Summary Trial at the Federal Court

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A. Introduction

"A paved cow path is not what we had in mind." This odd phrase was the title of a law firm technology conference several years ago. Perhaps obscure at first glance, it says a lot about the goals and challenges when dealing with change: the best way for a cow to get from A to B may well not be the best route to follow when driving a car.

The trial process commonly employed in the common law courts was designed to accommodate trials by juries. "We needed to adduce evidence orally, because, until modern times, most jurors were illiterate. We needed to resolve cases in one climactic trial because it was too impractical to assemble a jury more than once. There was little desire on the part of judges to control the course of litigation, pre-trial, when the ultimate decision-maker was the jury."[1]

Rule 1(5) of the British Columbia Supreme Court Rules says: "The object of these rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."[2] Rules to similar effect are found in most jurisdictions in Canada. The Federal Court equivalent is Rule 3 which reads: "These Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."[3]

Given that most trials in Canada are decided by judge alone, there are opportunities for change while maintaining the commitment to results that are just, speedy and inexpensive. In 1983 British Columbia adopted a rule to allow trials without (for the most part) live witnesses. Rule 18A was developed by the late Chief Justice Allan McEachern (then Chief Justice of the trial division). It was developed at a time when trial lists were lengthening and the numbers of trials being bumped because no judges were available was on the rise. The summary trial, as they are now generally referred to, was Chief Justice McEachern's solution.

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 fix, 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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[1] Chief Justice Donald Brenner and Allan Seckel, Q.C., "Making Justice Affordable" (2007) 40 U.B.C.L. Rev. 745 at 754; citing Geoffrey Davies, "The Reality of Civil Justice Reform: Why We Must Abandon the Essential Elements of Our System." (Paper presented at the 20th annual conference of the Australian Institute of Judicial Administration Annual Conference, Brisbane, Qld, 13 July 2002) at 3.

[2] B.C. *Rules of Court*, r. 1(5).

[3] *Federal Courts Rules*, r. 3.

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.

B. The Purpose of Rule 18A and How It Works

As with the Federal Court, B.C.'s Rules of Court have prescribed a summary judgment procedure for many years. Rule 18 allows a party to apply for judgment in an action on the ground that "there is no defence to the whole or a part of the claim or, if the application is made by the defendant, no merit in the whole or a part of the claim."[4] Where the court finds a *bona fide* triable issue it must dismiss the application.

The late Chief Justice McEachern, then of the Court of Appeal, explained the practical constraints on the summary judgment rule in what became the seminal judgment on Rule 18A, B.C.'s summary trial rule:

> The problem with R. 18 of course is that artful pleaders are usually able to set up an arguable claim or defence and any affidavit that raises any contested question of fact or law is enough to defeat a motion for judgment. Rule 18 was often ineffective in avoiding unjust delay or in avoiding unnecessary expense in the determination of many cases.
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> As a consequence, R. 18A was added to the Rules of Court in 1983 in an attempt to expedite the early resolution of many cases by authorizing a judge in chambers to give judgment in any ease where he can decide disputed questions of fact on affidavits or by any of the other proceedings authorized by R. 18A(5) unless it would be unjust to decide the issues in such a way.[5]

What follows below is a procedural overview of Rule 18A, a comparison between it and a conventional trial.

Procedural Aspects of Rule 18A

In B.C., summary trials are available in a wide variety of cases. Rule 18A(1) provides that:

> (1) A party may apply to the court for judgment, either on an issue or generally, in any of the following:
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> (a) an action in which a defence has been filed;

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[4] *Golden Gate Seafood (Vancouver) Co. Ltd. v. Osborn & Lange Inc.* (1986), 1 B.C.L.R. (2d) 145 at 171.

[5] *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.) [*Inspiration Management*] at 211.

(b) an originating application in respect of which a trial has been ordered under Rule 52(11)(d);

(c) a contested family law proceeding;

(d) a third party proceeding in which a statement of defence to third party notice has been filed;

(e) a proceeding by way of counterclaim in which a statement of defence to counterclaim has been filed.

The word "issue" as used in Rule 18A(1) means "an issue identifiable on the pleadings and specified in the application."[6]

A party brings their application by way of a Notice of Motion in the action. The application must be heard at least 45 days before the date set for trial if one has been set.[7]

Although often referred to as "trial by affidavit", Rule 18A generally permits parties to adduce a variety of forms of evidence. In addition to affidavits, parties may rely on answers to interrogatories, discovery evidence, formal admissions, and statements of expert opinion provided that the statement appears in the proper form or, failing that, is ordered admissible by the court.[8] The usual rules regarding the use of discovery transcripts and interrogatories apply in the summary trial context.[9]

These general provisions above are subject to the court ordering otherwise. In some cases, the court might expand the scope of permissible evidence to include cross-examination on affidavits, either before the court or before another person.[10] In other cases, a party may be precluded from obtaining one or more of the above forms of evidence because it left it too late in the day to do so. In some cases the court will order that the Rule 18A application proceed absent, for example, the examination for discovery of one party because the requesting party had ample time to conduct the discovery in advance of the hearing but opted not to do so.[11]

A moving party must be well-prepared before serving their Notice of Motion. Rule 18A(5) requires that the Notice of Motion be accompanied by:

- a copy of each affidavit in support of the application that has not already been filed and served;[12]

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[6] *Novin v. Danaii*, 2004 BCCA 527 at para. 31.

[7] B.C. *Rules of Court*, r. 18A(2) and r. 51A; r. 18A(1.1).

[8] B.C. *Rules of Court*, r. 18A(3).

[9] B.C. *Rules of Court*, r. 18A(4).

[10] B.C. *Rules of Court*, r. 18A(10).

[11] E.g. see *Anglo Can. Shipping Co. v. Pulp, Paper & Woodwkrs of Can., Loc. 8*, (1988), 27 B.C.L.R. (2d) 378 (C.A.).

[12] B.C. *Rules of Court*, r. 18A(5)(a) and r. 44(5)(b).

- notice of the answers to interrogatories, the evidence taken on an examination for discovery, and the admissions on which a moving party seeks to rely;[13] and

- every statement of expert opinion, not already filed, on which the party will rely.[14]

The moving party may not serve further affidavits, notices, or expert statements of opinions except: to adduce evidence that would, in a conventional trial, be admissible as rebuttal evidence; in reply to a notice of motion delivered by another party of record; or with leave of the court.[15]

A responding party must file and deliver its Response and supporting materials no later than the eleventh day after delivery of the Notice of Motion. A respondent who is opposed to proceeding under Rule 18A, or who requires an adjournment of the application in order to pursue further discovery, has recourse to several possible orders whether in advance of or at the hearing:

> 18A(8) On an application heard before or at the same time as the hearing of an application under subrule (1), the court may
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> (a) adjourn the application under subrule (1), or
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> (b) dismiss the application under subrule (1) on the ground that
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> (i) the issues raised by the application under subrule (1) are not suitable for disposition under this rule, or
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> (ii) the application under subrule (1) will not assist the efficient resolution of the proceeding.[16]

It is open to any party to a Rule 18A proceeding to request from the court any of the following preliminary directions, whether in advance of or at the hearing:

> 18A(10) On or before the hearing of an application under subrule (1), the court may order that
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> (a) a party file and deliver, within a fixed time, any of the following on which it intends to rely:
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> (i) an affidavit;
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> (ii) a notice under subrule (6),

[13] B.C. *Rules of Court*, r. 18A(5)(a), r. 44(5)(b) and r. 18A(6).

[14] B.C. *Rules of Court*, r. 18A(5)(a).

[15] B.C. *Rules of Court*, r. 18A(5)(b).

[16] B.C. *Rules of Court*, r. 18A(8).

(b) a deponent or an expert whose statement is relied on attend for cross-examination, either before the court or before another person as the court directs,

(c) cross-examinations on affidavits be completed within a fixed time,

(d) no further evidence be adduced on the application after a fixed time, or

(e) a party file and deliver a brief, with such contents as the court may order, within a fixed time.[17]

Finally, on hearing a Rule 18A application the summary trial judge may dispose of the application by granting any of the following orders:

18A(11)(a) grant judgment in favour of any party, either on an issue or generally, unless

(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,

(b) impose terms respecting enforcement of the judgment, including a stay of execution, as it thinks just, and

(c) award costs.[18]

In the early years of Rule 18A there was a perhaps surprising amount of confusion around the onus of proof when a defendant is the moving party. While the moving party will bear the onus of demonstrating the appropriateness of 18A in the circumstances this does nothing to displace the evidentiary burden on the party who asserts the affirmative of a particular issue.[19] Similarly, parties must remember that a *summary* trial is nonetheless a trial – it is not open to a party to deliberately choose not to present evidence and then argue that as a result there are insufficient facts before the court to decide the issues.[20]

Comparison to a conventional trial

Many of the differences between a summary trial and a full trial are also the advantages of a summary trial. Parties proceeding under Rule 18A can expect to secure an earlier hearing date than they would for a conventional trial simply because of shorter length of time required. The

[17] B.C. *Rules of Court*, r. 18A(10).

[18] B.C. *Rules of Court*, r. 18A(11).

[19] *Miura v. Miura* (1992), 66 B.C.L.R. (2d) 345 (C.A.).

[20] *D. Fogell Associates Ltd. v. Esprit De Corp. (1980) Ltd.*, 1996 CanLII 8623 (B.C.S.C.).

time, expense, and resources required will generally be far less in the summary process because of the shorter hearing, the absence of live witnesses, and often, the truncated discovery process.

Although bringing an 18A application does not operate to stay all pre-trial discovery procedures such as document production and examinations for discovery, the court retains discretion to order the postponement of an examination for discovery pending the hearing of an 18A application that has the potential to dispose of the claim or some part of it.[21] However, the court will not do so where the discovery evidence might contradict the documentary evidence on which the moving party relies.[22] Furthermore, because a summary trial application might only dispose of some of the issues between the parties, it should not be used to prevent the other party from presenting their larger case.[23]

Other differences of note are that there are no juries in summary trials, and because there will generally be no *viva voce* evidence, parties may not subpoena witnesses. In terms of costs awards, the general rule is that where the applicant is unsuccessful and the matter is referred to the trial list, the costs of the application will be costs in the cause. However, where the summary trial court finds that there are exceptional circumstances, such as an application that could be described as frivolous, the court may award costs of the application against the unsuccessful applicant.[24]

In B.C., summary trials proceed in chambers and counsel appear un-robed.

Variations on Rule 18A to accommodate the use of trial

It is not the nature of the action that determines whether or not a summary resolution is appropriate, but rather, the nature of the evidence which determines whether or not the chambers judge is satisfied that the facts can be determined and the law applied.[25] For example, it is "common and proper" to decide limitation issues as a preliminary issue by way of a summary trial, with the benefit that judgment on that issue may dispose of the entire claim.[26]

A summary trial application need not resolve all of the issues between the parties. Although recent jurisprudence of the B.C. Court of Appeal indicates a growing reluctance to allow "litigating in slices", as will be discussed further below, "the issues [which may be] brought before the court for resolution under R. 18A are infinite in their variety."[27]

When the court is faced with an application which will not dispose of the entire claim, either because it addresses only certain issues or because the issues are inappropriate for disposition under a summary process, the court may decide certain of the issues while remitting the

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[21] *Access Foundation v. Larkspur Foundation*, 1993 CanLII 2606 (B.C.S.C.).

[22] *Ibid*.

[23] *Garrow v. Burhenne*, [1990] B.C.J. No. 1734 (S.C.).

[24] *Carew and Stevens v. Goose et al.*, 2005 BCSC 1688.

[25] *Doell (Buck) v. Buck*, [1989] B.C.J. No. 2158 (C.A.).

[26] *Bell Pole Co. v. Commonwealth Insurance*, 1999 BCCA 262.

[27] *Placer Development Limited v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) at 384.

remainder to the trial list. This will generally only be done where it would be efficient to do so, as in some cases, granting judgment on a particular issue may be of assistance to the parties in reaching accommodation or narrowing the issues that remaining for full trial.

Even where the court dismisses the Rule 18A application as unsuitable, the parties may nevertheless obtain the benefit of procedural directions in respect of the trial from the chambers judge hearing the application which have the effect of expediting the proceedings and limiting expense:

> 18A(13) If the court is unable to grant judgment under subrule (11) and considers that the proceeding ought to be expedited by giving directions, the court may order the trial of a proceeding generally or on an issue and may order that
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> (a) the pleadings be amended or closed within a fixed time,
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> (b) a party file and deliver, within a fixed time, to each party as specified by the court, a list of documents or an affidavit verifying a list of documents in accordance with the directions that the court may give,
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> (c) interlocutory applications be brought within a fixed time,
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> (d) a general application for directions be brought within a fixed time,
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> (e) a statement of agreed facts be filed within a fixed time,
>
> (f) all procedures for discovery be conducted in accordance with a schedule and plan directed by the court, and the plan may set limitations on those discovery procedures,
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> (g) the obligation to pay conduct money to any of the parties or persons to be examined be allocated in the manner specified in the order,
>
> (h) an examination for discovery or a pre-trial examination of a witness be of limited duration,
>
> (i) a party deliver a written summary of the proposed evidence of a witness within a fixed time,
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> (j) the evidence in chief of a witness be of limited duration,
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> (k) the evidence in chief of a witness may be given in whole or part by the production of a written statement,
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> (l) experts who have been retained by the parties meet, on a without prejudice basis, to determine those matters on which they agree and to identify those matters on which they do not agree,

(m) evidence be adduced in a manner provided by Rule 40 (44) and (52),

(n) a party deliver a written summary of the whole or part of the party's argument within a fixed time,

(o) all or any part of the submissions of counsel be in writing or of limited length,

(p) a pre-trial conference be held at a time and place to be fixed at which any of the orders in this subrule may be made, and

(q) with the approval of the Chief Justice, the proceeding be set for trial on a particular date or on a particular trial list.[28]

C. Federal Court Rules

Current Federal Court Rules for Summary Judgment

While the Federal Courts Rules do not currently have a provision for summary trial, they do provide, in Rules 213 through 219, for summary judgment.

The circumstances in which a court may grant summary judgment are set out in Rule 216:

> (1) Where on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.
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> …
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> (3) 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 and law.[29]

The general principles relating to the current summary judgment rules of the Federal Court were set out in *Granville Shipping Co. v. Pegasus Lines Ltd*. as follows:

> I have considered all of the case law pertaining to summary judgment and I summarize the general principles accordingly:

[28] B.C. *Rules of Court*, r. 18A(13).

[29] *Federal Courts Rules*, r. 216.

> 1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried (*Old Fish Market Restaurants Ltd. v. 1000357 Ontario Inc. et al*);
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> 2. there is no determinative test (*Feoso Oil Ltd. v. Sarla (The)*) but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
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> 3. each case should be interpreted in reference to its own contextual framework (*Blyth* and *Feoso*);
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> 4. provincial practice rules (especially Rule 20 of the Ontario *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194]) can aid in interpretation (*Feoso* and *Collie*);
>
> 5. this Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario *Rules of Civil Procedure*) (*Patrick*);
>
> 6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so (*Pallman* and *Sears*);
>
> 7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge (*Forde* and *Sears*). The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a "hard look" at the merits and decide if there are issues of credibility to be resolved (*Stokes*).[30]

While Rule 216 itself gives the court the ability to find facts on a summary judgment motion in some circumstances, recent case law has limited the ability of the court to find facts under Rule 216(3),[31] noting that the "discretion" to grant summary judgment by deciding questions of fact even when there is a genuine issue for trial "may result in unfairness as well as uncertainty".[32]

The result has been to restrict the use of the summary judgment procedure.[33]

However, the proposed amendments to the Federal Courts Rules may change this. The proposed changes would amend Rule 215(3) so that if there is a genuine issue for trial, the court may "nevertheless determine that issue by way of summary trial".[34]

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[30] [1996] 2 F.C. 853 [footnotes omitted].

[31] David Wotherspoon and Mat Brechtel, "Summary Judgment in the Federal Court" (Paper presented at the inSIGHT IP Summit: Key Developments and Strategies to Keep Your Business Practice Current, Vancouver, B.C., 8-9 September 2008) (Toronto: Insight Information, 2008).

[32] *MacNeil Estate v. Canada (Department of Indian and Northern Affairs)*, 2004 FCA 50, [2004] 3 F.C. 3 at para. 39.

[33] Wotherspoon and Brechtel, *supra* note 31.

The adoption by the Federal Court of a summary trial rule modelled on Rule 18A may provide this Court with the guidance and structure to be able to decide matters under a summary procedure while still maintaining the fairness and justice that the Court has expressed concern about in relation to the Federal Court's summary judgment rule.

Comparison of Rule 18A and the Proposed Federal Court Rule

The summary trial rules proposed by the Federal Court largely mirror Rule 18A of the B.C. Rules of Court with some differences as noted below. The main proposed rules for a summary trial procedure are Rules 213 and 216 through 219.[35] While there are procedural aspects of the rules that vary slightly, the following discussion is primarily a comparison of the substantive aspects of the rules.

Motion for summary trial

Similar to the provision in Rule 18A(1), the proposed Rule 213(1) sets out that a party may bring a motion for a summary trial and judgment either on some or all issues raised in a pleading, after a defence has been filed. This is done by serving and filing a notice of motion and motion record.[36]

Evidence

The evidence that may be relied on in a summary trial is dealt with in Rule 18A(3) and the proposed Rule 216(1). Rule 18A(3) states that a party may adduce evidence by affidavit, answers to interrogatories, evidence taken on an examination for discovery, an admission, or a written statement of an expert meeting certain conditions.[37]

The proposed Rule 216(1) lists each of these types of evidence except for answers to interrogatories which are not available in the Federal Court.

Rule 216(1) is slightly different from Rule 18A(3) in two other ways. First, unlike Rule 18A(3), it does not state that a court may "order otherwise" with regard to the types of evidence a party may adduce. This difference is because Rule 55 of the Federal Courts Rules permits the Court, in special circumstances, to vary a rule or dispense with compliance of a rule and thus such a catch-all phrase is unnecessary.

Second, the proposed Rule states that the summary trial motion record must contain all of the evidence on which a party seeks to rely, including the listed types of evidence. This could indicate that the list of possible types of evidence that may be relied on is not exhaustive and so interrogatories may be allowed.

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[34] Rules Amending the Federal Courts Rules (Summary Judgment and Summary Trial), C. Gaz. 2009.I.177 [Proposed Rules].

[35] Proposed Rules, *supra* note 34.

[36] Proposed Rules, *supra* note 34, r. 213(3).

[37] Note that the B.C. *Rules of Court*, r. 18A(4) and r. 18A(4.1) set out that other rules of procedure regarding affidavit, interrogatory and expert evidence also apply to an application for summary trial.

Limits on service of additional documents

Rule 18A(5)(b) and the proposed Rule 216(2) contain limits on service of additional affidavits or expert statements. Both of these rules provide an exception to allow for proper rebuttal evidence to be filed and also provide that further affidavits or statements may be filed with leave of the court.

Dismissal of motion for summary trial

With regards to the power of a court to dismiss a motion for a summary trial, the two rules are identical in substance. Both provide that on or before the hearing of the motion for summary trial, the court may dismiss the motion if (1) the issue raised are not suitable for disposition by summary trial, or (2) a summary trial will not assist with the efficient resolution of the proceeding.[38]

Rule 18A(8)(a) additionally provides that on or before the hearing the motion, a court may adjourn the application.

Directions regarding conduct of a summary trial

Both Rule 18A and the proposed Rule 216(4) provide that the court may make directions regarding the conduct of a summary trial, however, the scope of the proposed rule appears to be substantially greater. Rule 18A(10) states that on or before the hearing of an application for judgment by summary trial, the court has the ability to order a specific list of directions, such as that a deponent attend for cross-examination.[39] Rule 216(4) states that on or before the hearing of a motion for summary trial, "the Court may make <u>any order required for the conduct of the summary trial</u>" and then goes on to give some examples. The way Rule 216(4) is phrased seems to give the Federal Court greater discretion with regards to the directions it can give.

Adverse Inference

The proposed Rule 216 also contains a provision allowing the Federal Court to draw an adverse inference, which is not included in Rule 18A. Rule 216(5) states that "[t]he Court may draw an adverse inference if a party fails to cross-examine on an affidavit or to file responding or rebuttal evidence." Such an express provision is not part of Rule 18A.[40]

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

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[38] B.C. *Rules of Court*, r. 18A(8) and Proposed Rules, *supra* note 34, r. 216(3).

[39] See above, pp. 4-5, for a complete list of the preliminary directions a court may order pursuant to Rule 18A(1) of the B.C. *Rules of Court*.

[40] Note that under Rule 83 of the *Federal Courts Rules* the ability to cross-examine a deponent on his or her affidavit exists as of right, while under the B.C. *Rules of Court*, for example Rules 18A(10) and Rule 40(45.1), it is necessary to obtain an order to cross-examine a deponent on an affidavit.

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.

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…"

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.

Enforcement of judgment and costs

Rule 18A(11) and the proposed Rule 216(7) both give the respective courts the power to impose terms regarding the enforcement of a judgment and to award costs. Rule 216(7), in addition to listing these among other specific powers of the court, contains an additional statement not in Rule 18A that upon granting summary judgment, the Federal Court may make <u>any</u> order necessary for the disposition of the action.

Stay of execution

Both courts also have the power, pursuant to Rule 18A(11) and the proposed Rule 219, to stay the enforcement of a judgment given under the Rule 18A procedure pending the outcome of another issue or claim.

Additional directions

Finally, if a motion for summary trial is dismissed entirely or in part, both rules give the courts power to order a trial or to give other directions or orders guiding the proceeding.[41]

D. Limits to Rule 18A Jurisdiction

<u>General Principles</u>

Rule 18A has been given a robust interpretation, so that where it is possible for a court to proceed on the basis of a summary trial and grant judgment under Rule 18A, courts will do so.

[41] B.C. *Rules of Court*, r. 18A(13) and Proposed Rules, *supra* note 34, r. 216(8) and r. 218.

This began with the interpretation given to Rule 18A in *Inspiration Management*[42] and has been followed in cases such as *Orangeville Raceway Ltd. v. Wood Gundy Inc.*;[43] *MacMillan v. Kaiser Equipment Ltd.*;[44] *Dahl et al. v. Royal Bank of Canada et al.*;[45] and *Standard Life Assurance Co. v. Horsburgh et al.*,[46] to give just a few examples.

In *Ballenas Project Management Ltd. v. P.S.D. Enterprises Ltd.*, the Court of Appeal recently stated "[t]he authorities establish that whether to proceed summarily is a matter for the discretion of the judge hearing the application".[47] However, despite this, there are limits on a court's discretion under Rule 18A and circumstances in which a court is not able to proceed or grant judgment under this Rule.

The limits on the court's jurisdiction to determine a matter pursuant to Rule 18A are set out in Rules 18A(8) and (11).[48] There has been a great deal of case law in B.C. interpreting what is meant by these limits on the court's jurisdiction and when a matter may be determined pursuant to Rule 18A. The following summarizes the main principles that have emerged from the case law.

Cannot find the necessary facts

Under Rule 18A(11), a court may decline to grant judgment if it cannot find the necessary facts to decide the issues or if it would be unjust to decide the matter.

A leading case on the extent of a court's discretion to grant judgment in a case brought pursuant to the Rule 18A summary trial procedure is *Inspiration Management*. In this case, McEachern C.J.B.C. commented on the sufficiency of the evidence:

> In deciding whether the case is an appropriate one for judgment under R. 18A the chambers judge will always give full consideration to all of the evidence which counsel place before him but will also consider whether the evidence is sufficient for adjudication. For example, the absence of an affidavit from a principal player in the piece, unless its absence is adequately explained, may cause the judge to conclude either that he cannot find the facts necessary to decide the issues, or that it would be unjust to do so. But even then, as the process is adversarial, the judge may be able fairly and justly to find the facts necessary to decide the issue.
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> Lastly, I do not agree … that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed by Taggart J.A. in *Placer*… Subject to what I am about to say,

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[42] *Inspiration Management*, *supra* note 5.

[43] (1995), 6 B.C.L.R. (3d) 391 (C.A.).

[44] 2004 BCCA 270, 33 B.C.L.R. (4th) 44.

[45] 2005 BCSC 1263, 46 B.C.L.R. (4th) 342 [*Dahl*].

[46] 2005 BCCA 108, 46 B.C.L.R. (4th) 88 [*Standard Life Assurance*].

[47] 2007 BCCA 166, 66 B.C.L.R. (4th) 122 at para. 10.

[48] B.C. *Rules of Court*, r. 18A(8) and r. 18A(11).

> a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be, however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. … In such cases, absent other circumstances or defences, judgment should be given.
>
> But even if there is a conflict of evidence which cannot easily be resolved on affidavits, as is often the case, the chambers judge is still not required to remit the case to the trial list. He could, for example, adjourn the application and order cross-examination on one or more affidavits, or he could order the deponents to appear to be cross-examined before him or another judge after which time it may be possible to find the facts necessary to give judgment. The chambers judge also has the option of employing any of the other procedures included in R. 18A(5) instead of remitting the case to the trial list.
>
> I have no doubt that R. 18A is destined to play an increasingly important role in the efficient disposition of litigation, and experience has already shown that its use is not limited to simple or straightforward cases. Many complex cases properly prepared and argued can be resolved summarily without compromising justice in any way.[49]

A conflict in an important or critical aspect of the evidence, including in the expert evidence, may preclude the court from finding the facts necessary to grant judgment on a summary trial.[50]

Assumed facts may not be sufficient for the court to grant judgment on a summary trial.[51]

Unjust

Under Rule 18A(11), the second basis on which a court may decline to exercise its discretion is if in the court's opinion it would be unjust to decide the issues on the application. A court may decline to grant judgment on this basis even if it is able to find the necessary facts.[52]

In *Inspiration Management*, the Court of Appeal set out general principles regarding the factors to be considered in deciding whether a judgment would be "unjust". McEachern C.J.B.C., writing for the Court, quoted as follows from another B.C. case:

> In summary, the rule is a means whereby the general principles stated by R. 1(5) may be attained. The rule must, however, be applied only where it is possible to do justice between the parties in accordance with the requirements of the rule

[49] *Inspiration Management*, *supra* note 5 at 215-16.

[50] *Urban Holdings Ltd. v. MacDuff*, 2007 BCSC 631; *Parker v. Campbell*, 2002 BCSC 1067; *Jutt v. Doehring* (1993), 82 B.C.L.R. (2d) 223 (C.A.); *Fitterer v. Ryan*, 1999 CanLII 6463 (B.C.S.C.).

[51] *Hobbs v. Robertson*, 2002 BCCA 381; *Christopher et al v. Westminster Savings Credit Union*, 2003 BCSC 362 [*Westminster Savings*].

[52] *McMaster v. Oracle Corporation Canada Inc.*, 2008 BCSC 1023 at para. 11.

> itself and in accordance with the general principles which govern judges in their daily task of ensuring that justice is done.[53]

McEachern, C.J.B.C., went on to state the following principles regarding a court's discretion to grant judgment in a summary trial:

> In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.[54]

In *Dahl*, the B.C. Supreme Court commented further on the court's discretion to grant judgment:

> Cases since *Inspiration Management* set out additional factors that should be considered in deciding whether a matter is suitable for determination pursuant to Rule 18A. The additional factors trial judges take into account in determining whether a case is suitable include:
>
> - is the litigation extensive and will the summary trial take considerable time;
> - is credibility a crucial factor – and have the deponents of the conflicting affidavits been cross examined;
> - will the summary trial involve a substantial risk of wasting time and effort, and producing unnecessary complexity; and
> - does the application result in litigating in slices.
>
> *Novin v. Novin*, [2004] B.C.J. No. 2082 (C.A.); *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138.[55]

Further, if discoveries or other pre-trial procedures have not progressed to the point where each party has had "an opportunity to uncover all of the evidence that might be important to its case", it may be unjust to grant judgment.[56]

It may not be just to dismiss a claim or grant or summary judgment against one defendant where there are two or more defendants.[57]

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[53] *Inspiration Management*, *supra* note 5 at 212 quoting *Placer Developments Ltd. v. Skyline Explorations Ltd.* (1985), 67 B.C.L.R. 366 (C.A.) at 385-86.

[54] *Inspiration Management*, *supra* note 5 at 214 [emphasis added].

[55] *Dahl*, *supra* note 45 at para. 12 [emphasis added].

[56] *Coast Foundation v. Currie*, 2003 BCSC 1781 [*Coast Foundation*] at para. 12, referring to *Bank of British Columbia v. Anglo-American Cedar Products Ltd.* (1984), 57 B.C.L.R. 350 (S.C.).

Important considerations apply to a court's discretion to grant judgment where it is asked to do so on an issue only, rather than on the matter generally.[58] In *Dahl*, the B.C. Supreme Court stated:

> A judge should not decide an issue if he or she will be required to make findings of fact that may embarrass the court hearing the subsequent issues, i.e. when there are conflicts on the evidence concerning overlapping issues or where the judge hearing the subsequent part of the case may have difficulty determining what issues remain live. *Otter Farm and Home Cooperative v. Sekhon*, [2001] B.C.J. No. 2338 (C.A.).
>
> Where there is an extensive overlapping of issues one issue ought not to be tried discretely on a summary trial. *Prevost (Committee of) v. Vetter* (2002), 210 D.L.R. (4th) 649 (B.C.C.A.) at 658; *Kaba v. Cambridge Western Leaseholds Ltd*., [1997] B.C.J. No. 2151 (C.A.); *Parsons v. Finch*, [2003] B.C.J. No. 1647 (C.A.).
>
> That is not to say issues cannot be isolated, however, trial judges must be cautious and ensure that the isolation of the issue will assist in the efficient resolution of the whole of the action, i.e. are the issues determinative or are they inextricably interwoven with the issues that must be determined at trial: *British Columbia (Attorney General) v. Perry Ridge Water Users Assn*., (2003), 13 B.C.L.R. (4th) 274 (C.A.).
>
> In *North Vancouver (District) v. Lunde* (1998), 162 D.L.R. (4th) 402 (B.C.C.A.) the court held that where an answer to an issue sought to be tried under Rule 18A will only resolve the whole proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate to the judge's satisfaction that the administration of justice, as it affects the parties to the motion and the orderly use of the court's time, will be enhanced by dealing with the issue as a separate issue. The judge must consider whether a summary trial is an effective use of court time and an efficient resolution of the proceeding. The court held that in making that determination, expense is also a relevant factor.
>
> …
>
> The plaintiffs rely on a number of cases for the proposition that it is unjust to proceed with a summary trial where parties have had no reasonable opportunity to conduct discoveries and obtain evidence that is solely within the knowledge of the opposing litigants. *Finan v. Kowalenko* (1985), 68 B.C.L.R. 1 (C.A.); *Bank of B.C. v. Anglo Cedar Product* (1984), 57 B.C.L.R. 350 (C.A.); *Bacchus Agents (1981) Ltd.*

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[57] *Thomson v. Kootenay Lake District Hospital* (1985), 68 B.C.L.R. 142 (S.C.); *Boehler v. Blaser Jagdwaffen*, 2000 BCSC 710; *Henderson v. First Nations Band Council 629*, 2007 BCSC 927.

[58] See for example *Coast Foundation*, *supra* note 56; *B.M.P. Global et al v. Bank of Nova Scotia*, 2003 BCCA 534, 19 B.C.L.R. (4th) 347.

> The authorities cited by the plaintiffs do not suggest that issues cannot be isolated for separate determination. Judgment on issues is explicitly contemplated by Rule 18A. The authorities cited by the plaintiffs merely indicate that separate determination of issues should be fair and efficient.[59]

Under Rule 18A(8), a court may dismiss an application for a summary trial if the issues raised are not suitable for disposition or the application will not assist in efficient resolution of the proceeding.

Not suitable for disposition or not of assistance in efficient resolution

In *Western Delta Lands v. 3557537*,[60] the B.C. Supreme Court stated that pursuant to Rule 18A(8) a party "may bring a preliminary application as of right to determine the suitability of a case for summary disposition."[61] Allan J. stated:

> Without purporting to restrict the application of Rule 18A(8), I suggest that a motion is likely to fail unless one or more of the following circumstances apply:
>
> (a) the litigation is extensive and the summary trial hearing itself will take considerable time;
>
> (b) the unsuitability of a summary determination of the issues is relatively obvious; e.g., where credibility is a crucial issue;
>
> (c) it is clear that a summary trial involves a substantial risk of wasting time and effort and of producing unnecessary complexity; or
>
> (d) the issues are not determinative of the litigation and are inextricably interwoven with issues that must be determined at trial.[62]

The factors set out in *Inspiration Management* and *Dahl* may also be considered by the court at this preliminary stage of determining whether a matter is suitable for disposition by summary trial.[63] For example, if the issues on a summary trial require findings of fact that will also relate to issues to be heard at trial, the matter may not be suitable for disposition on summary trial.[64]

In *Ekins*, MacKenzie J. held that an action was not suitable for determination under Rule 18A where (1) the case was factually complex, (2) there were four to five experts providing conflicting opinions on highly technical matters, (3) the issues were interwoven, and (4) a

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[59] *Dahl*, *supra* note 45 at paras. 13-19.

[60] 2000 BCSC 54 [*Western Delta*].

[61] *Ibid*. at para. 12.

[62] *Ibid*. at para. 24.

[63] See *Western Delta*, *supra* note 60 at paras. 28-53; *Ekins v. Davey*, 2007 BCSC 1630 [*Ekins*].

[64] *Prevost v. Vetter*, 2002 BCCA 202, 100 B.C.L.R. (3d) 44 ; *Parsons v. Finch et al.*, 2003 BCCA 409, 16 B.C.L.R. (4th) 86.

summary trial would not dispose of all the issues and would not assist in the economic resolution of the disputes.[65]

In *Coast Foundation*, Groberman J. made the following statement regarding efficient resolution of a matter:

> There are at least two aspects to be considered in gauging the efficiency of the summary trial process. First, this court must be concerned about the allocation of its own resources: *North Vancouver (District) v. Lunde* (1998), 60 B.C.L.R. (3d) 201 at 212 (C.A.) (paragraph 33). Summary trial applications that will not, even if successful, reduce the length of trial, should, in general, be discouraged. The court must recognize the reality that judicial time is a scarce resource.
>
> Second, the court must consider the efficiency of a partial determination from the standpoint of the litigation itself. Piecemeal decision-making is rarely an efficient manner in which to resolve a dispute. It raises the possibility of multiple appeals on individual issues, and this will generally impede rather than hasten the orderly determination of the action.[66]

If a case raises "important, rare and unsettled questions of law" it may not be appropriate for summary judgment.[67]

Recent Case Law

A consideration of several recent cases in which the court has faced Rule 18A applications illustrates that these inherent limits on the court's jurisdiction under Rule 18A and the court's ability to exercise discretion provide a means of ensuring the summary trial process is used unless it would not be fair or just.

For example, a court hearing a Rule 18A summary trial may use the procedures available through the Rule to uncover further evidence and find the necessary facts.[68] However, this is not done if it cannot achieve a just result. For example, in *Versatile Mortgage Corp. v. Hemmingson*,[69] Arnold-Bailey J. dismissed a Rule 18A application stating:

> I have considered that matter further and consider it likely that if the Hemmingsons were to be cross-examined, then it is likely that James McIntyre also would properly have to be cross-examined… In result, we would be engaged in a truncated process, one that may or may not ultimately prove responsive to all the evidence and the complex issues presented by the positions of the parties.

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[65] *Ekins*, *supra* note 63 at para. 26.

[66] *Coast Foundation*, *supra* note 56 at paras. 17-18.

[67] *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Limited*, 2002 BCCA 138, 164 B.C.A.C. 300 [*Bacchus Agents*] at paras. 22, 25-29.

[68] See for example *Inspiration Management*, *supra* note 5 and *Standard Life Assurance*, *supra* note 46.

[69] 2009 BCSC 64 [*Versatile Mortgage*].

> Also, the Court would not have an opportunity, if only cross-examination on the affidavits occurred, of considering the testimony on cross-examination in the context of the direct examination, which is an obvious, but important tool in determining contested facts. Upon reflection, I decline to direct that certain witnesses be cross-examined on their affidavits.[70]

This was a situation where the judge found it was not possible to decide the factual issues without *viva voce* testimony.

In *Uppal v. Rawlins*,[71] Smith J. referred to the proposition from the case law that "the existence of conflict in the evidence does not necessarily preclude rendering judgment under Rule 18A",[72] however, went on to find that there were concerns about credibility and the evidence did not permit conclusion on the disputed facts.

The B.C. courts have also recently stated that it will not automatically defer to the position of the parties with regards to whether a matter should be determined pursuant to the summary trial process. In two recent cases the B.C. Court of Appeal has noted that the position of the parties regarding summary trial is "not determinative of whether the matter is suitable for disposition under Rule 18A".[73] The B.C. Supreme Court has also declined to use the summary trial procedure despite the position taken by the parties.[74] These cases illustrate that the position of the parties regarding determination under Rule 18A will not be determinative if the court considers that justice cannot be done through the summary trial process.

Also, in *Masterfeeds Inc. v. N & H Farms Ltd.*,[75] Melnick J. recognized the additional time and expense that a conventional trial of the matter would involve, but concluded that even in light of these concerns, he could not "find the facts necessary to come to a just decision".[76]

These recent cases indicate that there are provisions within Rule 18A that limit the jurisdiction of the court to those cases that are properly determined pursuant to Rule 18A, where justice and fairness can be achieved.

Nevertheless, even with these limits, the summary trial process in Rule 18A is used frequently by the judiciary in B.C. to determine proceedings before it.

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[70] *Ibid*. at para. 8.

[71] 2009 BCSC 127.

[72] *Ibid*. at para. 21.

[73] *Pemberton Benchlands Housing Corporation v. Sabre Transport Ltd.*, 2009 BCCA 30 at para. 28 referring to *Bacchus Agents, supra* note 67; see also *Wendel v. Tristar Industries Ltd.*, 2009 BCCA 99.

[74] *684498 B.C. Ltd. v. Knutson*, 2009 BCSC 401; *Versatile Mortgage, supra* note 69.

[75] 2009 BCSC 342.

[76] *Ibid*. at para. 11.

E. Efficacy

Reception of the Summary Trial Process in BC and other jurisdictions

As noted in the Introduction, Rule 18A was initially met with resistance and in some cases outright scepticism. Twenty-five years later, the number of cases which are decided under Rule 18A closely approximates the number which are decided by way of a conventional trial.[77] For a bench which has had no effective increase to its complement over the past 20 years and a current vacancy rate of roughly 10%, one can appreciate the impact of Rule 18A on accessibility to the Court in general – as noted by Chief Justice Donald Brenner, without the use of Rule 18A by litigants and their counsel, the Court would have required additional appointments, more staff, and more courtrooms in order to meet its trial list over the past two decades.

On the twentieth anniversary of Rule 18A, one commentator had the following to say:

> 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.
>
> …
>
> 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.[78]

Today, summary trial procedures are also found in Alberta,[79] and to a more limited extent in Ontario,[80] PEI,[81] Saskatchewan[82] and Manitoba[83].

Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd., 2008 BCSC 799

The B.C. Supreme Court granted summary judgment pursuant to Rule 18A in June 2008 in *Louis Vuitton Malletier S.A. v. 486353 B.C. Ltd.*,[84] a counterfeiting case that began in the Federal Court

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[77] In most North Americans jurisdictions, approximately 3% of all proceedings will go to a formal trial. This is generally the case regardless of whether or not a proceeding is case-managed – the study concluded that case management impacts the timing of settlement rather than the probability of settlement, with managed cases tending to settle earlier in the proceeding than their un-managed counterparts. By contrast, that figure is approximately 1.4% at the B.C. Supreme Court, with a 1.2-1.4% of cases being resolved by way of summary trial.

[78] "Entre Nous" *The Advocate* 61:2 (March 2003) 169 at 169-70.

[79] Alberta *Rules of Court*, r. 158.1.

[80] Ontario *Rules of Civil Procedure*, r. 76.

[81] Prince Edward Island *Rules of Civil Procedure*, r. 75.1.

[82] Saskatchewan *The Queen's Bench Rules*, Part 40.

[83] Manitoba *Queen's Bench Rules*, r. 20.03(4).

[84] 2008 BCSC 799.

in 2004. The case has numerous defendants, who infringed the two plaintiffs' trade-marks and copyrights in several locations over a five year period.

Louis Vuitton began pursuit of the infringers with an *Anton Piller* order granted by the Federal Court and executed in August of 2004. Judgment was granted in March 2005 with a permanent injunction, $12,000 in damages, and $750 in costs. Following service of the judgment, the defendants continued their counterfeiting ways.

Louis Vuitton determined to continue to pursue its rights against the counterfeiters. Counsel for Louis Vuitton, Michael Manson, made a strategic decision to pursue the claims through the B.C. courts, rather than the Federal Court, because of the summary trial rule. In his view the relief he sought would not be granted summarily from the Federal Court but might be available through B.C.'s Rule 18A.

As it turned out, Mr. Manson was correct. Justice Boyd granted judgment following a summary trial in June of 2008. The remedies awarded were:

- a declaration that the copyrights and trade-marks at issue were valid and had been infringed;
- an order for delivery up of the infringing material;
- a permanent injunction;
- damages for trade-mark infringement, per instance of infringement, for each of the two plaintiffs, totalling nearly $1 million;
- damages for copyright infringement of $100,000;
- punitive and exemplary damages of $300,000; and
- special costs against some of the defendants.

The plaintiffs also sought a declaration that some of the defendants were in contempt of the Federal Court judgment granted March of 2005, however, the B.C. Court declined to grant this order in part because that was the purview of the Federal Court and in part because the punitive and exemplary damages awarded included an element of rebuke.

This case demonstrates the effective use of the B.C. summary trial process in a circumstance where the Federal Court would require a full trial.

Rule 18A and the relationship between justice, speed, and efficiency

The very purpose of Rule 18A requires that the three goals of justice, speed and efficiency be understood with reference to one another. In *Silbernagel v. Ritchie*,[85] Esson C.J.S.C. noted the following:

> It cannot be doubted that the spiralling increase in the complexity and length of lawsuits, with the consequent increase in cost and delay, can work injustice. The search for perfect justice results, in all too many cases, is no justice. To provide a less expensive and more expeditious procedure in appropriate cases is to positively enhance the quality of justice. It is in no way inconsistent with the guarantee of fundamental justice.[86]

Similarly, as held by McEachern C.J.B.C. in *Inspiration Management*:

> In my judgment, it must be accepted that while every effort must be made to ensure a just result, the volumes of litigation presently before our courts, the urgency of some cases, and the cost of litigation do not always permit the luxury of a full trial with all traditional safeguards in every case, particularly if a just result can be achieved by a less expensive and more expeditious procedure. …
>
> …
>
> In fact R. 18A substitutes other safeguards which are sufficient to ensure the proper attainment of justice. First, 14 days' notice of the application must be given (R. 18A(1.1)); secondly, the chambers judge cannot give judgment unless he can find the facts necessary to decide issues of fact or law (R. 18A(3)(*a*)); and thirdly, the chambers judge, even if he can decide the necessary factual and legal issues, may nevertheless decline to give judgment if he thinks it would be unjust to do so. The procedure prescribed by R. 18A may not furnish perfect justice in every case, but that elusive and unattainable goal cannot always be assured even after a conventional trial and I believe the safeguards furnished by the rule and the common sense of the chambers judge are sufficient for the attainment of justice in any case likely to be found suitable for this procedure. Chambers judges should be careful but not timid in using R. 18A for the purpose for which it was intended.[87]

In the *Silbernagel* case, the plaintiff argued that his *Charter* rights were infringed by the summary trial process because he had been denied the right to a jury trial. He further argued that Rule 18A violated the rules of natural justice by sacrificing the right to be heard to mere "administrative convenience". Esson C.J.S.C. went on to conclude:

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[85] (1996), 20 B.C.L.R. (3d) 62 (S.C.) [*Silbernagel*], aff'd [1997] B.C.J. No. 2015 (C.A.) [emphasis added].

[86] *Ibid*. at para. 21 [emphasis added].

[87] *Inspiration Management, supra* note 5 at 213-14 [emphasis added].

> This is not a matter of "administrative convenience" for the court. From its point of view, it is in many ways an inconvenient procedure which typically imposes a heavy burden upon the judge who must receive and absorb much information both as to the law and facts in a short time and who, all too often, must then spend more time than was required for the actual hearing in producing a written decision. But in many cases in which the safeguards of R. 18A have been met, the procedure has permitted justice to be done where that could not otherwise have been achieved at all, or only after much greater delay and higher cost. Summary trial is not a panacea but it has its place in the range of procedures available for deciding disputes.[88]

Esson C.J.S.C. was not alone in observing the burden that summary trials can place on the court. In preparing this paper we heard similar concerns from other members of the bench who emphasized that a Rule 18A application should not be seen as an opportunity to simply make closing submissions and leave the 'sorting out' of evidence to the chambers judge. Successful use of the summary trial process - including achievement of the three goals of justice, speed and efficiency – requires that counsel carefully prepare their evidence and marshal it in an organized fashion for the chambers judge. If counsel simply deposits a library of affidavits with the court and refers to the evidence in its general terms, they run the risk that material evidence may be overlooked or taken out of context as the court grapples with the voluminous record.

Impact of the revised B.C. Civil Rules on Rule 18A

Like many other jurisdictions in Canada, B.C. has recently been engaged in a process of civil justice reform. The B.C. Civil Justice Reform Working Group, co-chaired by Brenner C.J.S.C. and Deputy Attorney General Allan Seckel, Q.C., completed the consultation process on the proposed new Rules on 31, 2008 and, subject to Cabinet approval, they are expected to be implemented in January 2010. A significant change in the proposed rules is to require the parties to meet early in the proceedings to prepare a plan for conducting the case and achieving a resolution or, if they are unable to agree, to personally attend a Case Planning Conference.

It is our understanding that the summary trial procedure will be retained under the new Rules, but with the proviso that no party may apply for a summary trial until after the case plan has been obtained, whether by consent or by court order.[89] It will be interesting to watch how this added step will affect the number of summary trial applications brought and the number which successfully dispose of some or all of the issues between the parties. For example, in some cases the parties may be otherwise unaware of the summary trial options until appearing at a Case Planning Conference. Additionally, the Case Planning exercise may serve to avoid premature applications in some cases, such as where the Case Planning judge directs that certain discovery steps must be completed before an application can be brought.

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[88] *Silbernagel*, *supra* note 85 at para. 22 [emphasis added].

[89] BC Justice Review Task Force, online at <http://www.bcjusticereview.org/working_groups/civil_justice/civil_justice.asp>

F. Conclusion

Justice that is speedy and inexpensive is an ideal that all judges and lawyers should seek to attain. Indeed rules of court mandate that we do so. But getting there is often challenging.

We work within a judicial system created hundreds of years ago for exigencies that existed at that time. As circumstances have changed, processes have changed too, although perhaps too slowly for some.

Rule 18A was implemented by Chief Justice McEachern as a means of responding to increasing changing circumstances, the growing rota of the court, and the increasing cost of litigation. While not appropriate for some cases, it has proven beneficial for many. Most would agree that the summary trial rule in British Columbia has been a great success.

Time will tell if the adoption by the Federal Court of the spirit of Rule 18A will be similarly embraced.

