Keeping Up-to-Date on Court Rule Changes: What You Need To Know

There have been recent changes to both the *Federal Courts Rules*[1] and the Ontario *Rules of Civil Procedure*[2]. Both jurisdictions have opened up access to summary judgment by expanding the range of circumstances in which it will be granted, and by creating a mechanism for summary or mini-trials where there are issues of credibility or conflicting evidence. Ontario has also introduced changes to examinations for discovery that limit their duration to one day per witness in most cases and require the preparation of a discovery plan. There is also a proposal that fundamentally alters the rules governing expert witnesses in the Federal Courts, which has yet to be implemented.

The rationale for these changes appears to be a realization that the current summary judgment rules, in light of their interpretation in the case law, unduly limit the instances in which summary judgment can be granted. The Rules Committee of the Federal Court appears to have drawn inspiration from the experience in British Columbia, where Rule 18A has been in place since 1983. The Ontario changes generally are premised on improving access to justice, as a product of the Ontario Civil Justice Reform Project headed by former Associate Chief Justice Coulter Osborne. The proposed changes to experts seek to address concerns about the independence of experts, and the time and cost involved in adducing expert evidence.

These recent and proposed changes have a significant impact on intellectual property litigation. The introduction of summary trials at the federal level creates the possibility of American style Markman hearings on patent construction prior to the trial of infringement or impeachement actions. As experts are heavily relied on in intellectual property cases, the new expert rules have the potential to alter the conduct of litigation. It is this latter change that is most likely to meet, and indeed already has been met, with resistance from the bar.

Changes to Summary Judgment and the Introduction of Summary Trials

Both the Federal and Ontario jurisdictions seek to expand recourse to summary judgment whereas the former regimes discouraged litigants from pursuing this route. The following is a detailed explanation of the changes to each of the Federal and Ontario Rules.

Changes to the Federal Rules on Summary Judgment

The rules amending the *Federal Courts Rules* (Summary Judgment and Summary Trial) came into effect on December 10, 2009. The main changes appear in rules 213 to 219 although there are other sections that have been amended incidentally. It is evident that the Rules Committee looked to British Columbia Rules of Court Rule 18A as inspiration for these amendments, according to the Regulatory Impact Analysis Statement[3].

The summary judgment rules have been amended to establish a summary trial proceeding in addition to motions for summary judgment, enabling the Court to determine an issue or action even when there is conflicting evidence or issues of credibility. A summary trial can also be sought by a party when it is of the opinion that a genuine issue can be determined without a full trial.

A motion for summary judgment or summary trial can be brought on all or only some of the issues raised in the pleadings. A party may bring a motion for summary judgment or summary trial after the defendant has filed a defence, but before time and place of trial are fixed (213(1)). The Rules Committee concluded that the rules governing case management and Rule 55 allow the Court to vary or dispense with compliance in special circumstances, which suggest a possibility of more flexibility in the bringing of a motion. If a party brings a motion for summary judgment or summary trial, it may not bring a further motion for summary judgment or summary trial except with leave of the Court (213(2)).

The moving party must serve and file a notice of motion and motion record 20 days before date for hearing motion (213(3)). The Rules Committee effectively rejected The Canadian Bar Association's suggestion that the memoranda of fact and law be submitted after the respondent has served its responding motion record. The CBA had argued that as counsel must be able to show how any material dispute on the evidence can be resolved on the basis of other undisputed evidence, the moving party would not be able to identify disputes on the evidence with any precision, or at all. The responding party must serve and file a respondent's motion record 10 days before the date for hearing the motion (213(4)). The responding party must set out specific facts and adduce evidence showing there is a genuine issue for trial. It cannot rely on generalities, or on what might be adduced at a later stage in the proceedings (214).

The Court will grant summary judgment if it is satisfied that there is no genuine issue for trial (215(1)). If the only genuine issue is to the amount that the plaintiff is entitled to, the Court may order a full trial, or it may grant summary judgment with a reference under Rule 153 (215(2(a))). If the only genuine issue is a question of law, the court may determine the question and grant summary judgment accordingly (215(2)(b)). If the Court is satisfied that there is a genuine issue for trial, it may determine the issue by way of summary trial (215(3)(a)) or order that the action, or issues in it, proceed to trial or be conducted as a specially managed proceeding (215(3)(b)).

The motion record must contain all evidence on which the party seeks to rely including affidavits, admissions, affidavits/statements of expert witnesses, any evidence admissible under Rule 288/289 (216(1)). No further affidavits or statements can be served except if it is limited to evidence admissible at trial as rebuttal evidence and it is served at least 5 days before the

day set out in the notice of motion (216(2)(a)), or with leave of the Court (216(2)(b)). On a motion for summary judgment or summary trial, the motion record shall contain a memorandum of fact and law instead of written representations (366).

The Court can make any order for the conduct of a summary trial, including cross examination before the court (216(3)). Remarkably, an adverse inference can be drawn if a party fails to cross-examine or file responding evidence (216(4)).

The Court shall dismiss the motion if the issues raised are not suitable for summary trial (216(5)(a)) or summary trial would not assist in the efficient resolution of the action (216(5)(b)). If there is sufficient evidence for adjudication, the Court may grant judgment generally or on an issue unless it would be unjust to decide the issues on the motion (216(6)).

On granting judgment, the Court can make any order necessary for disposition of the action including directing a trial or Rule 153 reference to determine an amount to which the moving party is entitled (216(7)(a)), terms respecting enforcement (216(7(b)) and awarding costs (216(7)(c)). If the motion for summary trial is dismissed, the Court may order the action or the issues not disposed of by summary trial to proceed to trial, or order that the action be conducted as a specially managed proceeding (216(8)). A plaintiff who obtains judgment can proceed against the same defendant for the same relief and against other defendants for the same or other relief (217). Court may order a stay of execution pending the determination of any other issue in the action or in a counterclaim or third party claim (219).

If judgment is refused or granted only in part, Court may make an order specifying material facts not in dispute and defining the issues to be tried and make an order for payment into court of all or part of the claim (218(a)), security of costs (218(b)) or limiting the nature and scope of examination for discovery to matters not covered by affidavits or crosses on them and providing for their use at trial in the same manner as an examination for discovery (218(c)).

Changes to the Ontario Rules on Summary Judgment

There are also corresponding changes to the Ontario summary judgment rules. Despite a proposal by the subcommittee of the Civil Rules Committee, there were no changes made to the "no genuine issue for trial" test under Rule 20. Rather, as a means to expand the use and applicability of summary judgment, Rule 20 has been amended to expressly confer authority on the motions judge (but not a master) to weigh evidence, evaluate the credibility of deponents and draw any reasonable inferences from the evidence filed (Rule 20.04(2.1)).

Similarly, there has been no change to amend the "plain and obvious" test under Rule 21 to strike pleadings for not disclosing a reasonable cause of action or defence, despite suggests to the contrary. Justice Osborne was concerned that a more lenient test would have a

detrimental effect from an access to justice perspective[4]. However, to address concerns that Courts continually allow parties to amend their pleadings instead of striking a deficient claim or defence, the same judicial officer who grants leave to amend a pleading should preside over any subsequent Rule 21 motions involving the same pleadings, where practicable.

Another key change operates to remove a disincentive for parties to bring a summary judgment motion. In the past, Rule 20.06 presumptively provided for substantial indemnity costs against a moving party who was unsuccessful in obtaining summary judgment. To avoid this result, the Court had to be satisfied that the bringing of the motion was reasonable, unless the party was acting in bad faith or primarily for the purpose of delay. The presumption of substantial indemnity costs was not unique to Ontario, but it was rare among Canadian jurisdictions.

The new Rule 20.06 removes the presumption of substantial indemnity costs. Now, a Court may order costs on a substantial indemnity basis if a party acted unreasonably in bringing or responding to the motion, meaning it can apply to either the moving or responding party, or the party acted in bad faith or for the purpose of delay. Justice Osborne stated the following in his final report:

> In light of the significant costs associated with summary judgment motions, there ought to be some clear deterrent within rule 20 itself for those who wish to use summary judgment as a litigation tactic or who wish to use rule 20 to unduly delay the final resolution of the case. However, substantial indemnity costs should not be presumptive. Motion judges, I think, will have little difficulty in deciding whether substantial indemnity costs are appropriate in the circumstances of the motion.[5]

Similar to the summary trial provisions at the federal level, the motions judge (but not a master) can now order oral evidence to be adduced by one or both parties, with or without time limits, through the new mini-trial provision (Rule 20.04(2.2)). Justice Osborne stated:

> Quite apart from whether any rule 20 change is made, there was a clear call during consultations for an expedited mechanism for the resolution of straightforward disputed facts, other than a full trial. This is the mini-trial option. The mini-trial, with *viva voce* evidence, would be heard by the same judge hearing the summary judgment motion. I note that rule 20.05 allows for a "speedy trial" of an action, in whole or in part, where summary judgment is refused; however, the speedy trial provisions of rule 20 appear not to be used with any regularity.[6]

In contrast to the summary trial, this provision specifically calls for the need to hear oral evidence as the requirement for, and the rationale for, conducting a mini-trial. A mini-trial cannot be conducted based on affidavit evidence, cross-examinations on affidavits or discovery

transcripts, for example. Additionally, the mini-trial option appears to be at the motion judge's discretion where he or she feels it is necessary in order to resolve the summary judgment motion before them. This marks another difference from the summary trial, where it can be sought by either of the parties when they are of the view that a full trial is not required to determine the issue. Justice Osborne continues:

> As rule 20 matters now stand, the result of a rule 20 motion is binary: the motion is granted and the action ends, or it is dismissed and the parties are on the way to full trial. In my view, there should be more flexibility to the system. **Where the court is unable to determine the motion without hearing *viva voce* evidence on discrete issues**, the rules should provide for a mini-trial where witnesses can testify on these issues in a summary fashion, without having to wait for a full trial. This can be done in British Columbia through rule 18A. It could be done in Ontario through a similar rule, i.e., by amending rule 20.
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> As noted, at the conclusion of a summary judgment motion, subrule 20.05(1) already confers on the court the power to order matters proceed to trial "forthwith" on a list of cases requiring speedy trial. In my view, amendments to rule 20 ought to be made to permit the court, as an alternative to dismissing a summary judgment motion, to direct a "mini-trial" on one or more discrete issues forthwith **where the interests of justice require *viva voce* testimony to allow the court to dispose of the summary judgment motion**. The same judge hearing the motion would preside over the mini-trial.[7] [Emphasis added]

Justice Osborne originally recommended a broader summary trial mechanism in addition to the mini-trial provision, based on British Columbia's rule 18A and similar to the new federal provision:

> In addition to summary judgment and the mini-trial option previously discussed, a summary trial rule such as British Columbia's Rule 18A may provide an effective tool for the final disposition of certain cases on affidavit and documentary evidence alone. A significant number of actions in that province are tried under the rule. Unless the Civil Rules Committee concludes otherwise, I see no valid reason why Ontario should not import the text of British Columbia rule 18A.[8]

Evidently, the Civil Rules Committee did conclude otherwise, as there is no sign of an additional summary trial mechanism anywhere in the amended rules (other than in Rule 76), nor is it mentioned in Garry D. Watson and Michael McGowan's Ontario Civil Practice – Transition Guide[9].

The History of the Summary Judgment Rules and the Need for Reform

The *Federal Court Rules* were amended to introduce summary judgment provisions in January 13, 1994. Section 432.3(4) read as follows:

> (4) Where a judge decides that there is a genuine issue with respect to a claim or defence, the judge may nevertheless grant summary judgment in favour of any party, either upon issue [*sic*] or generally, unless
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> (a) the judge is unable on the whole of the evidence to find the facts necessary to decide the questions of fact or law; or
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> (b) the judge considers that it would be unjust to decide the issues on motion for summary judgment.[10]

The wording of Rule 432.3(4) was a verbatim reproduction of Manitoba's Rule 20.03(4). According to Summary Judgment in the Federal Court and in the Federal Court of Appeal: A Discussion Paper of the Rules Committee on Summary Judgment[11]:

> Manitoba Rule 20 has been interpreted to be given a wide scope by Manitoba Courts. An application under Rule 20 requires that the person moving for summary judgment must establish with evidence on a prima facie case for the entering of summary judgment. Once the moving party raises a prima facie case for the relief sought, the responding party then has an obligation to satisfy the court that there is an issue which requires determination at trial. This must be a triable issue which realistically could result in a judgment in the responding party's favour; there must be sufficient evidence on the record to enable the court to conclude that that party has a "real chance of success".
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> The court may draw inferences and look at the overall strength of the plaintiff's action. However, genuine or real issues of credibility (i.e. those which must be determined in order to decide the case), creating real conflicts in the evidence, require determination at a trial based upon viva voce evidence and assessments of credibility by a trial judge.[12][Footnotes omitted]

Just as Manitoba's Rule 20 was given wide scope by the Courts, the Federal Court also initially interpreted Rule 432.3(4) liberally. For instance, in *Pallmann Maschinenfabrik G.m.b.H. Co. KG v. CAE Machinery Ltd. et. al.*[13] , the defendants brought a summary judgment motion against the plaintiffs in a patent infringement action. The plaintiff also brought a summary judgment motion against the defendants.

Justice Teilelbaum granted the defendants' motion and denied that of the plaintiff. He was satisfied that there was sufficient evidence before him to decide the issues as identified, including the construction of the patent at issue:

> Rule 432.3(4) provides that where there is a genuine issue for trial the judge may nevertheless grant summary judgment in favour of either party, either upon issue or generally, unless the judge is unable on the whole of the evidence to find the facts necessary to decide the questions of fact or law or the judge considers that it would be unjust to decide the issues on the motions for summary judgment.
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> I am satisfied that there is sufficient evidence before me to decide the issues as identified. Essentially, the issue before me was whether the formation of the proper bundle is an essential element of the patent. This determination involved interpreting the patent and applying the applicable law to that interpretation. The construction of the patent is a matter for the court and I am satisfied that, based on the detailed submissions of all counsel and the affidavits filed, there is sufficient evidence before me to formulate an interpretation of the patent that is reasonable in the circumstances.
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> …
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> I am also satisfied that in the circumstances of the present applications it would not be unjust to decide the issues on these applications.[14]

Essentially, Justice Teitelbaum engaged in the very type of Markman hearing style determination of patent construction on a summary basis that is contemplated would occur under the new summary trial provisions.

Subsequently, however, the federal summary judgment rule was revised in 1998, for reasons that are not clear to the Rules Subcommittee for the current changes[15]. Rule 216(3), which corresponds to the former Rule 432.3(4), has substituted "if" for the word "unless" and "able" for "unable":

> (3) Summary judgment - Where on a motion for summary judgment the Court decides that there is a genuine issue with respect to a claim or defence, the Court may nevertheless grant summary judgment in favour of any party, either on an issue or generally, **if** the Court is **able** on the whole of the evidence to find the facts necessary to decide the questions of fact or law.[16]

The change from a double negative sentence to one stated in positive terms does not seem to import a stricter test. In fact, Rule 432.2(4)(b), which provided that summary judgment should not be granted if it would be unjust to decide the issues on the motion for summary

judgment, was not carried forward in the 1998 rules. If anything, this change would suggest that the Federal Court would have even greater leeway in deciding an issue or action on a summary judgment motion

However, subsequent decisions of the Federal Court of Appeal have confined the power of the Court to grant summary judgment. The Rules Subcommittee on Summary Judgment summarized the case law as follows:

> In *MacNeil Estate v. Canada (Indian and Norther Affairs Department)* and *Trojan Technologies, Inc. v. Suntec Environmental Inc.* the scope of these rules was considered by the Federal Court of Appeal. It was noted that once a judge declines to grant summary judgment because there is a genuine issue for trial, the same judge may be asked to grant summary judgment under subsection 216(3). If a judge then grants judgment, the party who has already established that there is a genuine issue is thus deprived of a trial. Where there are conflicts in the evidence, where the case turns on the drawing of inferences, or where an issue of credibility is at stake, a judgment under subsection 216(3) may be inappropriate[17]. [Footnotes omitted.]

The result of the Justice Sexton's decision in *MacNeil Estate*[18] has effectively circumscribed the availability of Rule 216(3), and thus rendered the federal summary judgment rules more limited than the Manitoba rules they were based upon. The Rules subcommittee was thus led to consider amendments to Rule 216 to allow the Court to grant summary judgment in some circumstances where there are disputed issues of fact, or order various procedures, such as cross-examination of affiants before the Court.

The Ontario summary judgment rules similarly had their foundation in wording from another jurisdiction which affords broad scope on summary judgment motions. Rule 20 of the *Ontario Rules* is premised upon whether or not there is a "genuine issue" for trial. That terminology finds its genesis in the U.S. Federal Rules of Civil Procedure. However, as Monahan and Adihetty observe in Summary Disposition of Cases[19]:

> Despite the similarity between Rule 20 and Rule 56 of the U.S. Federal Rules of Civil Procedure, they have produced divergent results. Commentators purport and studies indicate that the percentage of civil cases proceeding to trial in the U.S. federal courts has decreased significantly in the last two decades. Topping the list of reasons for this phenomenon is the established use of summary judgment to resolve cases. The 1986 trilogy of Supreme Court cases are cited as signaling a greater judicial acceptance of summary judgment.
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> In its three decisions, the Supreme Court reinforced the legitimate and effective use of summary judgment. The procedure, in the eyes of the Court, is properly regarded not

> as a disfavoured procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action". In regards to balancing rights, Rule 56 is to be construed with due regard not only for the rights of persons asserting claims and defences that are adequately based in fact to have those claims and defences tried to a jury, but also for the rights of persons opposing such claims and defences to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defences have no factual basis.[20] [Footnotes omitted]

In Ontario, the Court of Appeal seems to have taken the opposite approach. Monahan and Adhihetty continue:

> In ruling on a motion for summary judgment, the Ontario Court of Appeal has stated that a motions judge should never assess credibility, weigh the evidence, or find the facts because these are functions reserved for the trier of fact [*Aguonie v. Galion Solid Waste Material Inc.* (1998), 156 D.L.R. (4th) 222 at para. 32 (Ont. C.A.)]. A motions court judge is restricted to a narrow role and should not assume the role of a trial judge and, before granting relief, must be satisfied that it is clear that a trial is unnecessary [*Dawson v. Rexcraft Storage and Warehouse Inc.*, [1998] O.J. No. 3240 at para. 20 (C.A.)] If there is a genuine issue with respect to material facts then, no matter how weak, or how strong, may appear the claim, or the defence, which has been attached by the moving party, the case must be sent to trial [*Ibid.*at para. 28 (C.A.)] It is not for the motions judge to resolve the issue [*Ibid*.]. However, an examination of the evidence, which constitutes the record, is central to determining the existence of a genuine issue in respect to material facts [*Ibid.* at para.20].[21]

The scope of summary judgment in Ontario is thus even narrower than that at the federal level. So much so in fact that the Rules Subcommittee of the Federal Court stated that Ontario's Rule 20 was "not a model for amending Rule 216" as "Rule 20.04(2)(a) confines summary judgment to situations where 'there is no genuine issue for trial'"[22]. The Rules Subcommittee and Justice Osborne both expressed the need to expand the circumstances in which summary judgment is available to litigants.

Other Jurisdictions

In addition to Manitoba and the United States, which have been canvassed above, there are other jurisdictions that are relevant for comparison. The United Kingdom reformed its summary judgment provisions in the *Civil Procedure Rules* after a 1996 report by Lord Woolf, similar to the one undertaken by Justice Osborne in Ontario, recommended reforms to the civil justice system to improve access to justice[23]. Summary judgment motions were extended to

defendants as well as plaintiffs, just as Ontario did with the 1985 Rules of Civil Procedure. The significant change was that the test for summary judgment became whether or not there was a realistic prospect of succeeding on the claim or issue at trial. Lord Woolf provided the following recommendation:

> The test for making an order would be that the court considered that a party had no realistic prospect of succeeding at trial on the whole case or on a particular issue. A party seeking to resist such an order would have to show more than a merely arguable case; it would have to be one which he had a real prospect of winning. Exceptionally the court could allow a case or an issue to continue although it did not satisfy this test, if it considered that there was a public interest in the matter being tried[24].

His recommendation was adopted in Rule 24.2. Justice Osborne specifically considered the "realistic prospect of success" test in his recommendations for Ontario:

> The courts in England have noted that while the test of "no real prospect for success at trial" can be stated simply, its application in practice is difficult. Other English appellate decisions appear to have limited the impact of the rule, for reasons similar to those of the Court of Appeal for Ontario.
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> Changing the test in rule 20 from "no genuine issue for trial" to "no real prospect of success at trial" would, in theory, reduce the threshold for granting summary judgment. At a minimum, it would signal a more liberal approach to summary judgment motions. Should a test of "no real prospect of success" be adopted in Ontario, it would attract judicial interpretation and case law from England and Wales would likely be relied upon to guide the court. The English case law suggests an interpretation of "no real prospect of success" that is equally restrictive, if not more restrictive than the current "no genuine issue for trial" test and the Court of Appeal's interpretation of it. Accordingly, it seems to me that changing the "no genuine issue for trial" test to "no real prospect of success at trial" may well not work, if the goal is to expand the scope of summary judgment.[25]

Thus, whether it is Ontario, the Federal Court, or the U.K., there is a consistent pattern whereby the legislature amends the rules for summary judgment to expand its availability, and yet appellate courts are able to scale it back through the judicial interpretation of the relevant test. Justice Osborne astutely observed that the solution was for the legislature to expressly confer authority on the motions judge to weigh evidence, draw inferences and evaluate credibility.[26]

The most relevant jurisdiction for a discussion of summary judgment is British Columbia. The test for summary judgment is whether or not there is a bona fide triable issue, which the applicant for summary judgment must disprove beyond a reasonable doubt.[27] However, the

provisions for summary judgment in Rules 18(1) and (6) were found to be insufficient, as Monahan and Adhihetty note:

> The British Columbia courts found that artful pleaders were usually able to set up an arguable claim or defence, and an affidavit that raised any contested question of fact or law was enough to defeat a motion for judgment. Rule 18 was often ineffective in avoiding unjust delay or unnecessary expense in the determination of many cases. As a consequence, Rule 18A was added in 1983 in an attempt to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any case where he can decide disputed questions of fact on affidavits or by any of the other proceedings authorized by the rule unless it would be unjust to decide the issues in such a way.[28] [Footnotes omitted]

The Rules Subcommittee described the test under Rule 18A(11)(a) as the most expansive of the rules on summary judgment.[29] It provides as follows:

> (11) On the hearing of an application under subrule (1), the court may
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> (a) grant judgment in favour of any party, either on an issue or generally, unless
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> > (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
> >
> > (ii) the court is of the opinion that it would be unjust to decide the issues on the application.[30]

As the Rules Subcommittee notes, Rule 18A has been interpreted by the courts to allow for summary trial and judgments in a broad range of circumstances:

> The Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* [(1989), 26 B.C.L.R. (2d) 202] stated that Rule 18A was designed for the express purpose of permitting summary trials even though there was conflicting affidavit evidence [*Ibid.* at para. 55]. The ability of judges to find the necessary facts and to decide if it is just to resolve the issues before them will to a large extent depend on the nature and quality of the material before them. [31]

Monahan and Adhihetty note that while chambers judges were cautioned to be careful, but were encouraged not to be timid in using the rule for the purpose for which it was intended.[32]

Wotherspoon, Gammon and Sanger in Summary Trial at the Federal Court[33] provide extensive insight into the BC's Rule 18A. They observe that Rule 18A was developed at a time when the Courts faced heavy volume on their dockets, many of which never made it to trial due

to the lack of available judges[34]. Chief Justice McEachern's solution was not without controversy:

> When Rule 18A was first introduced it was met by considerable resistance from many members of the bench and bar. Presumably the concern was that speed and expense were holding sway over justice. Now, after more than 25 years of experience with summary trials, most lawyers and judges in B.C. would agree that it has been an excellent fit, that it is speedy and inexpensive (at least compared to full trials) and that justice has not been sacrificed in the process.
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> Indeed the statistics bear this out. Of the proceedings commenced in the B.C. Supreme Court, approximately 1.4% are decided by full trial and approximately 1.2% are decided by summary trial. This has allowed British Columbia to not increase its number of trial judges in approximately 20 years. Rule 18A has proven to be an effective means of increasing access to justice, while reducing costs to litigants and to the judicial system.[35]

A summary trial procedure based on the B.C. model has also been adopted in Alberta (Rule 158.1). While Manitoba does not have a summary trial rule, the motions judge has discretion to conduct a trial on affidavit evidence and grant judgment where there is a genuine issue for trial, unless the judge is unable to find the facts necessary or it would be unjust to do so. Apart from the new mini-trial provision referred to above, Ontario has a summary trial procedure under its simplified procedure under Rule 76, which is also used in Saskatchewan and Prince Edward Island. As Justice Osborne notes in his recommendations, The Advocates' Society Policy Forum approved of the concept of a summary trial rule in March 2006, and the CBA Systems of Civil Justice Task Force specifically recommended the mechanism[36].

Wootherspoon et al. provide a concrete example of a case that demonstrates the advantages of the B.C. summary trial procedure over the former federal regime[37]. In August 2004, Louis Vuitton Malletier S.A. sought and obtained an Anton Piller order from the Federal Court against infringers who were counterfeiting its product. In March 2005, they also obtained judgment and a permanent injunction. When the counterfeiting activity continued, Louis Vuitton's counsel sought relief through the B.C. courts in order to make use of the province's summary trial mechanism.

In June 2008, Justice Boyd for the B.C. Supreme Court granted judgment at the conclusion of a summary trial in *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*[38] The Court declared that the copyright and trade-marks were valid and infringed, order delivery up of the infringing goods, ordered a permanent injunction, ordered damages for trade-mark and copyright infringement and punitive and exemplary damages and special costs against some of the defendants.

Comparison of the New Federal Summary Judgment Rules to B.C. Rule 18A

Wotherspoon et al. provide a comprehensive comparison between the new federal provisions and B.C.'s Rule 18A[39]. For the most part, the Federal Courts Rules are at least as expansive as the B.C. rule. In fact, the new Federal rules appear to provide the Court with even greater powers than B.C. courts with respect to summary trials. The following section highlights some of the main differences between the two regimes.

In terms of the types of evidence that may be used for the purposes of summary trials, the B.C. rules provide for answers to interrogatories, which the federal rules do not do specifically. However, in stipulating that the motion record must contain all of the evidence on which a party seeks to rely, the list of evidence provided is inclusive, suggesting that answers to interrogatories may be permissible. While Rule 216(1) does not provide that the Court may "order otherwise" to permit other evidence, the Federal Court is already afforded the power to vary, or dispense with, a rule in special circumstances in Rule 55. Furthermore, Rule 216(5) permits the Federal Court to draw an adverse if a party chooses not to cross-examine the opposing party's affiant on his or her affidavit or chooses not to file responding or rebuttal evidence, which is not part of the B.C. regime.

The Federal Court appears to have greater powers in terms of the orders it can make with respect to the conduct of a summary trial. While the B.C. rule contains a specified list in terms of the types of orders the Court can make, the federal Rule 216(4) provides that the Court may make <u>any order</u> required for the conduct of the summary trial, followed by specific examples. It is not clear at this point exactly how far the scope of this provision extends in terms of the Court's powers in this regard. Similarly, with respect to the enforcement of judgment and costs, Rule 216(7) provides that the Federal Court may make <u>any order</u> necessary for the disposition of the action, which the B.C. rule does not. In B.C., Rule 18A(8)(a) explicitly provides that the Court may adjourn the application on or before hearing the motion for summary judgment.

There is one other difference that Wotherspoon et al. suggest could be relevant:

Judgment

The two rules are also similar with regards to the jurisdiction of the courts to grant judgment in a summary trial. Rule 18A(11) and Rule 216(6) both provide that a court may grant judgment on an issue or generally unless the court cannot find the necessary facts or it would be unjust to decide the issues on the motion. The rule regarding the sufficiency of evidence is stated differently between the two rules.

> Rule 18A(11)(a) states that the rule as being "unless...the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law" the court may grant judgment.
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> Rule 216(6) states that "[i]f the court is satisfied that there is sufficient evidence for adjudication, regardless of the amounts involved, the complexities of the issues and the existence of conflicting evidence, the Court may grant judgment..."
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> While the principle seems the same, given the extensive discussion by the B.C. courts of the interpretation of this rule, it is possible that the different language will have significance by the Federal Courts in the interpretation of the court's jurisdiction, possibly leading to a narrower interpretation. It will be interesting to see how the courts will interpret this provision.[40] [Emphasis added]

Conclusions on Summary Judgment and Summary Trial Changes

Wotherspoon et al. refer to a commentator who stated the following on the twentieth anniversary of Rule 18A:

> Not since the introduction of the summary trial under Rule 18A has such a versatile and useful tool been placed in the hands of litigators wishing to have a civil dispute of modest dimensions adjudicated in a speedy, comparatively inexpensive, yet just manner.
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> …
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> When Rule 18A was first introduced, no one could have imagined the way, and the extent to which, it would change (for the good) the practice of civil litigation within the province.[41]

The Rules Committee is no doubt counting on a similar reception by the bar, and the bench, of the Federal Court. Both the new federal and Ontario provisions explicitly provide powers to the motions judge to evaluate credibility, weigh evidence, draw inferences and, where necessary, conduct summary or mini-trials; powers which appellate courts have repeatedly taken away through construing the relevant tests, even in the face of legislative changes to the summary judgment rules. The changes to summary judgment that have been introduced have the potential to radically alter the landscape in both the federal and Ontario jurisdictions.

Rules Amending the Federal Courts Rules (Expert Witnesses)

On October 17, 2009, the Government of Canada published proposed changes to the *Rules* on the Canada Gazette[42]. The proposals fundamentally alter the rules governing expert witnesses in the Federal Courts, with certain exceptions for treating physicians. The proposed changes will make most of the rules governing expert witnesses applicable to both actions and applications. The Rules Committee of the Federal Court sought to address concerns about the independence of experts, and the time and cost involved in adducing expert evidence. Among the changes being proposed are a Code of Conduct for experts, the presentation of concurrent expert evidence (or "hot-tubbing") and expert conferences, the appointment of joint expert witnesses, and processes to streamline the qualification of experts. The following is an overview of some of the most salient changes, as categorized by the Rules Committee in its Regulatory Impact Analysis Statement[43], and IPIC's concerns as expressed in its response to the earlier Federal Court Discussion Paper on Expert Witnesses[44].

Recognizing the duty of expert witnesses (New Rule 52.2, Form 52.2 and Schedule)

The Rules Committee expressed concern that experts currently misapprehend their role as advocates for the party that has retained them, which in its view "diminishes the reliability and usefulness of the expert's evidence to the Courts"[45]. As a result, counsel must now provide a Code of Conduct to the expert, who must then sign a certificate agreeing to be bound by it. The Code of Conduct appears as a schedule to the Rules, and outlines a general duty of the expert to assist the Court impartially on matters relevant to his or her expertise, which overrides any duty to a party to the proceeding.

The proposal does not appear to address the issues of enforcement and sanction for non-compliance with the code, which IPIC had previously raised. IPIC's view is that non-adherence should be dealt with at the trial judge's discretion. However, IPIC's more critical concern is that the code will impede open and frank discussions between counsel and experts. As a result, litigants may retain an additional set of "consultant experts" who would not testify at trial, which would only add to the time and cost of litigation that the Rules Committee seeks to minimize[46].

Streamlining the process of qualifying expert evidence (New Rule 52.2, New Paragraph 262(2), Amended Paragraph 263(c), Amended Rules 299(1.1)(b) and 299(1.2))

Experts will be required to set out their area(s) of expertise in their expert affidavits or statements. While the *RIAS* also refers to a requirement that experts attach their *curriculum*

vitae, the precise text of the proposed rule merely states they shall set out their qualifications. As IPIC notes, this proposal merely codifies the current practice of the intellectual property bar[47].

More significantly, parties will now be required to include any objection to the qualifications of the requisitioning party's expert, and its basis, in their pre-trial conference memoranda. The requisitioning party will be required to object to the responding party's experts at the pre-trial conference. However, the timing requirement for the exchange of expert reports in the Rules may present a problem. Expert reports must be included in pre-trial memoranda or at a later date. In IPIC's view, expert reports would need to be received well before the pre-trial conference, in order for a party to properly determine whether or not to bring a challenge. Additionally, IPIC fears this proposal may allow a party to argue that a challenge to an expert's qualifications at trial is pre-empted.[48]

Additionally, expert affidavits and statements must be served on all other parties at least 60 days before the commencement of trial, and similarly rebuttal evidence must be served on all other parties at least 30 days before the commencement of trial, except with leave of the Court.

Requiring expert witnesses to confer in advance of trial (New Rule 279.1)

The Court will now have discretion to require that experts confer with one another in advance of trial, for the purpose of narrowing issues and identifying points of disagreement. Counsel will be present at these expert conferences as of right, although both parties can consent to have the experts meet in the absence of counsel. While a joint statement prepared by some or all of the experts at the conference will be admissible at trial, any discussions in an expert conference, or any documents drafted in preparation for it, are confidential and are not to be disclosed to the Court. The Court has additional discretion to order that the expert conference take place in the presence of a judge or prothonotary. Presumably, these last two requirements taken together mean that a judge or prothonotary at an expert conference cannot sit as the trial judge, although this is not explicitly stated.

Remarkably, an earlier version of Rule 279.1(1) began with the words "If the parties agree or it is in the interests of justice", but the Rules Sub-Committee decided to remove this wording. The result is a process entirely within the Court's mandate, which can be imposed even over the express objection of the parties.

IPIC opposes the expert conference proposal, and identifies problems which in its view clearly outweigh any potential benefits. Expert conferences will act as "mediation" to force parties to adopt a joint expert report that will concede on certain issues, such as scientific and technological issues that are often central to patent cases. Negotiations should be between the

parties, rather than between the experts, or else the latter could pressure parties to consent to positions that are adverse to their interests. Furthermore, IPIC feels that reliance on a joint expert report would effectively mean an abdication by the Court of its role to weigh the evidence before it and arrive at a decision. Perhaps more troubling, experts would get an advance viewing of the other side's expert and case, which would allow an expert to tailor his or her testimony as well as provide an incentive to reveal as little of their position as possible.[49] Such a result is inimical to procedural fairness and the Rules Committee's stated objective of ensuring the impartiality of experts.

Single joint experts (New Rule 52.1(2))

On consent, parties will be able to jointly nominate a single joint expert. The proposed rule is silent on the timing in which a joint expert could be appointed, although IPIC recommends this be done at the pre-trial conference. There is no guidance on any constraints on the instructions parties can give the experts, or the requisite area of agreement between the parties. Finally, IPIC insists the expert be truly independent and able to render an impartial opinion on the questions in issue.[50]

The need for cross-examination (Amended Rule 280(1) and New Rule 280(1.1))

An expert witness will be able to tender evidence in chief at trial by reading into evidence all or part of his or her affidavit or statement, and explaining any of its contents. Other evidence could be tendered in chief, with leave of the Court. However, the Court will have an overriding discretion to order an expert witness to testify before the Court where the judge deems it necessary.

Concurrent expert evidence "hot-tubbing" (New Rules 282.1 and 282.2)

The Court will now be able to require that some or all of the experts testify as a panel after the completion of the testimony of the non-expert witnesses of each party, or at any time. The Court may identify matters within the panel members' area of expertise and pose questions to them directly. Experts will give their views, and may be directed to comment on the views of other panel members and to make concluding statements. Experts will only be allowed to pose questions to each other with leave of the Court to ensure the orderly presentation of evidence. The rules governing cross-examination and re-examination will continue to apply to experts testifying concurrently. Like the expert conference provisions, the Court can impose this measure without the consent of the parties.

The new "hot-tubbing" provisions are arguably the most contentious proposal, and IPIC strenuously opposes them. It warns that the benefits of concurrent evidence are overstated. It decries the concept as being contrary to the adversarial system of justice in Canada, as judges

will take on a more inquisitorial role, thus undermining perceptions of judicial independence and impartiality. IPIC argues it is the role of the advocate to test the evidence being adduced, and not the judiciary. Furthermore, "hot-tubbing" would disregard principles of procedural fairness, such as a party's right to present their case in the manner they choose, and the importance of cross-examination as the most effective way to ascertain the truth[51].

Moreover, in addition to the prospect of Courts usurping the role of counsel there is the danger that experts will do so. Experts will become advocates for their party's position, which is precisely what the Rules Committee hoped to avoid. Experts will effectively "cross-examine" other experts, and the more senior, more assertive and more confident experts will dominate the panel, which could only serve to skew the evidence[52].

Limiting the number of experts (New Rule 52.4)

A party may call a maximum of five expert witnesses in a proceeding, except with leave of the Court, based on certain factors that are partially enumerated. IPIC notes that Section 7 of the *Canada Evidence Act*[53] already limits the number of expert witnesses, and that such an amendment to the Rules may be outside of the Court's jurisdiction. Furthermore, the jurisprudence already sets out the relevant factors for the Court to exercise its discretion, and thus IPIC questions the need to codify them[54].

Cost consequences (New Rule 400(3)(n.1))

There will be cost consequences for the unnecessary tendering of expert evidence at trial. IPIC notes that it is already common practice for parties to raise all relevant factors including the unnecessary introduction of expert evidence when addressing costs, and at any rate that such a determination is in the trial judge's discretion. It therefore concludes that there is no amendment need for this amendment[55].

Reaction of the Intellectual Property Bar

Interested persons were invited to make representations with respect to the proposed changes before December 16, 2009. The IPIC Litigation Committee set up a panel, comprised of chair Mike Charles and members Sheldon Hamilton and Geoff Mowatt, drafted submissions on behalf of IPIC.

As Robert Todd noted in *The Hot Topic of Hot Tubbing*[56], experts are particularly relevant in intellectual property litigation, such as the notional "person of skill in the art" in patent litigation. It is apparent from the analysis above that the proposed changes include some controversial measures, notably the expert conference and "hot-tubbing" provisions. Among the intellectual property bar, these changes have largely been met unfavourably and

with scepticism. Todd characterizes the reaction of IP lawyers as "hot and bothered" and with "furrowed brows".

In addition to the issues discussed above, there is concern that the proposals may run counter to their stated goals of reigning in partisan experts and rising court costs. One concern expressed is that situations where experts are required to confer or question each other may naturally lead parties to find experts with "assertive personalities and a penchant for spirited advocacy", who would pack along the legal theories of the parties they are acting for. Another is the possibly adverse effect on the reputation of the Canadian justice system as providing a clear separation between the role of the judge as neutral decision-maker and counsel as advocates for their clients. Judges questioning witnesses raises the question of how they would respond to an objection to the question by counsel. With hot tubbing, parties may be deprived of their right to control the narrative through the order of presentation.

One of the main concerns from a practical perspective is the added costs and complicated logistics of pre-trial conferences. It has been suggested that they will "create havoc" for trial coordination. In addition to coordinating experts to testify one after the other in the normal course of litigation, counsel would now be required to coordinate the availability of experts for pre-trial conferences. In the event that the experts are also required to testify as a hot tub panel, parties would be required to pay expert fees while the experts are waiting to testify as a group. As lawyers are prohibited from conversing with experts while they are testifying, it may become necessary to retain additional "consulting experts" throughout the course of the trial. This would entail a significant expense, one that would provide an advantage to wealthy litigants.

Todd also canvassed the contrary perspective from a member of the Federal Rules Committee:

> Osgoode Hall Law School professor Janet Walker, common law advisor to the Federal Courts Rules Committee, says the group pondered many of the concerns lawyers are raising. She suggests some of the fears focus on situations that are unlikely to arise in practice. It will be rare, for example, to see expert pretrial conferencing involving a pair of experts alone in a room without a judge or counsel, and against the wishes of parties.
>
> Even so, she says that eventually has been tempered by the requirement that it be in the "interests of justice." The code of conduct for experts will also help guide such a meeting, she suggests, as it emphasizes the requirement to act in an independent and objective manner.
>
> Walker admits the committee's most lively discussions surrounded the proposal for hot tubbing. The chief outcome of that rule is the availability of a new range of options for

> the provision of testimony, she says. "It's very helpful, I think, to have encouragement of the rules to have parties actually take it up."[57]

Professor Walker's statements suggest that the intention was to expand the toolbox available to counsel in litigation, rather than force any of the new measures on parties against their will. The Committee may also have been responding to the judiciary's concern about both the volume and complexity of evidence they must contend with in intellectual property matters, which has been likened to "tak[ing] a drink from a fire hose".

Changes to Discovery in Ontario

Justice Osborne has also recommended, and the Rules Committee accepted, changes to Ontario's framework for examinations for discovery. Prior to his recommendations, there was a Task Force on the Discovery Process in Ontario ("Discovery Task Force") in 2003, whose recommendations went largely unheeded. He prefaced his recommendations with the following observation:

> A conclusion reached by the task force, which I also reached during this Review, is that discovery problems do not exist everywhere in the province. They were found to arise primarily in larger, complex cases and most frequently in large urban centres such as Toronto. They rarely exist in smaller communities where the bar enjoys a spirit of collegiality and cooperation. In making my recommendations below, this reality of civil litigation in Ontario was duly considered.[58]

It's All About Proportionality (Rule 29.2)

Proportionality has become the watchword for discoveries. In determining whether or not a party must answer a question or produce a document, the Court will consider a number of factors, namely whether:

(a) the time required for the party or other person to answer the question or produce the document would be unreasonable;
(b) the expense associated with answering the question or producing the document would be unjustified;
(c) requiring the party or other person to answer the question or produce the document would cause him or her undue prejudice;
(d) requiring the party or other person to answer the question or produce the document would unduly interfere with the orderly progress of the action; and
(e) the information or the document is readily available to the party requesting it from another source.

There is an additional consideration in Rule 29.2.03(2) of whether an order would result in an excessive volume of documents required to be produced by the party or other person.

As a result of this new provision, it is foreseeable that parties will now object to questions or requests for document production on the basis of proportionality in addition to the existing grounds of privilege and relevance. However, the latter ground has been altered by Rules Committee, based on the following change.

A Simple Test of Relevance

This recommendation of Justice Osborne follows on one of the Task Force's suggestions. The "semblance of relevance" test, which has been judicially interpreted from the wording "related to" found in many of the discovery provisions (e.g. 30.02 and 31.06), has been changed to a simple test of relevance. This change has been achieved by changing the wording of the relevant rules to "relevant to" in each of the applicable rules.

As the "semblance of relevance" test was broader than the relevance test at trial, there was concern that it led to "trial by avalanche" and abuse of the discovery process. The change to a relevance test is meant to signal restraint to the profession, in order to comply with the principle of proportionality with respect to cost and efficiency. Justice Osborne provided the following comments on the change:

> This reform is not targeted at lawyers who make reasonable discovery requests, but rather at those who make excessive requests or otherwise abuse the discovery process. Therefore, a change from "relating to" to "relevant" would likely have little or no impact on those lawyers who already act reasonably during the discovery process. Its effects will be felt by those who abuse discovery or engage in areas of inquiry that could not reasonably be considered necessary, even though they currently survive "semblance of relevance" analysis.[59]

On a related note, Justice Osborne rejected a proposal that would require parties to answer all questions regardless of any objections on the basis of relevance. Aside from inflating costs, Justice Osborne considered such a proposal as being inconsistent with his recommendation to narrow the scope of discovery through the adoption of a simple relevance test, as parties would be required to answer questions that are marginally, or entirely not, relevant. However, he did encourage parties to voluntarily answer questions where relevance is not clear and note the objection on the record. The Court would have to decide the issue before the evidence could be used at trial. This is a process that is already in place under Rule 34.12(2), which reads:

> A question that is objected to may be answered with the objector's consent, and where the question is answered, a ruling shall be obtained from the court before the evidence is used at the hearing.[60]

The "One Day" Rule (Rule 31.05.1)

The 2003 Task Force referred to "numerous scenarios in which individual or small business litigants were focused to abandon claims or accept less than adequate settlements as a result of excessive discovery costs"[61]. Given the significant costs involved in conducting unnecessary multi-day discoveries, there is now a default time limit of one day, or seven hours for oral discovery. The threshold applies regardless of the number of parties or the number of other persons that will be examined. If a party wishes to exceed this threshold, it must either obtain the consent of the other parties, or obtain leave of the Court.

In exercising its discretion to grant leave, the court will generally consider issues related to proportionality. Specifically, the Court will consider:

(a) the amount of money in issue;
(b) the complexity of the issues of fact or law;
(c) the amount of time that ought reasonably to be required in the action for oral examinations;
(d) the financial position of each party;
(e) the conduct of any party, including a party's unresponsiveness in any examination for discovery held previously in the action;
(f) a party's denial or refusal to admit anything that should have been admitted; and
(g) any other reason that should be considered in the interests of justice.

Under subsection (e) there are specific examples provided of a party's unresponsiveness in earlier examination for discovery in the action. They include failure to answer on grounds other than privilege or obvious irrelevance, failure to provide complete answers to questions or providing answers that are evasive, irrelevant, unresponsive or unduly lengthy.

Justice Osborne provides a stunning indictment of the practices of some lawyers that have necessitated this change:

> Many with whom I met expressed similar concerns about oral discoveries being fishing expeditions, unfocused or conducted by poorly prepared counsel who are unduly concerned about overlooking potential facts and issues. A few also noted lawyer's self-interest in prolonging examinations to achieve billing targets. As I have suggested, prolonged discoveries did not appear to be a problem in smaller Ontario communities.[62]

With respect to the changes he recommended, Justice Osborne opines:

> In my view, this approach responds to concerns about unduly long and costly discoveries. It places reasonable limits on their duration for the typical case, and permits flexibility as needed for more complex cases. I recognize that this reform has the potential to generate motions seeking orders for more than one day of oral discovery. However, in most cases, counsel acting reasonably and having considered the cost of discovery and the importance, nature and value of the claim should be able to agree as to whether or not more than one day is needed. I would hope it would be in the rarest of cases that counsel would require the assistance of the court in determining the appropriate duration of examinations.[63]

It should be noted that the 7 hour time limit is per party. Where there are multiple parties, that are adverse in interest, examining a witness, it would be prudent for counsel to confer on a strategy for ensuring the relevant issues are divided between counsel and to determine an order for counsel to conduct the examination.

Mandatory Written Discovery Plan (Rule 29.1)

Rule 29.1 imposes an obligation on parties to agree to a written discovery plan, with a continuing duty to update the plan as required to reflect any changes in the prescribed information. It is required where a party intends on obtaining evidence through Discovery of Documents (Rule 30), Examination for Discovery (Rule 31), Inspection of Property (Rule 32), Medical Examination (Rule 33) or Examination for Discovery by Written Questions (Rule 35). According to Justice Osborne:

> The objective of a discovery plan would be to reduce or eliminate discovery-related problems by encouraging parties to reach an understanding early in the litigation process...on all aspects of discovery.[64]

The parties must agree to a discovery plan before attempting to obtain evidence, or 60 days after the close of pleading (or a longer period if the parties agree), whichever is first. The written discovery plan must include:

(a) the intended scope of documentary discovery under Rule 30.02, taking into account relevance, costs and their importance and complexity of the issues in the particular action;
(b) dates for the service of each party's affidavit of documents;
(c) information respecting the timing, costs and manner of the production of documents by the parties and any other persons;

(d) the names of persons intended to be produced for oral examination for discovery under Rule 31 and information respecting the timing and length of the examinations; and
(e) 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.

The consequences of failing to adhere to this new requirement are severe. If the parties do not agree on a plan, the Court may refuse to grant any relief, or award any costs, on any motion under Rules 30 to 35. There does not seem to be any provision for the parties to apply to the court for assistance in the event that they cannot agree.

With respect to electronic discovery, the rule now mandates the parties to "consult and have regard to" The Sedona Canada Principles Addressing Electronic Discovery from the Sedona Conference. Justice Osborne only called for a practice direction to encourage parties to rely on these principles:

> I am not inclined to recommend a series of rules to deal with e-discovery issues. To do so would impose on every case mandatory e-discovery obligations that may not be necessary or sufficiently flexible to suit the needs of different cases. It may also be too soon in Ontario's litigation culture to introduce such a reform.
>
> Instead, I would encourage greater use and reliance upon the E-Discovery Guidelines and The *Sedona Canada Principles*. The *Sedona Canada Principles* and accompanying commentary may be more effective than rules...What is crucial is that parties consider e-discovery issues and tailor discovery plans and agreements to meet the needs of their case. At least for now, this is a better approach than having rules based protocols that would be applicable in all cases.[65]

Justice Osborne went on to recommend a practice direction stating that the court *may* refuse to grant any discovery relief or make cost awards where the parties have failed to consider, and to the extent reasonable apply, the Sedona Principles.

While practically there may be little difference for litigants, as in either case the Court is given a permissive discretion to disallow relief or costs for failure to comply, the Rules Committee clearly went beyond, and seemly against, Justice Osborne's recommendation and actually incorporated compliance with The Sedona Principles into the rules as a mandatory requirement of the written discovery plan in every case.

In fact, Justice Osborne's recommendation for the discovery plan as a whole also seems to have been as a practice direction, not a change to the rules:

> During consultations, the need for such a rule amendment was questioned, given the time and cost associated with formalizing a discovery plan, especially in cases where parties do not have discovery problems. I do note, however, that this reform is in place in several American jurisdictions...
>
> In my view, parties should be encouraged to discuss early in the litigation how discovery will unfold, when and how productions will occur and when oral discoveries will take place. It would be prudent to document areas of agreement and disagreement, if any. Early discovery/production planning will reduce costs in the long run.
>
> A Practice Direction to promote discovery planning should also be considered, along the lines suggested above regarding e-discovery. It would state that the court may refuse to grant discovery relief or make appropriate cost awards on a discovery motion where parties have failed to produce a written discovery plan addressing the most expeditious and cost-effective means to complete the discovery process proportionate to the needs of the case.[66]

Justice Osborne's reference to a rule amendment seems to be a passing reference to the other jurisdictions. Once again, the Rules Committee went above and beyond his recommendation and by-passed the practice direction route for a full fledged amendment to the *Ontario Rules*. Ontario now joins Texas, New York and Arizona in this regard.

Conclusions on the Recent and Proposed Changes

Watson and McGowan refer to changes to the *Ontario Rules* as "the most extensive amendments to the Rules of Civil Procedure since they were first adopted in 1985" [Page 1]. The shift to a simple test of relevance and the introduction of a default one day/seven hour limit for the discovery of a party serve to tighten up the discovery process and decrease costs. The implementation of mandatory written discovery plans follows the lead of some American states. The granting of express statutory jurisdiction on motions judges to weigh evidence, evaluate credibility and draw reasonable inferences to decide a motion for summary judgment from the evidence expressly overrules jurisprudence from the Ontario Court of Appeal which denied motions judges those very powers. The ability to conduct a mini-trial where the motions judge deems it necessary for the parties to adduce oral evidence in order to determine the motion is a significant step toward the British Columbia model of a Rule 18A summary trial.

The federal changes go beyond the Ontario mini-trial provision, and arguably exceed even the British Columbia regime, granting the Federal Court even more sweeping powers to conduct summary trials. The proposed federal changes to expert evidence are modeled on changes that have already been implemented in the Australian context. Generally speaking,

the Rules Committees have looked to changes that have been tried in other common law jurisdictions in order to achieve the objectives of increasing access to justice and adhering to proportionality in Ontario, and providing expanded use of summary judgment and summary trials to dispose of cases not requiring a full trial as well as reigning in partisan experts, reducing costs and providing greater assistance to the trier of fact at the federal level. To paraphrase Wootherspoon et al., time will tell if the adoption of these changes will ultimately be as embraced as they were in other jurisdictions[67].

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[1] *Federal Courts Rules*, SOR/98-106 [*Rules*]
[2] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [*Ontario Rules*]
[3] *Rules Amending the Federal Courts Rules (Summary Judgment and Summary Trial): Regulatory Impact Analysis Statement:* http://gazette.gc.ca/rp-pr/p2/2009/2009-12-23/html/sor-dors331-eng.html
[4] The Honourable Coulter A. Osborne, Q.C., Civil Justice Reform Project: Summary of Findings and Recommendations (Ontario Ministry of the Attorney General, 2007) at 41 [*Osborne Report*]
[5] *Ibid.* at 37
[6] *Ibid.* at 34
[7] *Ibid.* at 36
[8] *Ibid.* at 37-38
[9] Garry D. Watson, Q.C. and Michael McGowan, Ontario Practice – Transition Guide 2009/2010: http://www.carswell.com/NR/rdonlyres/34BE674F-057D-4739-AD40-4CCC22336E18/0/Amendments_to_the_RulesL77981585TG.pdf
[10] *Federal Court Rules*, C.R.C. 1978, c. 663, Rule 432.3(4)
[11] Rules Subcommittee on Summary Judgment, Summary Judgment in the Federal Court and in the Federal Court of Appeal: A Discussion Paper of the Rules Subcommittee on Summary Judgment [*Discussion Paper*]
[12] *Ibid.* at 3-4
[13] *Pallmann Maschinenfabrik G.m.b.H. Co. KG v. CAE Machinery Ltd. et. al.* (1995), 62 C.P.R. (3d) 26
[14] *Ibid.* at 57-58
[15] *Discussion Paper, supra* note 11 at 3
[16] *Rules, supra* note 1, r. 216(3)
[17] *Discussion Paper, supra* note 11 at 2
[18] MacNeil Estate v. Canada (Indian and Norther Affairs Department), 2004 FCA 50 at paras. 36, 46 [*MacNeil Estate*]
[19] Paul Monahan and TJ (Tajesh) Adhihetty et al., Summary Diposition of Cases (Fasken Martineau DuMoulin LLP, February 2006) [*Monahan*]
[20] *Ibid.* at 6-7
[21] *Ibid.* at 3
[22] *Discussion Paper, supra* note 11 at 2-3, footnote 7
[23] U.K., Department of Constitutional Affairs, *Access to Justice Final Report* by The Right Honourable the Lord Woolf (1996): http://www.dca.gov.uk/civil/final/index.htm [*Woolf Report*]
[24] *Ibid.* at ch.12, para. 34: http://www.dca.gov.uk/civil/final/sec3b.htm#c12
[25] *Osborne Report, supra* note 4 at 34-35
[26] *Ibid.* at 35
[27] *HSBC Bank Canada v. Tahvili*, [2004] B.C.J. No. 42 (C.A.) at para. 13
[28] *Monahan, supra* note 19 at 5.
[29] *Discussion Paper, supra* note 11 at 4
[30] *Supreme Court Rules*, B.C. Reg. 221/90, r. 18A(11)(a)
[31] *Discussion Paper, supra* note 11 at 4
[32] *Monahan, supra* note 19 at 6
[33] David Wotherspoon, Keri Gammon and Stephanie Sanger, *Summary Trial at the Federal Court* (Faskin Martineau DuMoulin LLP, 2009) [*Wotherspoon*]

[34] *Ibid.* at 1
[35] *Ibid.* at 1-2
[36] *Osborne Report, supra* note 4 at 39
[37] *Wotherspoon, supra* note 33 at 20-21
[38] *Vuitton Malletier S.A. v. 486353 B.C. Ltd.*, 2008 BCSC 799
[39] *Wotherspoon, supra* note 33 at 10-11
[40] *Ibid.* at 11-12
[41] *Ibid.* at 20, taken from "Entre Nous" *The Advocates* 61:2 (March 2003) 169 at 169-170
[42] Canada Gazette: http://www.gazette.gc.ca/rp-pr/p1/2009/2009-10-17/html/reg1-eng.html
[43] Regulatory Impact Analysis Statement, http://www.gazette.gc.ca/rp-pr/p1/2009/2009-10-17/html/reg1-eng.html [*RIAS*]
[44] Intellectual Property Institute of Canada, *IPIC Response to Federal Court Discussion Paper on Expert Witnesses* (2008) at 6-7 [*IPIC Response*]
[45] *Ibid.* at *Issues and objectives*.
[46] *IPIC Response, supra* note 44 at 6-7
[47] *Ibid.* at 8
[48] *Ibid.* at 8-9
[49] *Ibid.* at 11-13
[50] *Ibid.* at 14-16
[51] *Ibid.* at 19-21
[52] *Ibid.* at 21-22
[53] *Canada Evidence Act*, R.S.C. 1985, c. C-5
[54] *IPIC Response, supra* note 44 at 22-24
[55] *Ibid.* at 19
[56] Robert Todd, *The Hot Topic of Hot Tubbing* (Legal Report: Intellectual Property, January 4, 2010): http://www.canadianlawyermag.com/The-hot-topic-of-hot-tubbing.html
[57] *Ibid.*
[58] *Osborne Report, supra* note 4 at 56
[59] *Ibid.* at 58
[60] *Ontario Rules, supra* note 2, r. 34.12(2)
[61] *Osborne Report, supra* note 4 at 58
[62] *Ibid.* at 59
[63] *Ibid.*
[64] *Ibid.* at 64
[65] *Ibid.* at 63
[66] *Ibid.* at 64-65
[67] *Wotherspoon, supra* note 33 at 24