

## THE BESSIE ORFUS ESTATE: AFFIRMS SUMMARY JUDGEMENT MOTION BEFORE AN ORDER FOR DIRECTIONS

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### Introduction

A recent yet to be reported decision<sup>2</sup> of the Divisional Court affirms that a summary judgment motion can be brought before an order for directions in estate proceedings. The July 12, 2010 order of Wilson J. (also unreported) provided for a summary judgment motion before a motion for directions. Leave to appeal of the order of Wilson J. was sought.

The decision of Sachs J. of the Divisional Court, released on September 23, 2010, dismissed the motion for leave to appeal. Sachs J. confirmed the wide jurisdiction of Superior Court judges to manage estate cases, including ordering that a matter proceed by way of summary judgment before an order for directions.

### Facts

The moving party, Sharon Gerstein (“**Gerstein**”), is the daughter of Bessie Orfus, the deceased. Gerstein filed a Notice of Objection to the issuance of a certificate of appointment of estate trustees on February 25, 2010. A motion for summary judgment was brought by the estate trustees. Gerstein objected to the scheduling of a summary judgment motion before a motion for directions. In her July 12, 2010 decision, Wilson J. applied the reasoning in *Smith Estate v. Rotstein*<sup>3</sup> and found that she had the jurisdiction to order a summary judgment motion prior to a motion for directions. Wilson J. then scheduled a full day summary judgment motion.

Gerstein sought leave to appeal to the Divisional Court of Wilson J.’s order. The grounds for leave to appeal are summarized in paragraph 4 of the Divisional Court decision. Gerstein’s submissions were as follows: (1) in an estates matter, a Superior Court judge has no inherent jurisdiction to order a matter proceeded by way of summary judgment; (2) the court did not have jurisdiction under Rule 20 of the *Rules of Civil Procedure* to order a summary judgment motion because Rule 20 only applies once pleadings have been exchanged, which in estate matters, is normally provided for in an order giving directions; and (3) the court’s sole jurisdiction to order a summary judgment motion in an estate matter is pursuant to Rule 75.06(3), as part of an order for directions on an application or motion.

### Decision

The Divisional Court dismissed the motion for leave to appeal and ordered the parties to attend before Brown J. at the estates summary judgment scheduling court to schedule a date for summary judgment.

Sachs J. found that a Superior Court judge does have jurisdiction to order a motion for summary judgment without the requirement that the motion be preceded by an order for directions. While agreeing that the facts were different, the Divisional Court found that in *Re Chappus Estate*<sup>4</sup>, the Ontario Court of Appeal clearly confirmed that a summary judgment motion did not require that a summary judgment motion be anticipated for in an order giving directions.

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<sup>2</sup> 2010 ONSC 5204

<sup>3</sup> 2010 ONSC 2117 (CanLII) and the decision of Himel J released on October 31, 2008 and unreported

<sup>4</sup> (2009), 46 E.T.R. (3d) 186, 2009 ONCA 279 (CanLII)

In referencing the wide discretion of Superior Court judges, Sachs J. refers to the recent decision in *Abrams v. Abrams*<sup>5</sup> (for which leave to appeal was also dismissed) which found that Superior Court judges have the inherent jurisdiction to manage the cases before them.

In paragraph 8 of her decision, Sachs J. writes:

While that power is not absolute, in this case, a Superior Court judge, who had the jurisdiction to make an order for directions, also decided she had the jurisdiction to order the hearing of a summary judgment motion without an order. Summary judgment motions are clearly contemplated by the Rules for estate matters.

Sachs J. suggested that the leave to appeal motion was about procedure as opposed to jurisdiction. As a matter of procedure, Sachs J. found that Gerstein was not prejudiced by the Wilson J. order as all necessary disclosure could be obtained through the summary judgment process (a clear concern of Gerstein).

Sachs J. noted that the summary judgment motion should have been scheduled through the summary judgment scheduling court. Effective as of January 1, 2010, amendments to Rule 20 expand the powers of motion judges to weigh evidence and evaluate credibility. Since summary judgment motions may involve the use of oral evidence and written evidence, pre-hearing management is required. Parties seeking a summary judgment motion on the Toronto Estates List are required to complete the comprehensive case management information sheet when booking an appointment. (See [www.courtcanada.com/oscar/case/main/court7.dgp](http://www.courtcanada.com/oscar/case/main/court7.dgp).)

Sachs J.'s decision, along with the decision in *Smith v. Rotstein* (which predates the new Rule 20) and the *Abrams v. Abrams* decision, cements the wide jurisdiction of Superior Court judges to manage estates cases. Summary judgment motions will only become more popular and those practicing estate litigation will have to familiarize themselves with the new procedural norms.

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<sup>5</sup> 2010 ONSC 2703 (CanLII) See also *Abrams v. Abrams*, 2010 ONSC 1254 (CanLII). Leave to Appeal from the decision was dismissed by Ferrier J. ( *Abrams v. Abrams*, 2010 ONSC 4714)