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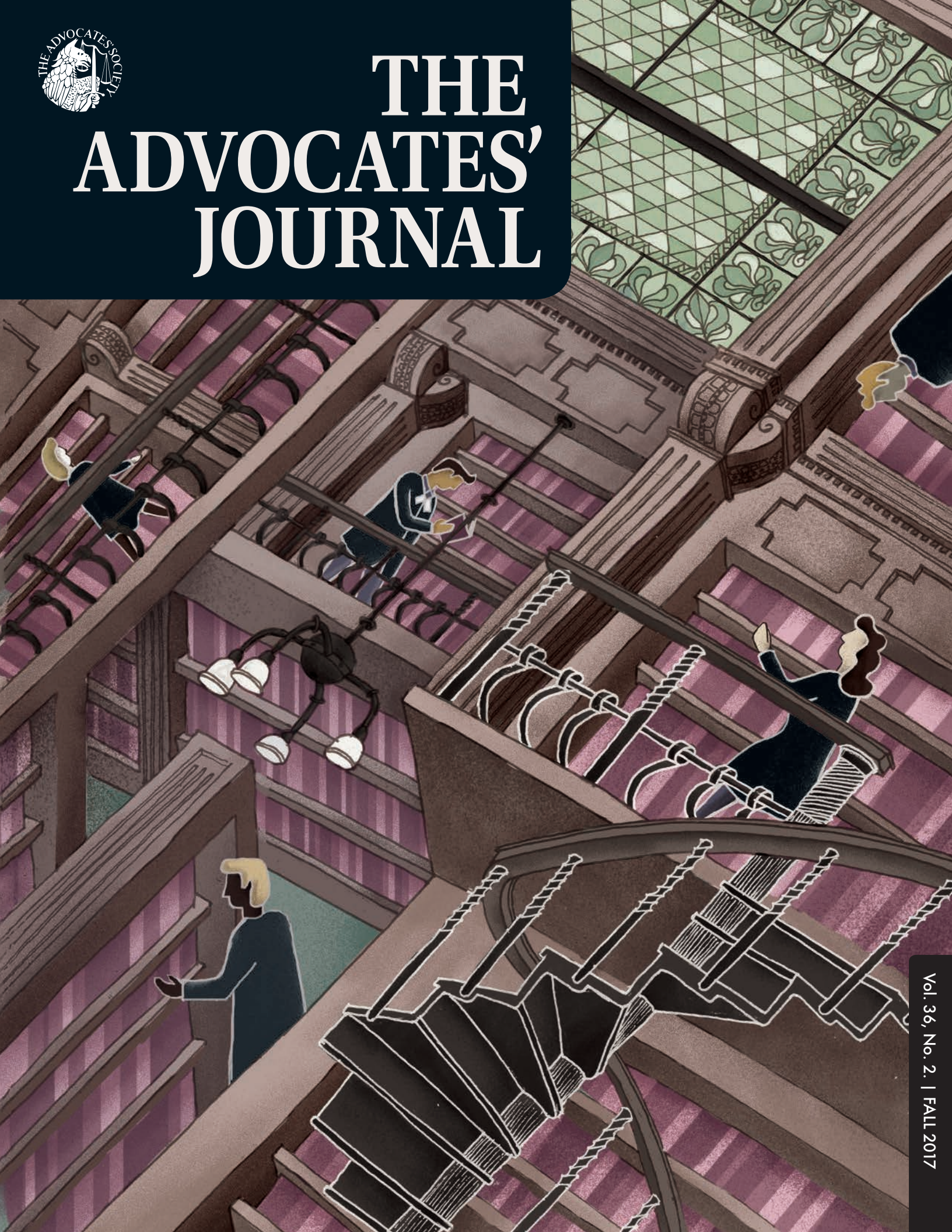

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If we can't trust witnesses, can we trust trials?

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Trials are overrated.

Heresy, I know – particularly so when appearing in *The Advocates' Journal*. But hear me out.

A growing body of scientific research indicates that human beings are not very good lie detectors. Drawing on this research, Paul Fruitman persuasively argued in the Summer 2017 issue of this *Journal* that "[o]ur system trusts that witnesses who testify credibly and confidently are telling the truth. It appears that trust is misplaced."

Nor is this problem limited to intentionally untruthful witnesses. Even well-intentioned witnesses who take seriously their oath or affirmation to tell the truth fall prey to reconstructing the past to fit their desired narrative. Every counsel can certainly recall the client or witness who forcefully and credibly insists on a particular version of events, only to be contradicted by contemporaneous documents or physical evidence.

It is difficult to overstate the significance of this problem for our adversarial system of justice, founded as it is on parties leading oral evidence from witnesses, and triers of fact making assessments of credibility based on that evidence. If cases can turn on credibility assessments, and human beings' ability to assess credibility is poor, what does that say about the quality of justice? Unless triers of fact have an innate or acquired ability to assess credibility that far exceeds that of the population at large, the implications are troubling.

There is, of course, an alternative means of adjudicating civil disputes on their merits: summary judgment. Traditionally, the bench and bar have been extremely reluctant to decide cases by way of summary judgment, wary of denying litigants their proverbial day in court. Summary judgment was perceived as a less desirable form of justice reserved for cases so obvious that a proper trial was unnecessary. Trials were necessary for anything but the easiest cases. However, if trials are in fact overrated as a means of determining the

truth and providing justice, our veneration of them may be misplaced.

As a trial lawyer, I do not want to see trials become even less frequent than they already are. Trials are to litigators what the stage is to actors. All the grinding work of preparation is directed to being ready for trial, or at least to the superior bargaining position that comes from being ready for trial. For most of us, trial advocacy is no small part of why we chose to become litigators. Moreover, the difficulty of training young lawyers in trial advocacy has become almost trite. It grows more difficult by the day.

With all that said, trials are dreadful for clients. They are expensive, lengthy and risky. It can take years to get to trial. Our civil justice system is perpetually short of judges, courtrooms or both. The capacity of the civil system to try cases in a timely manner is likely to be strained even further by the demands of the criminal justice system in light of the Supreme Court of Canada's decision in *R. v. Jordan*.

Trials are to litigators what the stage is to actors.

A long-standing reluctance to embrace summary judgment

The historical rules and jurisprudence surrounding summary judgment reflected the veneration of trials as a means of resolving civil disputes. Before 1985, summary judgment was available to plaintiffs only on enumerated claims for a debt or liquidated demand. A defendant could never seek summary judgment, no matter how spurious the case.

The 1985 amendments to the *Rules of Civil Procedure* implemented a modest expansion of summary judgment. Rule 20 permitted defendants as well as plaintiffs to seek summary judgment, but only where the motions judge was satisfied that there is no "genuine issue" for trial with respect to a claim or defence.

The key words were "genuine issue" for trial. Summary judgment was not conceived as a true alternative to trial. Rather, reflecting the traditional skepticism of summary judgment, it was a measure available only where a trial would essentially be a waste of time. There are not many cases where there is *no* genuine issue for trial. Even in cases that turn on the interpretation of a contract, which one might expect would lend themselves to summary adjudication, it is relatively easy to generate a genuine issue for trial given the evolution of the law to recognize that contracts must always be interpreted in light of their surrounding circumstances.

The jurisprudence on summary judgment reflected the skeptical approach embodied in the Rules. While Justice Henry's suggestion in *Pizza Pizza Ltd. v. Gillespie* that the motions judge was to take "a hard look at the merits" gave hope to proponents of summary judgment,[1] those hopes were relatively short-lived. Eight years later, in *Aguonie et al. v. Galion Solid Waste Material Inc.*, the Court of Appeal held that, on a motion for summary judgment, "the court will never assess credibility, weigh the evidence, or find the facts." Rather, the court's role was limited to "assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial."[2]

Recent reforms encouraging summary judgment

In 2007, former Associate Chief Justice Coulter Osborne released his report on making the civil justice system in Ontario more accessible and affordable. One section of his report was dedicated to summary judgment and made a series of recommendations that were ultimately incorporated into the 2010 amendments to the *Rules of Civil Procedure*. Chief among these amendments were ones specifically empowering a judge hearing a motion for summary judgment to (1) weigh the evidence; (2) evaluate the credibility of a deponent; and (3) draw any reasonable inference from the evidence.[3] Critically, however, the motions judge was not to exercise those powers where it was "in the interests of justice for such powers to be exercised only at a trial."

While the initial jurisprudence under the new Rule 20 adopted a more liberal approach to summary judgment, the Court of Appeal quickly reversed that trend with its decision in *Combined Air Mechanical Services Inc. v. Flesch* ("*Combined Air*)."[4] The court's interpretation of whether it was "in the interests of justice" to require a trial was extremely broad and traditional. Echoing the Supreme Court of Canada's paeans to the trial process in standard of review cases such as *Housen v. Nikolaisen*,[5] the court noted that the trial judge "is a trier of fact who participates in the dynamic of a trial, sees witnesses testify, follows the trial narrative, asks questions when in doubt as to the substance of the evidence, monitors the cut and thrust of the adversaries, and hears the evidence in the words of the witnesses."[6]

The Court of Appeal was just as deferential to the role of trial counsel. The court noted that the order in which witnesses are called, the manner in which they are examined and cross-examined, and how the introduction of documents is interspersed with and explained by the oral evidence, is of significance. This "trial narrative" may have an impact on the outcome.[7]

The poetry of the trial process was juxtaposed with the prose of summary judgment:

> The deponents swear to affidavits typically drafted by counsel and do not speak in their own words. Although they are cross-examined and transcripts of these examinations are before the court, the motion judge is not present to observe the witnesses during their testimony. Rather, the motion judge is working from transcripts. The record does not take the form of a trial narrative. The parties do not review the entire record with the motion judge.[8]

Taking these factors into account, the court concluded that summary judgment was available beyond the traditional categories only where "the full appreciation of the evidence and issues that is required to make dispositive findings can be achieved by way of summary judgment."[9]

The Supreme Court reinvigorates summary judgment

The Court of Appeal for Ontario's decision was short-lived. On appeal, the Supreme Court of Canada overturned the "full appreciation test" as being too restrictive and recognized that summary judgment could be "a proportionate, more expeditious and less expensive means to achieve a just result than going to trial."[10]

While the result was welcome, the decision still represented only a limited and conditional embrace of summary judgment that emphasized its expediency and cost-efficiency, not its accuracy. The Supreme Court framed its decision by adopting The Advocates' Society's submission that, given the cost of trial, "the trial process denies ordinary people the opportunity to have adjudication."[11]

Notably, the Supreme Court continued to presume a "tension between accessibility and the truth-seeking function."[12] The more expansive (and expensive) procedures associated with a trial were presumed to be superior at serving courts' truth-seeking function.

The Supreme Court's judgment in *Combined Air* was a welcome corrective to the Court of Appeal's veneration of the trial process. Welcome as it was, the Supreme Court's decision still did not accept summary judgment as a co-equal method of adjudicating cases alongside trials. Rather, summary judgment was effectively acknowledged as merely being "good enough" in light of the goals of proportionality and efficiency.

Not just "good enough"

My suggestion is that, in many civil cases, summary judgment is not just "good enough"; it is "as good as," or "better than," for at least three reasons.

First, as Paul Fruitman's article pointed out, human beings (which, last I checked, included judges) are not nearly as good as we think we are at assessing credibility. By placing so much weight on assessments of credibility, trials are prone to turn not on which side's witnesses are in fact truthful, but on which are successful in projecting truthfulness. These two are often not the same thing.

Second, particularly in commercial cases, the contemporaneous documentary record should usually be far more important than witnesses' recollections (or, more cynically, their *post hoc* rationalizations). This is most obviously true in contract cases, where the witnesses for each side miraculously just happen to recall that the factual matrix was most consistent with their preferred interpretation of the contract. These *post hoc* rationalizations are far less probative than what the relevant parties actually said and did in the contemporaneous documents.

Third, the role of counsel in drafting affidavits is a feature, not a bug. It is hard to reconcile the Court of Appeal for Ontario's distaste for this aspect of summary judgment with its praise for counsel's role in crafting a "trial narrative." The fact is, the skill of counsel will play a role whichever method of adjudication is chosen. If anything, however, the ability of skilful counsel to win a losing case is somewhat mitigated in summary judgment, where the focus is properly on the documents rather than on the witnesses.

An extreme example of a case for summary judgment

The expanded approach to summary judgment that I propose is not limited to straightforward cases involving a handful of documents. It could and should be used in even complex commercial cases. For example, one of the more prominent trials in recent years was the so-called "allocation dispute" arising out of the insolvency of Nortel. Debtor groups from Canada, the United States and EMEA (Europe, the Middle East and Asia) were fighting over the allocation of approximately $7 billion in proceeds from the sale of Nortel's worldwide assets.[13]

Nortel was a unique trial. It was tried in a joint session of the Superior Court of Justice, Commercial List in Toronto and the US Bankruptcy Court for the District of Delaware. Justice Newbould presided in Toronto, and Judge Gross in Delaware. As a result of the joint nature of the proceedings, the parties engaged in American-style depositions, conducting more than 125 depositions of fact and expert witnesses located around the world over a span of several months. This was followed by a 21-day trial and then three days of argument. The parties submitted evidence-in-chief at trial principally by way of affidavits, with brief oral examinations-in-chief followed by full cross-examinations.

At the end of all of this litigating, most witnesses proved to be of little assistance. Much of the evidence at trial consisted, to the obvious and understandable frustration of the trial judges, of witnesses' self-serving interpretations of contracts entered into years or even decades earlier. Even less helpful were cross-examinations that consisted largely of lawyers arguing with witnesses concerning their interpretations of the documents.

Typical of Justice Newbould's frustration with witnesses giving evidence about their interpretations of the relevant agreements was the following description of the parties' position on the Master R&D Agreement (MRDA), the interpretation of which was central to the dispute:

> There was a great deal of evidence led by the U.S. and EMEA interests as to the subjective views of the witnesses, mostly tax personnel, regarding the rights of the parties under the CSA or MRDA or what the witnesses understood the language to mean, or in one case as to the witness's understanding of what others understood the documents to mean. Apart from the latter being inadmissible hearsay, all of this evidence was not admissible as it amounted to subjective views as to the meaning of an agreement. Nor was it admissible under the factual matrix rule permitting objective surrounding circumstances at the time of the execution of the agreement to be considered, and I do not consider it. For example, what Mr. Henderson thought about the rights under the CSA license, that he copied from an earlier version of the CSA, or what others thought the MRDA meant or what they thought the intent of it was is not to be taken into account. See *Sattva*, *supra*, at para. 59.[14]

Throughout the trial and again in his Reasons, Justice Newbould repeatedly referred to the parties' subjective views of the evidence as being inadmissible or irrelevant.[15] Ultimately, Justice Newbould's conclusion was that he did "not consider the surrounding circumstance or factual matrix evidence to provide much clear assistance in construing the meaning of the terms in the MRDA."[16] Even expert evidence was occasionally criticized as being an "inadmissible subjective view as to how the MRDA license should be interpreted."[17]

Where Justice Newbould did give effect to the evidence of witnesses, it was usually on relatively uncontroversial subjects, such as the fact that the MRDA was driven by tax concerns,[18] that Nortel assigned all worldwide patents to one corporate entity as a matter of best practices[19] or that the majority of Nortel's bonds were issued without guarantees.[20] In addressing the important issue of whether a substantive consolidation of worldwide assets would be permissible, Justice Newbould emphasized that the relevant evidence was "clear beyond peradventure," and "clear and uncontested".[21]

In the result, Justice Newbould and Judge Gross agreed on a *pro rata* allocation that was not even advocated by any of the three main debtor groups; rather, it was advanced as a primary argument only by counsel representing Nortel's UK pensioners. No witness gave testimony indicating that a *pro rata* allocation was required by the agreements between the parties; rather, the evidence led in support of this outcome was simply that nothing precluded a *pro rata* allocation, and it was a just solution in the circumstances.

Given this result, it raises the question of whether the extensive trial and pre-trial procedures in Nortel were even necessary. The deposition transcripts were barely referred to at trial or in the judgments. Even the trial evidence was typically relied on only where it was uncontroversial or uncontradicted. Far more important were the documents themselves, and the judges' overall assessment of what was fair in all the circumstances in light of the relatively undisputed underlying facts. Summary judgment would likely have achieved the same result

I believe the same is true in many commercial cases. The evidence of the witnesses is rarely probative of anything unless supported by the contemporaneous documents. Commercial cases are not like, for example, personal injury cases where only the disputed evidence of eyewitnesses can determine what actually happened, and who did what. In commercial cases, the documents are the most important thing, and the documents are presented just as well by summary judgment as they are by traditional trial. Indeed, one might argue they are better presented by summary judgment, without the distracting spectacle of witnesses putting their gloss on the documents.

A process already begun

The move toward summary judgment–style procedures has in fact already begun in various forums. On the Commercial List, it is now routine for evidence-in-chief to be given principally by way of evidence-in-chief.[22] Parties never waste time proving documents through witnesses; a document brief is routinely agreed on in advance of trial.

Arbitration is another forum where summary judgment–style procedures have become routine. Parties routinely submit evidence by way of affidavits, with minimal cross-examinations in court. Rare is the commercial litigator who has not tried any number of cases in this manner.

Finally, the leave-to-proceed test for securities misrepresentation cases under Part XXIII.1 of the *Securities Act* is, in essence, a summary judgment test. While it of course is just a test for whether a case can actually proceed to a trial, if the defendant prevails, it is the final adjudication on the merit of a claim on behalf of, typically, thousands of class members.

Notes

1. (1990), 75 OR (2d) 225 at 237 (Gen Div).
2. (1998), 38 OR (3d) 161 at 173 (CA).
3. *Rules of Civil Procedure*, Rule 20.04(2.1).
4. 2011 ONCA 764.
5. 2002 SCC 33.
6. *Combined Air*, *supra* note 4 at para 47.
7. *Ibid* at para 48.
8. *Ibid* at para 49.
9. *Ibid* at para 50.
10. *Hryniak v Mauldin*, 2014 SCC 7 at para 4.
11. *Ibid* at para 24.
12. *Ibid* at para 29.
13. The author acted as Canadian counsel to the EMEA Debtors.
14. *Re Nortel Networks Corporation*, 2015 ONSC 2987 at para 119.
15. *Ibid* at paras 120–121.
16. *Ibid* at para 157.
17. *Ibid* at para 166.
18. *Ibid* at paras 174, 176.
19. *Ibid* at para 196.
20. *Ibid* at para 230.
21. *Ibid* at paras 222, 223. While Justice Newbould did not order a substantive consolidation or conclude that it was necessary to effect the resolution of the case, he did find that, if his order did amount to a substantive consolidation, it was permissible.
22. *Re Nortel Networks Corporation (Re)*, 2015 ONSC 2987; *The Catalyst Capital Group Inc v Moyse*, 2016 ONSC 5271; *Husky Injection Molding Systems Ltd v Schad*, 2016 ONSC 2297.