgment would be inappropriate.[42] It seems that the Manitoba Court of Appeal endorses a pragmatic examination of the merits; the references to a "hard look at the merits" and a "real chance" indicate more than the mere possibility that a claim will be successful.[43]

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[38] *Jane Doe 1 v Manitoba*, 2005 MBCA 109, [2005] MJ No 335 ("*Jane Doe*").
[39] *Chaves et al v Shum et al* (2004) 184 ManR (2d) 164, 2004 MBCA 56 ("*Chaves*").
[40] *Ibid* at para 7 (quoted at para 17 of *Jane Doe*, *supra* note 38).
[41] *Bodnarchuk v RBC Life Insurance Co*, 2011 MBCA 18, 262 ManR (2d) 225 at para 13.
[42] *Homestead Properties (Canada) Ltd v Sekhri et al*, 2007 MBCA 61, 214 ManR (2d) 148 (CA) at para 17 ("*Homestead*").
[43] *Ibid*, at para 14, the Manitoba Court of Appeal follows the same approach as in *Chaves*, *supra* note 39; See also *4953372 Manitoba Ltd (cob) Four Rivers Medical Clinic Main v D M Jensen Medical Corp*, 2011 MBQB 62, [2011] MJ No 83 at para 4 where the Court expects respondents to "put their best foot forward".

Complexity of subject matter is not, in and of itself, a complete defence against an application for summary judgment, but it can be seen as an important factor when determining the appropriateness of the relief.[44] In *Jane Doe*, complexity concerns were compounded by what the Court understood to be a "developing area of the law", particularly given that it was a developing aspect of *Charter* law.[45]

Finally, the Manitoba Court of Appeal cautions against the granting of summary judgments where the moving party relies on affidavit evidence relating to that party's knowledge, state of mind or intention, as these assertions are rarely accepted without cross-examination, and without the judge having the opportunity to assess the demeanour of the witness.[46] Some of the concerns about relying on affidavit evidence may be cured by subrule 7-5(3), which allows the Court to require that oral evidence be presented. This would seem to address the concerns while preserving the Court's ability to expedite the process.

In *Towers Ltd v Quinton's Cleaners Ltd*,[47] the Manitoba Court of Queen's Bench engaged in a survey of summary judgment decisions in that province. Accepting the approach described in the *Jane Doe* and *Homestead* decisions, Justice Goyal adopted the reasoning in *Podkriznik v Schwede*[48], stating that a respondent's defence to a summary judgment application must be "both an answer to the claim in law and supported by sufficient evidence to enable the judge to say that there is a real chance of the defence succeeding".[49]

The Court went on to balance expediency with ensuring that the relief is appropriate:

> In considering whether to precipitate a comparatively quicker conclusion and summary determination of an action, a court must be both restrained and rigorous. As Twaddle J.A. stated in *Podkriznik, supra*:

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[44] *Jane Doe*, *supra* note 38 at paragraph 18.
[45] *Ibid* at paras 21 and 23.
[46] *Ibid* at para 26 relying on *Johnson (G.D.) Ltd v Royal Bank of Canada* (1998), 126 ManR (2d) 285 (CA) at para 6.
[47] *Towers Ltd v Quinton's Cleaners Ltd*, 2009 MBQB 34, 237 ManR (2d) 100 ("*Towers*").
[48] *Podkriznik v Schwede* (1990), 64 ManR (2d) 199 ("*Podkriznik*").
[49] *Towers*, *supra* note 47 at para 78.

> [15] Rule 20 should not be utilized as a steamroller to obtain a convenient conclusion to a case where it is likely that the defence will fail. If the defence has any prospect of success, the action should proceed to trial. But the theoretical possibility of a defence being successful is not by itself a reason to deny summary judgment to a plaintiff. The theory must be both an answer to the claim in law and supported by sufficient evidence to enable the judge to say that there is a real chance of the defence succeeding.[50]

Summary judgment does not operate as an express lane that allows the applicant to bypass the rigour required for a Court to determine an issue. Its purpose is to expedite a matter, while maintaining the integrity of the judicial process. That being said, it is not "unjust" or "unfair" to grant summary judgment where a *possible* defence is offered; the defence must be both viable, and meet the specific challenges put forward by an applicant.

Justice Goyal reinforced the principle that a dispute on material facts does not preclude the granting of summary judgment.[51] One of the fundamental differences between an application for summary judgment, and an application to dismiss a claim on the pleadings, is that when considering summary judgment the Court is *not* required to accept that alleged facts are true.[52]

Ontario

Amendments to the *Ontario Rules of Civil Procedure*, as of January 1, 2010, have changed the test under which a Court in that province will grant summary judgment. Under the current regime, a Court shall grant summary judgment if the Court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence. The Ontario rule is nearly identical to Saskatchewan's new rule.

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[50] *Ibid* at para 82; See also *Bodnarchuk*, *supra* note 41 at paras 39-40 where the Manitoba Court of Appeal determined a theoretical possibility and a belief is not enough to respond to an application in the absence of hard evidence.

[51] *Ibid* at para 83.

[52] *NB Petro Inc v Manto Sipi Fuels Ltd*, 2010 MBQB 275, 260 ManR (2d) 160 at para 26 quoting the Manitoba Court of Appeal decision (delivered by Twaddle J.A.) *Somers Estate v Maxwell*, (107) ManR (2d) 220; 11 ETR (2d) 53 at para 10; See also *4953372 Manitoba Ltd (c.o.b.) Four Rivers Medical Clinic Main v D M Jensen Medical Corp*, 2011 MBQB 62, [2011] MJ No 83 at para 6.

Since the 2010 amendments to the rule, the Ontario Superior Courts have often cited *Papaschase Indian Band No 136 v Canada (Attorney General)*[53] as to the ultimate importance of the summary judgment rule in civil litigation. At para.10:

> ….The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial. Trying unmeritorious claims imposes a heavy price in terms of time and cost on the parties to the litigation and on the justice system. It is essential to the proper operation of the justice system and beneficial to the parties that claims that have no chance of success be weeded out at an early stage. Conversely, it is essential to justice that claims disclosing real issues that may be successful proceed to trial.

The Supreme Court has thereby confirmed that the purpose of the summary judgment process is to avoid expensive litigation where it is possible to determine the outcome of an action without the need for a trial.

Civil Rules of Procedure-Rule 20

The Ontario rule states:

> **General**
>
> 20.04 (1) Revoked: O. Reg. 438/08, s. 13 (1).
> (2) The court shall grant summary judgment if,
> (a) the court is satisfied that there is *no genuine issue requiring a trial* with respect to a claim or defence; or
> (b) the parties agree to have all or part of the claim determined by a summary judgment and the court is satisfied that it is appropriate to grant summary judgment.
>
> **Powers**
>
> (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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[53] *Papaschase Indian Band No 136 v Canada (Attorney General)* 2008 SCC 14, JE 2008-689, [2008] AWLD 1349.

1. Weighing the evidence.
2. Evaluating the credibility of a deponent.
3. Drawing any reasonable inference from the evidence.

Oral Evidence (Mini-Trial)

(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.

Previous Rule 20 Interpretation

The former Ontario rule provided that the Court could only grant summary judgment if it was satisfied that there was "no genuine issue *for* trial", as in Manitoba. The Ontario Court of Appeal has had extensive discourse as to the previous interpretation of the rule, most notably in *Aguonie v Galion Solid Waste Material Inc*[54], in which Justice Borins stated:

> [31] In *Ungerman, supra*, Morden A.C.J.O. interpreted the phrase "genuine issue for trial" within the meaning of rule 20.04(2) when, as in this appeal, there is an issue in respect to material facts. After reviewing a number of American authorities, at p. 551 he concluded:
>
> …
>
> > It is safe to say that "genuine" means not spurious and, more specifically, that the words "for trial" assist in showing the meaning of the term. If the evidence on a motion for summary judgment satisfies the court that there is no issue of fact which requires a trial for its resolution, the requirements of the rule have been met. It must be clear that a trial is unnecessary. The burden is on the moving party to *satisfy* the court that the requirements of the rule have been met. Further, it is important to keep in mind that the court's function is not to resolve an issue of fact but to determine whether a genuine issue of fact exists…
>
> [32] An issue of fact must relate to a material fact. As Morden A.C.J.O. pointed out in *Ungerman*, supra, at p. 550: *"[i]f a fact is not material to an action, in the sense that the result of the proceeding does not turn on its existence or non-existence, then it cannot relate to a 'genuine issue for trial'."* In ruling on a motion for summary judgment, *the court will never assess credibility, weigh the evidence, or find the facts. Instead, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to*

[54] *Aguonie v Galion Solid Waste Material Inc*, [1998] OJ No 459, 38 OR (3d) 161.

> *material facts requiring a trial.* Evaluating credibility, weighing evidence, and drawing factual inferences are all functions reserved for the trier of fact….
>
> [33] I wish to point out that, although the court's role in respect to motions that involve factual issues must stop short of resolving such issues, rule 20.04(4) permits the motions judge to determine a question of law and grant judgment accordingly, where he or she is satisfied that the *only* genuine issue is a question of law.[55] (emphasis added)

Reasons For New Wording

As in Saskatchewan, the Ontario rule now requires that a party seeking summary judgment satisfy the court that "there is no genuine issue *requiring* a trial," instead of the previous "no genuine issue *for* trial." The amendments also give the Court a broader fact finding power, including the ability to weigh evidence, evaluate credibility and draw inferences (as in Saskatchewan), as well as to order a mini-trial.

Healey v Lakeridge Health Corp[56] addresses the change in wording from "genuine issue for trial" to "genuine issue requiring a trial". Perell, J. provided one of the early explanations of the new wording at paras 20 et seq:

> [20] Semantically, there is not much difference between "no genuine issue for trial" and "no genuine issue requiring a trial," which leads one to ask what purpose was being achieved by the change. As a matter of statutory interpretation, this is a way of asking what was the problem that the Civil Rules Committee was trying to remedy by amending the rule? The answer is that the problem was that: (1) the former test was regarded as too strict with the result that the rule was not achieving its purposes; and (2) the utility of the rule was being impaired by case law that had held that a motions judge could not assess credibility, weigh evidence, or find facts on a motion for summary judgment…
>
> …
>
> [22] Rule 20.04 (2.1) is a statutory reversal of the case law that had held that a judge cannot assess credibility, weigh evidence, or find facts on a motion for summary judgment. Further, under rule

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[55] *Ibid* at paras. 31-33.
[56] *Healey v Lakeridge Health Corp*, [2010] OJ No 417 (Ont Div Ct) ("*Healey*").

> 20.04 (2.2), a judge for the purpose of weighing the evidence, evaluating credibility, and drawing inferences may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> [23] Placed in the context of the other amendments to Rule 20, the purposes of the change from "no genuine issue for trial" to "no genuine issue requiring a trial" in the test for a summary judgment are: (1) to make summary judgment more readily available; and (2) to recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment.

It should be noted that the evidentiary burden on a summary judgment application has apparently not changed. *Sakka (Litigation Guardian of) v Air France*[57], restates the principle at para. 34:

> ….in spite of the changes to the rules, the same principles apply as to the obligations of parties to a summary judgment motion. The moving party has the burden of showing that the claim does not raise a genuine issue requiring a trial and the responding party has an evidentiary burden to put forward some evidence of its position. …

Substantive Interpretation

To date, the Ontario Court of Appeal has remained silent on the interpretation of Rule 20; this is due to change in the immediate future. On June 21, 2011, the Court of Appeal heard five appeals together, addressing the interpretation and application of the new rule as it relates to summary judgment motions.[58]

The cases were likely selected by the Court of Appeal as they address various issues that have arisen over the course of the last 18 months, including an apparent dichotomy of views at the Superior Court level. These cases are summarized in Appendix A to this paper.

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[57] *Saskka (Litigation Guardian of) v Air France,* 2011 ONSC 1995.
[58] *Combined Air Mechanical Services v Flesch*, 2010 ONSC 1729 (SCJ); *Mauldin v. Cassels Brock & Blackwell LLP*; *Bruno Appliance Furniture v Cassels Brock & Blackwell,* 2010 ONSC 5490; *394 Lakeshore Oakville Holdings Inc. v Misek*, 2010 ONSC 6007; *Parker v Casalese*, 2010 ONSC 5636.

Summary of the Two Jurisdictions

Undoubtedly, the combined decision from the Ontario Court of Appeal will inform the Saskatchewan courts' approach to summary judgment applications. Both Manitoba and Ontario adopt a two stage approach that requires the applicant to establish a *prima facie* case for summary judgment, and the respondent to provide evidence that answers the applicant's claim. Although it will be interesting to see if the Ontario Court of Appeal comments specifically on the significance of the wording change in the rule, the most significant difference in the two jurisdictions appears to relate to the extent of the Court's discretion with respect to the assessment of the evidence on the motion.[59]

While it remains to be seen how the Ontario Court of Appeal will ultimately interpret the utilization of new powers granted to motions judges, it seems clear that, as the techniques and methods of motions and trial judges intersect, there may be a blurring of the line distinguishing their traditional roles.

Rule 7-9 - Striking Out or Amending Pleading or Document and Related Powers of Court

Rule 7-9 will replace the current Rule 173.

The text of the new rule is set out below:

> 7-9(1) If the circumstances warrant and one or more conditions pursuant to subrule (2) apply, the Court may order one or more of the following:
>
> > (a) that all or any part of a pleading or other document be struck out;
> >
> > (b) that a pleading or other document be amended or set aside;
> >
> > (c) that a judgment or an order be entered;
> >
> > (d) that the proceeding be stayed or dismissed.
>
> (2) The conditions for the order are that the pleading or other document:

[59] See attached Charts outlining case law in Manitoba and Ontario, Appendix B.

> (a) discloses no reasonable claim or defence, as the case may be;
>
> (b) is scandalous, frivolous or vexatious;
>
> (c) is immaterial, redundant or unnecessarily lengthy;
>
> (d) may prejudice or delay the fair trial or hearing of the proceeding;
>
> (e) is otherwise an abuse of process of the Court.
>
> (3) No evidence is admissible on an application pursuant to clause (2)(a).

Rule 7-9 still contains the fundamental aspects of Rule 173. The concluding portion of Rule 173 is now broken down into enumerated subsections at the beginning of the rule but they are not substantively modified. The mandatory direction that an offending party pay double costs is removed, however.

There are some other minor changes such as replacing "unnecessarily prolix" with "unnecessarily lengthy"; the word "embarrass" is also removed from the phrase "prejudice, embarrass or delay" in Rule 173. It would be surprising, however, if the tests applied to Rule 173 over the years are applied differently to Rule 7-9. In fact, one element of the "reasonable cause of action" test is now expressly built into Rule 7-9(3), which states that "no evidence is admissible on an application under clause 2(a)".

One change with uncertain potential implications is the addition of the phrase "or other document" into the rule. "Document" is defined in Part 17 as including:

> Information recorded or stored by means of any device, including an audio recording, video recording, computer disc, film, photograph, chart, graph, map, plan, survey, book of account or machine readable information.

The intent behind this definition appears to have more to do with disclosure requirements. However, Rule 25.11 of the Manitoba Rules of Court uses the phrase "pleading or other document" in its rule to strike pleadings. In *Winnipeg School Division No. 1 v. Winnipeg*

Teachers Assn.[60] the Court found that, "the phrase 'pleading or other document' is broad enough to include an affidavit."

It would appear, however, that there is no particular need to rely on Rule 7-9 in this manner, since Rule 13-33 expressly allows an applicant to apply to strike a scandalous affidavit.

Conclusion

Although there will inevitably be some who are dissatisfied with some components of these new summary procedure rules, we expect that most will appreciate the enhanced ability to deal with matters in a more efficient and timely way, all of which will ultimately benefit our clients and the practice of the profession.

[60] *Winnipeg School Division No. 1 v. Winnipeg Teachers Assn.* 2007 MBQB 3.

APPENDIX A

Substantive Interpretation - Restrictive and Expansive Interpretations in Ontario

Combined Air v Flesch[61]

The defendants sought summary judgment against the plaintiff, their former employer, to dismiss their initial claim for an alleged breach of restrictive covenants.

Belobaba J.:

> [1] The defendants' motions for summary judgment reaffirm a long-standing principle in the law of contract. Where the terms of a commercial agreement have been fully and fairly negotiated by sophisticated business parties advised by legal counsel, a court will rarely if ever intervene. And where, as here, an action brought by one of the parties is founded on claims that are not supported by the agreement or the evidence and raise no genuine issues requiring a trial, summary judgment will readily be granted.

In hearing the motion, the Court ordered a "mini-trial" under Rule 20.04. The Court invited the defendants to call a witness to shed light on evidence going to whether the defendant's new employer was in fact in competition with the defendant. The witness appeared and testified.

Ultimately the Court granted the two motions for summary judgment. At para 26 the Court states:

> [26] In my view, the Flesch defendants did not breach any of the restrictive covenants. Neither Strategic Property Management nor Computer Room Services Corporation are similar businesses; nor do they compete with Combined Air for the same customers. The Flesch defendants breached no fiduciary duty; they did not engage in the torts of conversion, misrepresentation or unlawful interference. There is no evidence to support any of these allegations. There are no issues

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[61] *Combined Air Mechanical Services v Flesch*, 2010 ONSC 1729 (SCJ).

> requiring trial. The motion for summary judgment is granted and the action as against the Flesch defendants is dismissed.

In granting the summary-judgment motion, the Court also noted that it had the *viva voce* evidence of that witness before it to rely on and did not have to rely on the evidence of two of the other parties in order to make a decision.

Mauldin v Cassels Brock & Blackwell LLP[62]

In this case Respondents were granted partial summary judgement as per Rule 20. There was a motion before a single justice of the Court of Appeal for leave to extend the time to perfect an appeal, as the deadline had been missed. The issue was whether the underlying appeal was of "so little merit" that an extension need not be granted. The underlying appeal concerned whether a motions judge may use the new powers under rule 20.04(2.1) of weighing evidence, evaluating credibility and drawing inferences as though they were exercising the powers and jurisdiction of a trial court judge, rather than using the powers as tools to determine whether there was a genuine issue requiring a trial.

Two interpretations have been advanced. One holds that "it is not the role of the motions judge to make findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment. This change in the Rule does [not] substitute a summary trial for a summary judgment motion. Although a summary judgment motion may, if the motions judge so directs, resemble a summary trial, the test and the decision are different."

The second is the "arguably more expansive reading of the new Rule 20 adopted by Perell J. at:

> [23] An arguably more expansive reading of the new Rule 20 was adopted by Perell J. in *Healey v Lakeridge Health Corp*., 2010 ONSC 725 (Ont SCJ), a decision referred to by the motion judge. Perell J. states at paras. 22-23 and 29:

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[62] *Mauldin v Cassels Brock & Blackwell LLP*, 2011 ONCA 67.

> Rule 20.04 (2.1) is a statutory reversal of the case law that had held that a judge cannot assess credibility, weigh evidence, or find facts on a motion for summary judgment. Further under rule 20.04(2.2), a judge for the purpose of weighing the evidence, evaluating credibility, and drawing inferences may order that oral evidence be presented by one or more parties, with or without time limits on its presentation.
>
> Placed in the context of the other amendments to Rule 20, the purposes of the change from "no genuine issue for trial" to "no genuine issue requiring a trial" in the test for summary judgment are: (1) to make summary judgment more readily available; and (2) to recognize that with the court's expanded forensic powers, although there may be issues appropriate for trial, these issues may not require a trial because the court has the power to weigh evidence on a motion for summary judgment.
>
> . . . . .
>
> It is informative to note that rule 20.04(2.1) envisions that the motions judge may use the powers of a trial judge unless it is in the interest of justice for such powers to be exercised only at a trial. The reference to the interests of justice suggests that the motions judge will have to assess whether the search for truth and justice requires the forensic machinery of a trial.

[24] In a more recent decision, *Canadian Premier Life Insurance Co. v. Sears Canada Inc.*, 2010 ONSC 3834 (Ont. S.C.J.), Pepall J. refers to Cuthbert and Hino Motors and indicates her disagreement with the view expressed by Karakatsanis J. that the judge hearing a motion for summary judgment should not make findings of fact for purposes of deciding the action. After reviewing the recommendations in the Osborne Report, Pepall J. held as follows at para. 68 (footnotes omitted):

> [C]onsistent with the language of Rule 20, a motions judge is not precluded from making findings of fact for the purpose of deciding the action on the basis of the evidence presented on a motion for summary judgment. A judge is now able to weigh the evidence, evaluate credibility and draw reasonable inferences from the evidence and order oral evidence. Implicit in these powers is the ability to make a finding of fact. If a motions judge using these powers can safely make a determination without the need for a trial, he or she is authorized to do so. This view is consistent with that expressed by D.M. Brown J. in Lawless v. Anderson: "... in a very real sense Rule 20.40(2.1) vests in a motion judge the powers typically exercised by a trial judge" and "... the fact-finding

> restrictions placed on judges under old Rule 20 have been removed, or at least significantly loosened." [Emphasis added.]

The Court noted that the Court of Appeal has not yet commented on the scope and meaning of the amended rule, or the extent to which it is open to a judge on a summary judgment motion to make findings of fact for the purpose of deciding the action based on the evidence presented on a motion for summary judgment. As such, it could not be said that the underlying appeal was of "so little merit" that the extension need not be granted.

The appeal of this case will likely address the extent of the fact-finding powers of a judge when granting summary judgment under Rule 20.

***Bruno Appliance Furniture v. Cassels Brock & Blackwell*[63]**

This case focused on the use of the word "requiring" in "the court is satisfied there is no genuine issue *requiring* a trial." Justice Grace found so much evidence against the Defendant that he thought plaintiff's counsel was able to satisfy the burden of proof for civil cases, which is balance of probabilities. In finding that Defendant was probably responsible for the loss of the plaintiffs' funds, Justice Grace concluded that no further litigation, such as a trial, would be *required* to determine the Defendant's liability.

Since the order is final, the right of appeal is automatic. So the Ontario Court of Appeal will be asked to determine whether Justice Grace's interpretation and application of the new rule is correct. As with *Mauldin*, the appeal of this case will likely address the extent of the fact-finding powers of a judge when granting summary judgment under Rule 20.

***394 Lakeshore Oakville Holdings Inc v Misek*[64]**

The Plaintiff property owner brought a motion for summary judgment with respect to whether the defendant neighbour's property enjoyed an alleged easement. The Plaintiff provided extensive evidence, which was attacked by the opposing party as to its credibility. The Motion Judge concluded, however, that a trial was not required to determine whether or

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[63] *Bruno Appliance Furniture v Cassels Brock & Blackwell*, 2010 ONSC 5490.
[64] *394 Lakeshore Oakville Holdings Inc v Misek*, 2010 ONSC 6007.

not her evidence proved the existence of a prescriptive easement. The judge found no genuine issue requiring a trial:

> [124] Further, the licence that was the pre-existing practice or custom between the owners of 394 and 394A Lakeshore Rd. W. did not have the capacity to become a prescriptive easement. The licence provided only a personal benefit that the owners of 394A would not be regarded as trespassers by the owners of 394 Lakeshore Rd. W. The licence was not reasonably necessary for the enjoyment of the dominant tenement or meant to burden the servient tenement. Further, the licence was not defined with adequate certainty, and it was not limited in scope.
>
> [125] A trial is not necessary in the circumstances of this case to determine whether a prescriptive easement was created. There is no genuine issue requiring a trial. The evidence shows only a licence, which does not run with the lands. It is also plain and obvious and no trial is necessary to conclude that the Plaintiff never had a claim against Mrs. Purvis.

Parker v Casalese[65]

In this case, the plaintiffs were neighbours and the defendant built two new houses between the plaintiffs' houses, which the Plaintiffs claimed were damaged during construction. The Plaintiffs brought the motion for summary judgment. The Divisional Court heard and dismissed the appeal of a summary judgment motion under the new Rules where the judge's reasons denying the motion read in full as follows:

> [3] The Endorsement of the Motions Judge is brief. It reads in full:
>
> This motion is dismissed. Submissions regarding costs may be exchanged & delivered to me within one month.
>
> There are numerous conflicts in the evidence and I am satisfied that they can be justly resolved only after a trial.

The Divisional Court noted that:

> [9] Rule 20.05 now grants a motions judge additional powers, in the event that a summary judgment motion is unsuccessful or partially successful, to give directions specifying what material facts are not in dispute and what issues remain to be tried, and to impose terms on the

[65] *Parker v Casalese*, 2010 ONSC 5636

> parties in relation to, inter alia, time limits for the exchange of evidence and examinations at trial.
>
> Analysis
>
> [10] We are of the view that the reasons given by the motions judge were inadequate. In particular, he made no reference to the test for summary judgment as set out in Rule 20, and there is nothing to indicate whether he appreciated the fact that the standard is different and more flexible under the new Rules.

The Divisional Court still denied the appeal, however, finding that regardless of the lack of reasons, the record contained sufficient justification for denying summary judgment. Some of the factors, beyond the complexity of the facts, included: conflicting evidence as to a number of liability and causation issues requiring *viva voce* evidence; uncertainty as to the breakdown of various heads of damages; and lack of pre-hearing cross-examination.

APPENDIX B

Charts Outlining Case Law in Ontario and Manitoba

ONTARIO

1.1 Cases Interpreting New 2010 ON rule

1.2 Trends (Limitation Period)

1.3 Trends (Other Than Limitation Period)

MANITOBA

1.1 Rule in Manitoba and Trends (Limitation Period)

1.2 Trends (Other Than Limitation Period)

Ontario

1.1 Cases Interpreting New 2010 ON rule

- Generally, the rule and test are the same as the previous rule
- New rules seen as giving court more tools with which to decide summary judgment cases

Citation	Summary (if applicable)	Keywords
Healy v Lakeridge Health Corp, 2010 ONSC 725	Previous rule: the court shall grant summary judgment where the court is satisfied that "there is no genuine issue *for trial*" Amended to: the court must be satisfied that "there is no genuine issue *requiring a trial*" [para 19] (1) Former test regarded as too strict (rule not achieving its purpose) and (2) rule impaired by case law (motions judge could not assess credibility, etc.) [para 20] New rule allows judge to: weigh evidence, evaluate credibility of deponent, draw any reasonable inference from the evidence [para 21]	Civil practise and procedure – genuine issue requiring a trial.

Citation	Summary (if applicable)	Keywords
	New rule makes summary judgment more readily available, recognize that issues might not require a trial because evidence can be weighed on a motion for summary judgment [para 23] Motions judge will have to assess whether the search for truth and justice requires the forensic machinery of a trial [para 29] Moving party must provide a level of proof that demonstrates that a trial is unnecessary to truly, fairly, and justly resolve the issues. [para 30]	
Cuthbert v. TD Canada Trust, 2010 ONSC 830	Test itself has not changed, but the new rule provides the judge with more tools to "take a hard look" at the evidence to determine whether it raises a genuine issue requiring a trial. [para 11] The new rule does not change the burden of a party in a summary judgment motion [para 12]	Banking and finance law, civil litigation – no genuine issue requiring a trial.
Smith Estate v Rotstein, 2010 ONSC 2117	Motion was prepared and argued under old rule; only reason a decision was not released prior to the rule changes was constraint of judge's calendar – therefore **old rule applied**. [para 29]	Wills and appointment of trustee – partial summary judgment, no genuine issue for trial.
Liu v. Silver, 2010 ON SC 2218	The plaintiff must adduce evidence of material facts that require a trial to assess credibility, weigh evidence, and draw factual inferences. [para 13] Court is entitled to assume evidence contained in record is all the evidence the parties would reply on if the matter proceeded to trial [para 14]	Medical malpractice - no genuine issue requiring a trial, plaintiff failed to commence claim within limitation period.
Saltsov v. Rolnick, 2010 ONSC 914	1. Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried; [para 48] 2. the party who seeks summary dismissal bears evidentiary burden of showing that there is "no genuine issue of material fact requiring trial" [para	Breach of fiduciary duty and trust, breach of contract, intentional interference with

Citation	Summary (if applicable)	Keywords
	48] 3. a party cannot rely on mere allegations or the pleadings [para 48] 4. the chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts [para 48]	economic relations – claims made outside limitation period, no genuine issue for trial
Aylmer Meat Packers Inc. v. Ontario, 2010 ONCS 649	The new rule 20 applies as of January, 2010, regardless of when the notice of motion was filed. [para 28] Summary judgment is a procedural provision and any changes to it are procedural enactments [para19] New rule has simply expanded court's ability to conserve the resources of the court and the parties. [para 22, 23] Changes to rule have no impact on the substance of the action or the rights of the parties in the action; no effect on the casues of the action; nor on the defences available – only the procedure has changed by which claims can bee resolved [para 25, 26]	Civil litigation, whether to apply new rule if motion filed in 2009.
Langille v. Toronto, 2010 ONSC 196	Obligation of responding party clarified by new rules [para 20]	Civil litigation, municipal law – failure to comply with notice requirements, no genuine issue requiring a trial
Zurba v. Lakeridge Health Corp., 2010 ONSC 318	Whether discoverability can itself by a triable issue is to be determined by asking whether it is in the interest of justice for such powers to be exercised only at a trial [para 20, 21]	Civil litigation, health law, medical opinion, when limitation period commences – the assessment of evidence require live witnesses in a trial context.
Konwisarz	Summary judgment to dismiss action – it was brought	Civil litigation,

Citation	Summary (if applicable)	Keywords
Estate v William Osler Health Centre, 2010 ONSC 2118	outside of two-year limitation period	health law, medical opinion – claim not brought within limitation period, medical opinion not necessary to trigger limitation period – no genuine issue requiring trial
Zwaigenbaum v. Scher, 2010 ONSC 559	Summary judgment to dismiss action – it was brought outside of two-year limitation period	Negligence claim against lawyer – outside limitation period, no genuine issue requiring a trial
Canadian Imperial Bank of Commerce v. Mitchell, 2010 ONSC 2227	**18** Notwithstanding the existence of the new rule, the position of the responding party to a summary judgment motion remains as it was previously. The responding party may not simply restate mere allegations contained in its pleadings. He must instead set out in affidavit material coherent evidence of specific facts showing that there is a genuine issue requiring a trial. It is not sufficient to say that more and better evidence will or might be available at trial. While there is an onus on the moving party to establish that there is no genuine issue requiring a trial, the case law also resolutely establishes that the respondent must "lead trump or risk losing": Rule 20.02(2); *Pizza Pizza Ltd. v. Gillespie et al* (1990), 75 O.R. (2d) 225 (Ont. Ct.); *Irving Ungerman Ltd. v. Galanis* (1994), 4 O.R. (3d) 545 at 552 (C.A.); *High-tech Group Inc. v. Sears Canada Inc.* (2001), 52 O.R. (3d) 97 (C.A.).	Banking, mortgages, finance law

1.2 Trends (Limitation Period)

- Several of the most recent ONCA “genuine issue” cases revolved around questions as to whether discoverability extended the limitation period, these questions were seen as genuine issues for trial

- Recent ONCA cases that dealt with claims based on expiration of limitation periods:

Citation	Summary (if applicable)	Keywords
Alexis v. Toronto Police Service Board, 2009 ONCA 847	Summary judgment to dismiss action – it was brought outside of two-year limitation period, discoverability was not a genuine issue for trial	Constitutional issue; civil litigation – no genuine issue for trial.
Camarata v Morgan 2009 ONCA 38	When limitation period begins for such actions – at time of accident or at time of death.	Civil litigation, estate suing for injuries suffered by deceased in motor vehicle accident – no genuine issue for trial, limitation period expired
Iroquois Falls Power Corp v Jacobs Canada Inc., 2008 ONCA 320	Genuine issue as to whether services beyond the scope of professional engineering were provided to which a different limitation period applied	Civil litigation, professional engineering and damages – genuine issue as to limitation period
Guarantee Co. of North America v Mercedes-Benz Canada, 2006, 86 OR (3d) 479 (CA)		Damages to motor vehicle, limitations period in Highway Traffic Act – no genuine issue, limitation period expired

1.3 Trends (Other Than Limitation Period)

- Recent summary judgment cases heard and disposed of (not related to limitation period):

Citation	Summary (if applicable)	Keywords
Toronto Dominion Bank v Khan, 2010 ONCA 320		Civil litigation, banking and finance law, no merit to defendant's position, appeal from summary judgment dismissed
Martin v Zivkovic, 2010 ONSC 2427		Insurance law, motor vehicle accident, summary judgment motion allowed
Jamal v Jamal, 2010 ONSC 2362		Civil litigation, tort law, defamation, no genuine issue for trial
Liu v Silver, 2010 ONSC 2218		Civil litigation, medical malpractice, no genuine issue for trial
Kurdina v Gratzer 2010 ONCA 288	Appeals to summary judgments dismissed	Civil litigation, health law, malpractice liability, negligence, professional responsibility
Combined Air Mechanical Services Inc v Flesch, 2010 ONSC 1729	Where an action is brought by one of the parties to a commercial agreement, the terms of which have been fully and fairly negotiated by sophisticated business parties advised by legal counsel, **summary judgment** will readily be granted if the action is founded on claims that are not supported by the agreement or the	Contracts, validity & terms

Citation	Summary (if applicable)	Keywords
	evidence and raised no genuine issues for trial.	
DG Sports Inc v WWK Sportsdome Inc., 2010 ONCA 234	Appeal to summary judgment dismissed	Civil litigation, contract interpretation, landlord & tenant law
Sandringham Holdings Ltd. v. Shoeless Joe's Enterprises Inc., 2010 ONSC 2343		Insurance law, no genuine issue requiring trial
Harris v. GlaxoSmithKline Inc., 2010 ONSC 2326		Patent law, no genuine issue
Cockshutt v. Computer Facility Services Inc., 2010 ONSC 1789, 80 C.C.E.L. (3d) 225	If there are a number of issues and an absence of serious prejudice or disadvantage to employee in proceeding by way of trial, it was in interests of justice to have all of issues determined at same trial "I consider it to be in the interest of justice to have all of the issues determined at the same trial, rather than bifurcating the issues as suggested by counsel for the plaintiff." (para 27).	Employment law; termination and dismissal
Sedore v. Fleming, 2010 ONSC 1891	3 On a motion for summary judgment the moving party must establish that there is no genuine issue for trial… If the evidence on a motion for summary judgment satisfies the court that there is no genuine issue of fact which requires a trial for resolution, the requirements of the rule have been met. It must be clear a trial is unnecessary. 8 The expiry of a limitation period is a radical defect going to the heart of the claim. As such it cannot be cured by an amendment to the pleadings. The plaintiff's statement of claim must therefore be	Negligence; breach of contract

Citation	Summary (if applicable)	Keywords
	struck as disclosing no cause of action. An order will go to that effect. The defendant does not seek costs. Therefore there will be no order as to costs.	
Canadian Imperial Bank of Commerce v. Mitchell, 2010 ONSC 2227		Banking law, line of credit, no genuine issue requiring trial
Royal Bank v. Consorteum Inc., 2010 ONSC 7088	Partial summary judgment is granted in favour of the Bank in the amount of $70,000 (This was not in dispute). The issue concerning the balance being claimed by the Bank shall be determined at a trial.	Banking; loans
Mauldin v. Cassels Brock & Blackwell LLP, 2011 ONCA 67		Civil Fraud
Ryabikhina v. St. Michael's Hospital, 2011 ONSC 1882	When determining a motion for summary judgment, the court is to assume that the record before it contains all of the evidence which the parties would present if the case were to proceed to trial	Evidence; tort
1215314 Ontario Ltd. v. Benincasa, 2011 ONSC 936	"In my view, the amendments to Rule 20 were enacted in order to expand the powers of the motions judge and judicial fact finding in summary judgment motions. However, that power is not unlimited. There will be some cases that cannot be resolved on such a motion and must be sent on to trial."	Mortgage in arrears; writ of possession
Destiny Software Productions Inc. v. Musicrypt Inc.,2011 ONSC 470	The amendments to Rule 20, however, do not affect the requirement that on a summary judgment, the responding party must "lead trump" and "put their best foot forward" from an evidentiary perspective: see B*osnjak v. Bildfell*, 2010 ONSC 5363, [2010] O.J. No. 4085 (Ont. S.C.J.) at paras. 3-7. Therefore, Musicrypt must "put its best foot forward" with respect to each of the claims made in its Counterclaim.	Patent litigation

Citation	Summary (if applicable)	Keywords
Diament v. Ockrant, 2011 ONSC 2175	There was no issue which required trial as it related to breach of fiduciary duty or fraud. "There was adequate information to permit findings of both liability and quantum." (para 26)	Estates; fraud
CAO v. Whirlpool Corp., 2011 ONSC 2151	9 In determining whether there is a genuine issue requiring a trial, the motions judge must consider the evidence submitted by the parties and has the power to weigh evidence, evaluate the credibility of a deponent and draw reasonable inferences from the evidence. 10 On a motion for summary judgment, the moving party has the burden of showing that the claim does not raise a genuine issue requiring a trial. Where the moving party meets that burden, the responding party has an evidential burden to set out facts to demonstrate that a genuine issue for trial exists. Both parties are expected to put their "best foot forward".	No genuine issue requiring trial found; tort claim

Manitoba

1.1 Rule in Manitoba and Trends (Limitation Period)

Citation	Summary (if applicable)	Keywords
Homestead Properties (Canada) Ltd. v Robert, 2007 MBCA 61	**14** The test for summary judgment is well established, and no further detailed explanation is needed. The test is to the same effect regardless of whether the moving party is the plaintiff or the defendant. When the defendant moves, as here, he must prove, on a *prima facie* basis, that the plaintiff's	Landlord and tenant law - no genuine issue

Citation	Summary (if applicable)	Keywords
	action must fail. If he meets that burden, then the plaintiff has the burden to establish that there is a **genuine issue for determination**. He must show that his claim is "one with a real chance of success" (see *Hercules Managements Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 at para. 15; see also *Manitoba Hydro Electric v. Inglis (John) Co. et al.* (1999), 142 Man.R. (2d) 1 (C.A.)). If he fails to do so, summary judgment dismissing the claim will follow. **17** Whether the test is cast in terms of "the action fails in law" (*Somers*, at para. 10), or that the defendant must show "the absence of a valid claim in law" (*Somers*, at para. 11), or that "the action must fail in law" (*Somers*, at para. 16), or "that at a trial it will succeed" (*Blanco*, at para. 28), or some other like phrase, the expressions amount to the same thing. The moving party must show that, *prima facie*, on the facts the responding party's case must fail. If he does, then the second step of the analysis commences, and the responding party has the burden of showing that there is a **genuine issue for trial.**	
Shell v Barnsley, 2006 MBCA	Queen's Bench Rule 20.03(4) requires judge to consider the appropriateness of proceeding by way of summary judgement [para 13] - 20.03(4) Where the court decides there is a **genuine issue** with respect to a claim or defence, a judge may nevertheless grant judgment in favour of any party, either upon an issue or generally, unless (a) the judge is unable on the whole of the evidence before the court on the motion to find the facts necessary to decide the questions of fact or law; or (b) it would be unjust to decide the issues on the motion. [para 13] - i.e., it is unjust to decide, on a summary basis, complex issues involving developing areas of the law involving the Charter.	Civil procedure, lawyer's liability (contract, negligence, negligent misrepresentation) – case should not have proceeded in summary manner, i*n light of the complexity of the issues before the motions judge in a developing area of the law, and the fact that the motion was premised on assumptions*

Citation	Summary (if applicable)	Keywords
		which concerned the pleadings and the fact
Baird v Manitoba, 2010 MBCA 46	Appeals to decision of motions judge dismissed – motions judge had dismissed plaintiffs' claims for water damages due to drainage works, their motions were brought outside of two year limitation period	Civil litigation, government law, statutory interpretation
Arctic Foundations of Canada Inc. v Mueller Canada Ltd., 2009 MBQB 309	The test on a motion for summary judgment is where there is a genuine issue for trial. [para 60] Court of Queen's Bench Rule 20.03(1) (supra)	Civil litigation (torts – pure economic loss, fraud, misrepresentation) – no genuine issue.
Fegol v St. Clements, 2010 MBQB 52	**33** Queen's Bench Rule 20.01(3) allows a defendant to move for summary judgment dismissing all or part of the claim in a statement of claim. To succeed, the court must be satisfied that there is no genuine issue for trial with respect to the claim (Queen's Bench Rule 20.03(1)).	Civil litigation, municipal law, no genuine issue for trial based on two year limitation period
Brett-Young Seeds Ltd v KBA Consultants, 2007 MBQB 32		Torts, damages, professional responsibility (architects & engineers) – genuine issue respecting liability, no genuine issue respecting damages.
Green v Canada Trust Realty Inc. 2005 MBQB 249,	- first question is to determine if defendants have established prima facie case, based on the materials provided, that they would succeed in their defence - if so, the court must consider whether the plaintiff has shown that there is a triable issue	Civil procedure, constitutional law, corporations and associations law, limitation period did not rule out genuine issue for trial

Citation	Summary (if applicable)	Keywords
Gray v Canada Life Assurance Co., 2003 MBQB 245	- discussion of when limitation period begins for claims of permanent disability	Insurance, disability, limitation period – no genuine issue for trial
Valley Agricultural Society v Behlen Industries, 2002 MJ No 222 (QB)	-	Tort, negligence, when time begins to run – genuine issue for trial as to date of accrual of the case of action
Beatty v Waters, 2002 MJ No 141 MBQB	-	Medicine, liability of practitioners, consent, limitations of actions – no genuine issue (limitation period expired)
Royal Canadian Legion, Kelwood, No 50 Branch v Manitoba, 2002 MBQB 50	-	Municipalities, taxes – no genuine issue (outside limitation period)
Lehmann v. Co-Operators General Insurance Co. 2009 MBQB 6	Issue of whether limitation period applied to the policy and whether plaintiffs received notice of the limitation period were factual and credibility issues in dispute	Civil litigation – motion dismissed
Winnipeg Condominium Corp v 3333 Silver	-	Tort, misrepresentation, negligent design & construction -

Citation	Summary (if applicable)	Keywords
Developments 2000MBQB 233		genuine issue for trial regarding when limitation period began

1.2 Trends (Other Than Limitation Period)

- Recent summary judgment cases heard and disposed of (not related to limitation period):

Citation	Summary (if applicable)	Keywords
Bodnarchuk v RBC Life Insurance Co., 2010 MBQB 85	*Good outline of summary judgment rule in MB	Wrongful dismissal, negligent misrepresentation, intentional infliction of mental suffering, part of claim dismissed, some genuine issues for trial
Ultracuts Franchises v Magicutes Inc. 2010 MBCA 34	Interference with economic interests a developing tort therefore not a case for summary judgment	Civil litigation, interference with economic interests – genuine issues for trial
Bridgwater v Stanhope, 2009 MBCA 126	Motions judge reasoning upheld	Insurance, tort law, negligence
Aero Corp v. G & D Erb Holding Ltd. 2008 MBCA 88	Appeal allowed – no triable issues.	Civil litigation, real property law
Brett-Young	Appeal allowed, there was a genuine issue as to the	Civil litigation,

Citation	Summary (if applicable)	Keywords
Seeds Ltd. v K.B.A. Consultants Inc. 2008 MBCA 36	defendant's liability	general damages, economic loss