

# Something Old, Something New:

## A Preliminary Look at Summary Judgment and the Discovery Process under the New Rules of Civil Procedure

presentation to

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presented by

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## Introduction

On January 1, 2010, amendments to the Ontario Rules of Civil Procedure (“the Rules”) came into effect. They are the most extensive amendments to the Rules since they were first adopted in 1985. The amendments to the Rules emerged from recommendations made in the Osborne report,<sup>1</sup> as considered and approved by the Civil Rules Committee. This panel will look at two areas of revision in the Rules: motions for summary judgment under Rule 20, and the reform of the discovery process under Rules 29.1 - 31.

The amendment to Rule 20 expands the court’s powers on a summary judgment motion to permit a judge (though not a master) to weigh evidence, evaluate the credibility of a deponent and draw any reasonable inference from the evidence.<sup>2</sup> In addition, a new mini-trial ‘power’ now permits a judge to order the hearing of oral evidence on a motion for summary judgment where the interests of justice require it to dispose of the summary judgment motion.<sup>3</sup> The language of the rule has been revised to include the words “no genuine issue requiring a trial” (vs. the former “no genuine issue for trial”), which gives the court broader powers to dispose of claims at this stage. Finally, the financial risk of bringing a summary judgment motion has been reduced as a result of an amendment to former rule 20.06 (1): the presumption of substantial indemnity costs against an unsuccessful moving party has been eliminated and replaced with a rule conferring discretion on the court to impose substantial indemnity costs where a party has acted unreasonably or in bad faith.

With respect to the discovery process, there are several important reforms arising from the amendments to the Rules. Firstly, the concept of relevance has been redefined, replacing the phrase “relating to any matter in issue in the action” with the phrase “relevant to any matter in issue in the action” throughout the discovery rules. Secondly, a “one day” rule has been imposed, limiting every party to a total of seven hours for examinations for discovery regardless of the number of parties or other persons to be examined.<sup>4</sup> The seven hours of discovery time may be extended with the consent of the parties or with leave of the court. Thirdly, the Rules now require that the parties agree to, and update as needed, a written discovery plan. If the parties fail to agree to a plan then on “any motion under Rules 30 to 35 relating to discovery, the court may refuse to grant any relief or to award any costs”.<sup>5</sup> Furthermore, in preparing the discovery plan, the parties must consult and have regard to the Sedona Canada Principles regarding electronic discovery.<sup>6</sup> Finally, a significant new requirement has been imposed under rule 29.2.03 directing the court to consider proportionality in making any determination as to

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<sup>1</sup> In June 2006, the Honourable Coulter Osborne – former Associate Chief Justice of Ontario – was asked to propose options to reform the civil justice system to make it more accessible and affordable for Ontarians. Justice Osborne submitted a summary of his findings to the Attorney General of Ontario in a report called *Summary of Findings and Recommendations of the Civil Justice Reform Project* in November 2007. See commentary in Watson and McGowan, *Ontario Civil Practice 2010* (Toronto: Carswell, 2009) at SURVEY 57 – 73.

<sup>2</sup> Rule 20.04 (2.1).

<sup>3</sup> Rule 20.04 (2.2).

<sup>4</sup> Rule 31.05.1 (1).

<sup>5</sup> Rule 29.1.05.

<sup>6</sup> Rule 29.1.03 (4).

whether a party or other person must answer a question or produce a document. The rule lists a number of factors that should be considered in making such determinations.

In many ways, “proportionality” is the buzzword for the “new” Rules. It is incorporated not only at Rule 29.2, but also at Rule 1.04 (1.1), which states:

In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. [Emphasis added]

“Proportionality”, “mini-trials” and “one-day” discovery: although much appears to be new, the focus of this panel is to address how these amendments are operating in practice. The next section reviews the case law under the new Rules, since they came into effect in January, assessing how the bench and bar are actually dealing with them in the courtroom.

## Summary Judgment Motions Under Rule 20

A review of judgments released up to April 26, 2010, reveals that at least fifteen motions for summary judgment have been heard under the amended Rule 20. Of the fifteen cases reviewed, nine motions for summary judgment were granted<sup>7</sup> and six were dismissed.<sup>8</sup> Additionally, there is one judgment from Justice D.M. Brown in which he ordered a mini-trial, which is both interesting and instructive of what form the procedure might take.

In *Dr. Therese Thomas Dentistry v. Bank of Nova Scotia*, 2010 ONSC 1227, Justice Brown held that a one-day mini-trial was appropriate considering the scope of the issues and the nature of the affidavit evidence. The affidavits of the parties were diametrically opposed versions of events and it was, therefore, impossible for him to weigh the evidence or to evaluate credibility based on the affidavit evidence alone. The affidavit evidence presented a classic “he said/she said” dichotomy. Furthermore, the adjudication of the issues between the parties would require *viva*

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<sup>7</sup> Cases where summary judgment was granted: *Brown's Cleaners and Tailors Ltd. v. Omers Realty Corp.*, 2010 ONSC 1073 (February 16, 2010), Justice G.T.S. Valin; *Canadian Imperial Bank of Commerce v. Mitchell*, 2010 ONSC 2227 (March 30, 2010) Justice M.G.J. Quigley; *Combined Air v. Flesch*, 2010 ONSC 1729 (April 8, 2010) Justice Belobaba; *Healey v. Lakeridge Health Corp.*, 2010 ONSC 725 (January 29, 2010) Justice P.M. Perell; *Kapy v. Hwang*, 2010 ONSC 1597 (March 22, 2010) Justice P. Lauwers; *Langille v. Toronto (City)*, 2010 ONSC 443 (January 19, 2010) Justice E. Frank; *New Solutions Extrusion Corp. v. Gauthier*, 2010 ONSC 1037 (February 12, 2010) Justice A. Karakatsanis; *Shankowsky-Day v. Isaac Estate*, 2010 ONSC 121 (January 8, 2010) Justice S.E. Healey; and *Vella v. Pavao*, 2010 ONSC 1543 (March 11, 2010) Justice B.A. Allen.

<sup>8</sup> Cases where summary judgment was denied: *Cockshutt v. Computer Facility Services Inc.*, 2010 ONSC 1789 (March 25, 2010) Justice A.M. Molloy; *Hino Motors Canada Ltd. v. Kell*, 2010 ONSC 1329 (March 2, 2010) Justice A. Karakatsanis; *Sangha v. Sekhon*, 2010 ONSC 1017 (February 11, 2010) Justice J.R. Bellegem; *Valemont Group Ltd. v. Philmor Goldplate Homes Inc.*, 2010 ONSC 1685 (March 18, 2010) Justice Karakatsanis; *Zurba v. Lakeridge Health Corp., et al.*, 2010 ONSC 318 (January 29, 2010) Justice P. Lauwers; and *MCAP Leasing Limited Partnership v. Lind Furniture (Canada) Ltd.*, 2010 ONSC 1085 (March 22, 2010), Justice D.G. Price.

*voce* evidence from only two or, at most, three witnesses. He therefore directed a mini-trial on the following terms:

1. The affidavit evidence of the plaintiff and defendant would serve as their evidence-in-chief, subject to the right of the parties to supplement that evidence by giving a further 10 minutes evidence-in-chief;
2. If the defendant wished to call an additional witness, it had to serve and file an affidavit from that witness at least 45 days before the mini-trial. That affidavit would serve as the witness' evidence-in-chief, subject to the right of counsel for the defendant to conduct up to a further 10 minutes of examination-in-chief;
3. If the plaintiff wished to submit a supplementary affidavit to respond to any additional matter raised in the defendant's affidavit, then it had to be prepared, served and filed 28 days prior to the mini-trial. That affidavit would also form part of her evidence-in-chief;
4. The plaintiff was permitted to conduct a cross-examination of the defendant up to one hour in length, and a cross-examination of the defendant's second witness of up to 15 minutes in length;
5. The defendant was permitted to conduct a cross-examination of the plaintiff of up to 45 minutes in length;
6. Immediately following the completion of the evidence, the defendant would make a closing submission of up to 30 minutes in length and the plaintiff a responding submission of up to 45 minutes in length. The defendant was permitted a reply of up to 15 minutes.

Although this is the only case so far that directs a mini-trial, it is interesting to note the criteria used in this case for choosing a mini-trial: diametrically opposed affidavit evidence, the necessity of evaluating credibility and a very small number of witnesses required. By contrast, in *MCAP Leasing Limited Partnership v. Lind Furniture (Canada) Ltd.*, 2010 ONSC 1085, Justice D.G. Price dismissed a motion for summary judgment and a mini-trial, finding that it was not in the interests of justice for the court to exercise its power under Rule 20.04 (2.1) to make findings of credibility. A number of witnesses would have been required to provide evidence and the broad scope of evidence required for a determination of the issues in the matter precluded a mini-trial as the most appropriate procedure.

Other summary judgment decisions have provided a wealth of insight as to how the judiciary is adapting to its new set of evaluative "tools" under Rule 20. They also demonstrate that, generally speaking, judges have embraced the test of "no genuine issue requiring trial" as permitting them more discretion to dispose of matters on summary judgment in the interests of justice.

For example, in *Healey v. Lakeridge Health Corp.*, 2010 ONSC 725 (January 29, 2010) Justice P.M. Perell attempted to distinguish between the old rule, whether there was any genuine issue "for" trial, and the new rule, whether there are any issues "requiring" trial. He made the following comments:

**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: *Aguonie v Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161 (C.A.); *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

[...]

**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.

[...]

**27** I agree with the Defendant Doctors that the former case law gave preference to the trial as the means for a litigant to have his or her day in court and that the availability of a summary judgment was narrowly subscribed. *However, this truth does not answer the problems of interpreting the new language for the test for summary judgment and applying the new powers that are designed to expand the availability of summary judgments with a corresponding diminishment of the role of the trial in the administration of justice.*

**28** ... To go back to the insights of Justice Morden in *Irving Ungerman Ltd. v. Galanis*, *supra*, sometimes a trial is necessary to provide procedural and substantive justice, but sometimes, a trial is unnecessary and requiring one would be a denial of procedural justice. *This insight suggests that a factor in interpreting and applying the new rules about summary judgment is the determinant of whether a trial is genuinely necessary, not because it is to be given some preferred status in the administration of justice, but because the issues to be resolved cannot be truthfully, fairly, and justly resolved without the forensic machinery of a trial.*

[...]

**30** Put into practical terms, these insights mean that having regard to the new powers to weigh the evidence, evaluate the credibility of a deponent, and draw

any reasonable inference from the evidence, the moving party must provide a level of proof that demonstrates that a trial is unnecessary to truly, fairly, and justly resolve the issues.

[...]

**33** I appreciate that this approach of focusing more attention on the issue to be determined and on what "requiring a trial" means is not a bright line test like the one that existed before, where a judge would know that there was a genuine issue for trial because he or she could not decide the matter without some weighing of the evidence. But the certainty of the old rule was intellectually dishonest because weighing evidence is unavoidable and occurs in the very act of determining whether it requires to be weighed. [Emphasis added]

Justice Perell's comments reflect the balance the new Rule affords the judiciary; they are appreciative of the flexibility given to a judge hearing a summary judgment motion, while still deferential to the underlying purposes of summary judgment that has long been expressed in cases under the old Rule, such as *Irving Ungerman Ltd. v. Galanis*, [1991] O.J. No. 1478 (C.A.). Justice Quigley, in *Canadian Imperial Bank of Commerce v. Mitchell*, 2010 ONSC 2227, also comments that the changed wording in the rules, "happily will now override prior jurisprudence that sought to prevent a judge from making [evidentiary determinations and credibility findings]." Perhaps Justice Karakatsanis puts it most concisely in *Hino Motors Canada Ltd. v. Kell*, 2010 ONSC 1329, where she states at paragraph 7:

Simply put, the test remains largely the same as it was under Irving Ungerman, where the issue was whether the evidence "requires a trial." The new Rule 20.04 provides the judge with more tools to determine if this test is met.

Despite the novelty of the provision, cases under the new Rule 20 frequently cite case law under the old Rule. A common theme in respect of which the old case law continues to emerge is the necessity of putting "your best foot forward" or "leading trump" in both advancing and responding to motions for summary judgment. New Rule 20 cases, such as *Canadian Imperial Bank of Commerce v. Mitchell*, *supra*, and *Kapy v. Hwang*, 2010 ONSC 1597, continue to cite jurisprudence dating from the 1990s for both of these propositions.<sup>9</sup>

When the amendments to the Rules were originally introduced, some members of the bar and bench expressed concern that broadening the scope of Rule 20 could lead to an over proliferation of summary judgment motions, resulting in unintended stresses on the judicial system. A preliminary review of the cases suggests this concern is unfounded.

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<sup>9</sup> The proposition that the defendant must put his "best foot forward" or risk losing is cited to Borins J. in *Rogers Cable TV Ltd. v. 373041 Ontario Ltd.* (1994), 22 O.R. (3d) 25, while the proposition that a respondent must "lead trump or risk losing" is cited to *Pizza Pizza Ltd. v. Gillespie et al* (1990), 75 O.R. (2d) 225 (Ont. Ct.) and *Irving Ungerman Ltd. v. Galanis* (1994), 4 O.R. (3d) 545 at 552 (C.A.).

In *Cockshutt v. Computer Facility Services Inc.*, 2010 ONSC 1789, Justice A.M. Molloy dismissed a motion for summary judgment regarding the notice period in a wrongful dismissal claim. Justice Molloy acknowledged that summary judgment is often a suitable route for the determination of a wrongful dismissal action where, as in this case, there is no issue as to whether the dismissal was for cause; nonetheless she found that, in the circumstances, a trial was in the interest of justice. There were facts in dispute between the parties as to the characterization of the plaintiff's position with the employer, which would impact the appropriate notice period. Other areas of dispute identified by the defendant employer would not have been bars to summary judgment in this case. However, where there was a risk of making overlapping factual findings summary judgment was inappropriate:

**25** ... The defendants intend to present evidence as to the nature of that employment in support of their argument and it may be that the trial judge will be obliged to rule on the duties and responsibilities involved. There may therefore be some overlap between the factual determinations of the trial judge as to those job responsibilities and the factual determination required on this motion regarding the character of the employment as a factor relevant to the notice period.

**26** The witnesses to be called at the trial on the bonus and other damages issues will be the same witnesses required to deal with the notice issue. Adding the issues raised in this motion to the trial will not significantly increase the length of the trial and will not greatly expand the issues. There would be no risk of inconsistent findings of fact and no difficulty with respect to the issue of determining mitigation. The discoveries have already been completed and the case is ready to proceed to trial. The total trial time required would be under a week and such trials can be accommodated with very little delay in the court's schedule.

**27** Given the number of issues about which there is some question and some difficulty in proceeding on a summary basis, and given the absence of any serious prejudice or disadvantage to the plaintiff in proceeding by way of 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. [Emphasis added]

Similarly, in *Valemont Group Ltd. v. Philmor Goldplate Homes Inc.*, 2010 ONSC 1685, Justice Karakatsanis emphasized at paragraph 28 that a summary judgment motion is not a substitute for trial:

**28** Unless the parties agree under Rule 20.04(2)(b), a summary judgment motion does not create a new general power to fashion a flexible individually crafted trial process, involving a combination of affidavit, transcript or oral evidence for the purpose of determining all or part of the claim. The test for summary judgment under Rule 20.04(2)(a) -- whether there is a genuine issue that requires a trial for its resolution as first articulated in *Irving Ungerman Ltd. v. Galanis*

(1991), 4 O.R. (3d) 545 (C.A.) -- has not changed. Both the analytical review and the availability of oral evidence under Rules 20.04 (2.1) and (2.2) have considerably broadened the motions judge's tools on a summary judgment motion. Nonetheless, although a motions judge may weigh the evidence, evaluate credibility and draw reasonable inferences from the evidence, the judge does so for the purpose of determining whether a trial is required to resolve a genuine issue. In other words, although a summary judgment motion may, if the motions judge so directs or if the parties agree, resemble a summary trial, the task of the judge hearing a summary judgment motion is different: See *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.) The motions judge must take "a hard look" at the evidence to determine whether it raises a genuine issue requiring a trial. *In short, summary judgment is not, as the Philmor argument might seem to suggest, a substitute for trial.* [Emphasis added]

The amendments to Rule 20 have apparently succeeded in expanding the “toolbox” available to motions judges in evaluating whether a matter genuinely requires a trial, or whether it may more appropriately be adjudicated at the summary judgment stage. Although much remains the same in respect of summary judgment motions, particularly with respect of the expectation that parties must “lead trump” on such motions or risk losing, early case law under the new Rule suggests it may well fulfill the purposes underlying the amendment by decreasing the number of cases that necessitate a full trial and allowing more cases to be resolved at an earlier stage.

## **Discovery Reform Under Rules 29.1, 29.2, 30 & 31**

Like Rule 20 summary judgments, the amendments to the discovery process also appear to have been embraced by masters and judges in Ontario. The consideration of the proportionality principle is consistently referenced in the decisions to date. Discovery plans are not yet mentioned frequently in the case law, a result that is not entirely surprising given their novelty. There are, however, two cases that engage the seven-hour examination for discovery requirement, one of which adds some clarity to the new “one-day” rule.

In *Solutions With Impact Inc. v. Domino's Pizza of Canada Ltd.*, 2010 ONSC 630 (Master D.E. Short), the defendant sought an order that the two representatives of the two plaintiff corporations should be discovered separately, as well as other restrictions regarding sharing of information in respect of their respective discoveries. Although the relevant rule in this case was not changed by the January 1, 2010 amendments, the inclusion of the rule on proportionality required Master Short to consider whether such a request was in keeping with the principles underlying the amendments. At paragraphs 35 – 55, Master Short spends some time discussing the “New” Rules, referencing in particular his discussion on proportionality in *Moosa v. Hill Property Management Group Inc.*, 2010 ONSC 13. However, since the parties were neither requesting an extension of time for discovery, nor had they developed a discovery plan, there was very little application of the amendments beyond consideration of what would be most “expeditious and cost effective” result (see paragraph 49).

Master Short allowed the application in part, excluding the co-plaintiff from the first of the two discoveries but permitting both to be in attendance at the second discovery on the clear understanding that there should be no communication between them either prior or during the course of the discovery. Domino's was permitted to examine each of the plaintiffs, one after the other, for a period of up to seven hours total.

This decision is notable in clarifying that the seven-hour limit on examination for discovery is, literally, seven hours and not "one day" despite the wording of the rule. As a typical day of examination for discovery would normally be no more than six hours of actual examination, the rule is – based on the decision of Master Short – apparently more akin to a "day and a half" rule.

The other decision that has dealt with the seven-hour limit under the rule is *J. & P. Leveque Bros. v. Ontario*, 2010 ONSC 2312. The question before the Court in that case involved an interpretation of Rule 31.05.1 (1) (the seven-hour limit on discovery) and the interplay of this section with Rule 29.1.03 (1) (requirement of a discovery plan). The plaintiff sought to extend the length of examination for discovery past seven hours.

The court considered the following factors relevant:

- That there were five named parties to the litigation;
- The range of damages in excess of \$2 million
- The parties had exchanged digital productions and had a database of nearly 9000 documents;
- Multiple jurisdictions were involved;
- Mediation was successful with respect to a fourth defendant but unsuccessful with the remaining parties;
- A counterclaim existed in the amount of \$25,000
- The time frame to which the evidence related spanned three years; and
- The parties were represented by experienced counsel, familiar with the issues.

Justice Templeton noted the overarching concern of the Osborne Report of the need for effective and cost-efficient access to justice. She further noted the importance of preparation on the part of legal representatives, as well as the importance of not pursuing irrelevant information, in controlling spiraling legal costs particularly at the discovery and trial stages. The interests of justice required that the above factors be balanced "jointly and severally" by all participants in the process. This balance, Justice Templeton commented, is embodied in the new Rules 29.1.03 and 31.05.1:

[16] The interests of justice do not require that the concept of effective representation trump the concept of cost-efficient and/or expeditious justice or vice versa; but they do require that these factors be balanced both jointly and severally by all participants in the process. It is the inherent melding of these concepts that the new amendments of the Rules seek to enhance within an environment of fairness and objectivity. Thus, in Rule 29.1.03 there is reference to "any other information intended to result in the expeditious and cost-effective

completion of the discovery process in a manner *that is proportionate to the importance and complexity of the action.*” (Emphasis in original)

[17] This overarching concern for balanced access to justice is also reflected in Rule 31.05.1 (2) (g) which grounds the Court’s option to consider evidence pertaining to “any other reason that should be considered in *the interests of justice*” (my emphasis) when considering a leave application for an extension of time as is the case here.

Justice Templeton went on to clarify what she understood the time limit in 31.05.1 to be encompassing and when a time limit set out in the parties discovery plan could be altered or extended:

[19] Further, against the backdrop of Justice Osborne’s comments and the amendments to the Rules, I interpret the limit of seven hours to mean seven hours of *actual* discovery on the record and that the limit does not envisage inclusion of breaks, adjournments or, in addition to the conduct described in Rule 31.05.1 (e) and (g), unreasonable interference in the questioning process by opposing counsel the effect of which interference is to unduly shorten the time available to the examining party.

[20] I am also of the view that in circumstances in which the time limit agreed upon in the Discovery Plan has expired and counsel is at a crucial point in his/her examination on an issue central or germane to the case, flexibility ought to be brought to bear and that further time to a maximum of one hour to continue and conclude the examination would not be unreasonable in the circumstances.

[21] In cases involving multiple parties, I would expect the excess of one hour to be deducted from the time available for that same party to examine another party to the litigation. In other words, to ensure that effective and cost-efficient justice is realized, counsel must adhere to their agreement with respect to the *total* length of the examinations but where there is more than one party, a leeway of one hour past the allotted time for the examination of one of the parties would not be unreasonable provided it is recovered from the examination of another party. This flexibility allows counsel to be effective and to prioritize but at the same time cost-efficient in the overall process.

In the case at bar, Justice Templeton allowed the plaintiff to extend the hours for discovery to a maximum of 19 hours in total.

In respect of addressing proportionality in the discovery process, Master Short has been particular emphatic in its use. An oft-quoted passage in recent decisions of Master Short, regarding the impact of the new proportionality requirement at rules 1.04 (1.1) and 29.2.03(1) to

the discovery process, is that of Lord Woolf, in the fifth chapter of his report *Access to Justice*:<sup>10</sup>

“1. The overall aim of my Inquiry is to improve access to justice by reducing the inequalities, cost, delay and complexity of civil litigation and to introduce greater certainty as to timescales and costs. My specific objectives are:

- (a) to provide appropriate and proportionate means of resolving disputes;
- (b) to establish "equality of arms" between the parties involved in civil cases;
- (c) to assist the parties to resolve their disputes by agreement at the earliest possible date; and
- (d) to ensure that the limited resources available to the courts can be deployed in the most effective manner for the benefit of everyone involved in civil litigation.”

Master Short also provides extensive discussion of the intent of the newly revised Rules, and particularly the proportionality requirement, at paragraphs 101 to 117 of *Moosa v. Hill Property Management Group Inc.*, *supra*. Other adjudicators have been no less conscious of its importance in determining whether oral or documentary production is required.

In *Blenkhorn et al. v. Mazzawi et al.*, 2010 ONSC 699, Justice DiTomaso found that the proportionality requirement precluded additional examination of *Family Law Act* claimants in a motor vehicle accident whose claims were readily discernible from the discovery of the primary plaintiff:

[23] In light of the new emphasis on proportionality regarding the said rules, I find it is not reasonable or justified to proceed with the defendants’ proposal to examine Craig and Leigh Blenkhorn for the purpose intended. This would only add expense and time to the proceeding and further risk a delay in the commencement of the trial.

[24] I find the added time, expense and undue prejudice involved in the defendants’ request is out of proportion to the matters at issue in the litigation. Again, the defendants have already examined one of the *FLA* claimants, namely, the husband of the primary plaintiff, and they have examined the primary plaintiff twice regarding the very issue on which discovery is sought from the *FLA* adult children.

In *Bruce v. MacQuarie Premium Funding Inc.*, 2010 ONSC 2236 (Master R.M. Brott), the plaintiffs sought an order compelling a defendant’s affiant to re-attend a cross-examination of his affidavit and to answer questions that were refused at his original cross-examination. In

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<sup>10</sup> See *1588143 Ontario Inc. v. Lantic Inc.*, 2010 ONSC 1613 (March 16, 2010) Master D.E. Short at Para. 36; *Brand Name Marketing v. Rogers*, 2010 ONSC 1159 (March 10, 2010) Master D.E. Short at Para. 52; *Green v. Mirtech International Security Inc.*, 2010 ONSC 1240 (February 24, 2010) Master D.E. Short at Para. 32; *Rohit v. Nuri*, 2010 ONSC 17 (February 10, 2010) Master D.E. Short at Para. 34; and *Moosa v. Hill Property Management Group Inc.*, 2010 ONSC 13 (February 4, 2010) Master D.E. Short at Para. 108.

determining whether to grant the order, Master Brott considered the impact of proportionality on Rule 39, which permits a cross-examination on a pending motion:

[12] The new rules do encourage the court and counsel to take a reasonable and practical approach to procedural issues, particularly those issues surrounding discovery and production. However, the new rules on proportionality do not remove Rule 39 which permits a cross examination on a pending motion. The caselaw pertaining to Rule 39 clearly establishes that the questions on cross-examinations must be relevant to the motion or to the affidavit in support of the motion or to the deponent's credibility. Proportionality in the new Rules is not to be a substitute for the relevance test. Proportionality is simply the boundary line which is there to keep counsel and the court thinking of issues of cost, time and undue prejudice. Proportionality is not intended as a shield to a cross-examination on an affidavit. It is more of a check and balance once relevance has been established.

In this case, Master Brott found that answering the questions would not require the affiant to produce numerous documents and he was not being asked to conduct an in-depth analysis that would cost him more time and money than what the case was worth. Therefore, the order was granted.

In *Hollo v. Toronto Transit Commission*, 2010 ONSC 1656, Master M. Sproat confirmed in *obiter* that Rule 29.2, importing a proportionality requirement into the discovery process, did not permit shifting of the costs of production based on the party's means:

**17** Even if the new rule applied, in my view, the rule does not have the effect of allowing the court to shift the costs of production. Rather, the rule operates to relieve a party from an obligation to produce documents based on the notion of proportionality, which compels the court to consider whether the time involved is unreasonable, whether the expense is unjustified, whether there would be undue prejudice, whether there would be undue interference with the conduct of the action and whether the documents are readily available from another source.

**18** In order to avoid the production, it is incumbent upon the plaintiff to adduce evidence as to these considerations. On this motion, there was no such evidence that would allow me to conclude that these factors have been established such that the plaintiff should avoid production.

Finally, in *Rossi v. Vaughan (City)*, 2010 ONSC 214 (Master M. Sproat), the court refused to order the defendant to answer undertakings and refusals, or to compel the defendant City to conduct a review of its server and computer systems. The City had already undertaken a search of its computer system and no documents subject to disclosure were found. There was no basis for questioning the parameters of the City's search or that the City failed to disclose relevant documents. The investigation requested by the plaintiff would have been costly and there was no

evidence to suggest that the benefits of such an investigation would warrant the costs. The considerations of relevance and proportionality precluded such an order (see paragraphs 13-14).

## **Conclusion**

The amendments to the *Rules of Civil Procedure* were intended to facilitate a “more accessible and affordable” justice system for Ontarians. It is probably too early to tell whether they will succeed substantially in achieving that objective. Nonetheless, the amendments to Rule 20, regarding summary judgment motions, and to the discovery process appear to have gained traction with the judges and masters of the Superior Court. At least at this early stage, there is visible support for the goals of proportionality and efficiency that underlie the amendments to both processes. In respect of summary judgment, Ontario court justices have embraced their expanded discretion to make findings of fact and determinations of credibility. On the discovery side, the proportionality principle provides a fresh lens through which to assess the merits of requests for examinations and production, grounded as it is in the balancing of costs and complexity of matters, and not merely the question of relevance.

The result in both cases is a mix of old and new: summary judgment under the new Rule 20 still asks whether a trial is necessary, but permits a more thorough examination of that question by the motions judge; discovery and production are still based in relevance, but the new proportionality requirement considers whether the associated cost is too much in light of the complexity of the case. There is no question that case law under the old Rules remains relevant, particularly on summary judgment (as discussed above). However it is equally undeniable, on a review of the recent cases, that the new framework for evaluating the merits of both summary judgment motions and discovery requests is one that will be enforced by the bench and in which all pre-2010 case law on these issues will be interpreted.