



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *John Doe (#46) v. His Majesty the King in Right of
Newfoundland and Labrador*, 2025 NLCA 38

Date: November 7, 2025

Docket Number: 202401H0049

Restriction on Publication: By court order dated November 22, 2022, information that could identify John Doe shall not be published in any document or broadcast or transmitted in any way.

BETWEEN:

JOHN DOE (#46)

APPELLANT

AND:

HIS MAJESTY THE KING IN RIGHT OF
NEWFOUNDLAND AND LABRADOR

RESPONDENT

Coram: L.R. Hoegg, F.J. Knickle and G.L.C. Noel JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador,
General Division 202201G4571
(2024 NLSC 95)

Appeal Heard: March 19, 2025

Judgment Rendered: November 7, 2025

Reasons for Judgment by: L.R. Hoegg and G.L.C. Noel JJ.A.

Concurred in by: F.J. Knickle J.A.

Counsel for the Appellant: James R.A. Locke
Counsel for the Respondent: David G. Rodgers

Authorities Cited:

CASES CITED: *John Doe (#46) v. Newfoundland and Labrador*, 2024 NLSC 95; *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42; *Marco Ltd. v. Newfoundland Processing Ltd. et al.*, 1995 CanLII 10495 (NLSC); *Fillatre v. Fillatre*, 2016 NLCA 69; *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA); *Hennessey v. Eastern Regional Integrated Health Authority*, 2022 NLCA 45; *Niqitaq Fisheries Ltd. v. Fowler*, 2019 NLSC 122; *Power v. Hutchings*, 2022 NLCA 46; *Fishery Products International Ltd. v. Rose*, 2018 NLCA 65; *Business Development Bank of Canada v. Callahan*, 2021 NLSC 1; *B & B Line Construction Ltd. v. Futuretech Communications Inc.*, 2000 CanLII 28818 (NLSC); *Greeley v. Greeley*, 2015 NLTD(G) 65; *Royal Bank of Canada v. Incoretec Inc. et al.*, 2007 NLTD 211; *Jane Doe (#4) v. Newfoundland and Labrador English School District*, 2022 NLSC 114; *Swain v. Vickers*, 2019 NLSC 17; *Hynes v. Bromley Estate*, 2009 NLTD 127; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Marco Ltd. v. Newfoundland Processing Ltd. et al.*, 1995 CanLII 10518 (NLSC); *Szeto v. Dwyer*, 2010 NLCA 36; *Walsh v. T.R.A. Company Limited*, 2018 NLSC 178; *John Doe (G.E.B. #36) v. Roman Catholic Episcopal Corporation of St. John's*, 2015 NLTD(G) 81; *Knudsen v. Williams*, 2021 NLSC 85.

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D, rules 17A, 29.09(1)(c), 39.03; *Rules of Civil Procedure*, RRO 1990, Reg 194, rule 20.04(2.1-2.2).

L.R. Hoegg and G.L.C. Noel JJ.A.:

INTRODUCTION

[1] This decision deals with the appropriateness of deciding a civil action by summary trial.

[2] The appellant, John Doe (#46), alleged that while he was a resident at the Whitbourne Boys Home in the 1980's, he was sexually assaulted by Father Ronald Bromley. Father Bromley was a Roman Catholic priest who was authorized by the

Government of Newfoundland (the “Province”) to interact with the boys at the home and take them on outside excursions. Father Bromley is deceased. John Doe’s action is based on the Province’s vicarious liability for Father Bromley’s actions.

[3] John Doe filed an application for summary trial. The Applications Judge returned the application for a hearing on the threshold question of appropriateness for summary trial.

[4] In his reasons (*John Doe (#46) v. Newfoundland and Labrador*, 2024 NLSC 95, (the “Decision”)), the Judge set out the law respecting whether a matter can be decided by summary trial as stated by this Court in *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42. He identified the question for his determination to be whether there was any reason why the case was inappropriate for summary trial. He found there was such reason, saying that given Father Bromley’s demise, the only way for the Province to test the veracity of John Doe’s claim was to enable the Court to assess his general credibility during full direct and cross-examination by counsel:

[31] Whether the testimony of John Doe (#46) is generally believable or honest is a genuine issue for trial. It requires the trier of fact to undertake an exercise in credibility analysis with the view of deciding the veracity of his claim. I agree with counsel for the Province that this objective can only be accomplished after observing the demeanor of the Plaintiff during a full direct and cross-examination by counsel (see *Marco* principles 14(b) and 6).

[5] At paragraph 34, the Judge went on to say that a defendant, whose only meritorious defence strategy is to test the veracity of the plaintiff’s allegations, must be able to do so before a trial judge, not a summary trial judge. For these reasons, the Judge ruled that John Doe’s case was inappropriate for summary trial. However, the Judge went on to give other reasons why, in his view, summary trial was inappropriate. Specifically, he reasoned that deciding cases principally on written material without observing witnesses could be problematic, that it may be unjust to summarily decide serious, substantial and complex claims with potential for significant damages awards, and that historical sexual abuse claims must be assessed in the context of a full trial because potential witnesses are no longer available (Decision, at paras. 32-34).

[6] Accordingly, the Judge dismissed John Doe’s application.

[7] John Doe appeals the Judge’s decision.

ISSUES

[8] John Doe's appeal raises three issues:

- (1) Did the Judge err in his consideration of the threshold issue?
- (2) Did the Judge err with respect to the issue of credibility?
- (3) Did the Judge misapply the principles of access to justice by failing to consider alternate remedies?

Standard of Review

[9] It is well established that deciding a summary trial application is a discretionary decision (*Marco Ltd. v. Newfoundland Processing Ltd. et al.*, 1995 CanLII 10495 (NLSC) ("*Marco No. 2*") at para. 76, principle 14, and *Brook Construction*, at para. 101). Discretionary decisions are reviewable on a deferential standard. An appeal from such a decision can only succeed if the Judge exceeded his or her jurisdiction, failed to apply or misapplied an applicable principle, made a palpable and overriding error in his or her appreciation of the facts, or the failure (of an appellate court) to interfere would cause a manifest injustice (*Fillatre v. Fillatre*, 2016 NLCA 69, at para. 16; and *Langor v. Spurrell*, 1997 CanLII 14712 (NLCA), at paras. 32-33). Accordingly, this Court may interfere with the Judge's decision if any of the above-described errors is established.

The Law

[10] Summary trials are available upon a successful application by a plaintiff or defendant pursuant to Rule 17A of the *Rules of the Supreme Court, 1986*, SNL 1986, c. 42, Schedule D. In pertinent part, rules 17A.01(1) and 17A.03(2) read:

Summary Trial

17A.01. (1) A plaintiff or defendant may, after defence has been filed and at any time prior to the proceeding being placed on a trial list, apply to the Court with supporting affidavit material or other evidence for summary trial seeking judgment on or dismissal of all or part of the claim in the statement of claim, as the case may be.

...

17A.03. (2) Where the Court decides that there is a genuine issue with respect to a claim or defence, a judge may nevertheless grant judgment in favour of any party, either upon an issue or generally, unless

(a) the judge is unable on the whole of the evidence before the Court on the application to find the facts necessary to decide the questions of fact or law; or

(b) it would be unjust to decide the issues on the application.

[11] In *Brook Construction*, Green C.J.N.L., drawing on this Court’s jurisprudence since Rule 17A was proclaimed, provided a template for considering an application for summary trial. He set out the law with fulsome explanation respecting how issues arising in such an application ought to be addressed in keeping with the philosophy, purpose, and objectives of the rule.

[12] When a plaintiff or defendant applies to have a matter decided by summary trial, the court must first consider whether summary trial as a process is appropriate. Two questions arise on this threshold consideration: (1) has the applicant complied with the requirements of the rule, and (2) is there reason why summary trial would be inappropriate in the instant case (*Brook Construction*, at paras. 34-37; and *Hennessey v. Eastern Regional Integrated Health Authority*, 2022 NLCA 45, at para. 30). The Court noted that a separate hearing is not always necessary to resolve the threshold questions (*Brook Construction*, at para. 46).

[13] Whether an applicant has complied with the requirements of the rule would be readily apparent in an application before a judge. Whether a matter is inappropriate for summary trial would also, in most cases, be readily apparent. Accordingly, in non-compliant and inappropriate cases, an applications judge would be able to dismiss the application forthwith. If the threshold considerations are met, an applications judge would proceed directly to consider whether there is a genuine issue for trial that can be fairly decided on the record before the judge (at rule 17A.03).

ANALYSIS

(1) Did the Judge Err in Consideration of the Threshold Issue?

[14] John Doe argues that the Judge’s focus on John Doe’s credibility in consideration of the threshold issue was misplaced. His argument is essentially that the Judge jumped the gun by considering his credibility as a threshold issue. He says

that the Judge ought to have decided the threshold issue of appropriateness first, and then considered the issue of John Doe's credibility. He maintains this is so because assessment of credibility is built into the summary trial analysis in rule 17A.03 itself, which is the next stage of the analysis.

[15] The Judge considered the material in the application before him and observed that it was not a typical application for summary trial. It was atypical in that the Province did not identify specific points of disagreement with John Doe's position or set out affidavit evidence that differed from John Doe's affidavit evidence. In most summary trial applications, the respondent puts its "best foot forward" (*Brook Construction*, at para. 25) by setting out its own position with supporting affidavit evidence which identifies the conflict with the applicant's position, the resolution of which determines all or part of the claim. In cases that seek resolution of the claim, the identification of the specific conflict between the parties assumes that they concede the other aspects of the claim. It is the judge's consideration of the identified conflict that enables the judge to determine whether there is a genuine issue for trial, what it is, and whether the judge can resolve it on the material before him.

[16] In this case, the Province was unable to put a best foot forward, as it were. The Province had no evidence to submit that would contradict John Doe's evidence so as to identify the issue for resolution on summary trial. Rather, the Province argued that it needed a full trial to test the general credibility of John Doe's evidence, given that his evidence was central to determining the veracity of his claim.

[17] Not wanting to rush to a decision in this unusual situation without further submissions from the parties, the Judge exercised his discretion to set the matter for a hearing on the threshold issue. After hearing from the parties, the Judge decided that the case was inappropriate for summary trial.

[18] John Doe argues that the Judge's reasoning shows a misapprehension of the threshold issue and how it should be determined. Specifically, he maintains that the Judge's credibility concerns do not relate to the threshold issue of appropriateness; rather, they relate to whether there is a genuine issue for trial which is meant to be determined after the threshold issue is determined. In this regard, John Doe relies on paragraph 40 of *Brook Construction*:

[40] Care should be taken not to elevate the threshold inquiry to the status of a stand-alone, separate mandatory requirement additional to the requirements set out in rule 17A. The threshold inquiry is in reality only designed as a screening device ...

[19] We cannot accept John Doe’s argument that the Judge erred in considering credibility when deciding the threshold issue. We agree with the Judge’s approach that it is appropriate to weed out cases at the threshold stage when it is evident that summary trial is inappropriate (Decision, at para. 19). While the template in *Brook Construction* is very useful guidance, it does not command a rigidly ordered consideration of issues that present in a summary trial application. Indeed, *Brook Construction* specifically endorses weeding out summary trial applications at an early stage (at paras. 43, 91). In any event, it can hardly be an error in principle to identify and consider credibility concerns at the early stage of an application so as to screen out cases that are inappropriate for summary trial.

[20] In the result, we see no error in the Judge’s consideration of his credibility concerns as part of the threshold analysis.

(2) Did the Judge Err With Respect to the Issue of Credibility?

[21] John Doe maintains that even if credibility can be properly considered at the threshold stage, the Judge’s credibility concerns were unfounded. He says this is because the Province put forward no evidence that raised credibility concerns with, or refuted, John Doe’s evidence.

[22] The Judge stated that “[w]hether the testimony of John Doe is generally believable or honest is a genuine issue for trial” because it “requires the trier of fact to undertake an exercise in credibility analysis with the view of deciding the veracity of his claim” (Decision, at para. 31).

[23] In *Marco No. 2*, Green J. (as he then was) referred to “credibility generally” in the context of a discretionary decision respecting whether and how far cross-examination on affidavit evidence filed on a summary trial application ought to be permitted:

[76] 6. The opportunity to avail of cross-examination is in the discretion of the court so as to ensure promotion of the philosophy of the rule of providing expeditious and inexpensive paper trials. Cross-examination would likely be appropriate where:

- (a) there is some disputed issue disclosed on conflicting affidavits, the resolution of which is necessary to the ultimate outcome of the case;

- (b) even though the applicant for cross-examination has not filed a conflicting affidavit, the purpose of cross-examination is to address information that is not within the knowledge of the cross-examiner's own deponents, provided the court can be convinced from other sources (eg. the pleadings), that there is a substantive point of difference between the parties;
- (c) there is other good reason to test the veracity of a statement that is directly related to a material fact in dispute.

Unlike cross-examination on a full trial, cross-examination on affidavits would not generally be permissible for the purpose of attacking credibility generally. If that is necessary, then that is probably a good indication that the case should go to trial.

[24] Justice Green's comments at paragraph 76, principle 3 of *Marco No. 2* also pertain:

[76] 3. To bring himself or herself within the Rule the applying party must:

- (a) in a case where he or she has the ultimate burden of proof on the merits, put forward an evidentiary basis for the claim which, if considered alone, would prove each element of the cause of action; ...

[25] The term "general credibility" was referred to in *Niqitaq Fisheries Ltd. v. Fowler*, 2019 NLSC 122. In *Niqitaq*, Boone J. (as he then was) stated that on an application for summary trial, he could determine whether a witness's evidence regarding a particular fact or document was reliable, but that he could not determine whether a witness was generally believable or honest. He ruled that he did not need to consider the witness's general credibility because it was not central to deciding the discrete contractual issue which would determine the outcome of the application.

[26] The jurisprudence from this Court confirms judges can make credibility assessments in summary trials in appropriate circumstances (*Power v. Hutchings*, 2022 NLCA 46, at paras. 22, 29; and *Fishery Products International Ltd. v. Rose*, 2018 NLCA 65, at paras. 48, 114). Several decisions from the Supreme Court of Newfoundland and Labrador have also permitted credibility determinations in summary trials. In *Business Development Bank of Canada v. Callahan*, 2021 NLSC 1, the Court permitted such evidence respecting what happened at a particular meeting between the parties and one other person, to resolve a factual dispute. This was a discrete and contained issue which could be resolved in short order. See also *B & B Line Construction Ltd. v. Futuretech Communications Inc.*, 2000 CanLII

28818 (NLSC), at paragraph 11; *Greeley v. Greeley*, 2015 NLTD(G) 65, at paragraph 13; and *Royal Bank of Canada v. Incoretec Inc. et al*, 2007 NLTD 211, at paragraph 9, where direct testimony was permitted on summary trials to decide discrete or contained issues of credibility resolvable in an expeditious manner.

[27] It is so, as John Doe argues, that there was no evidence before the Judge suggesting that John Doe was not credible, and the Province does not identify any specific credibility concerns about his evidence. Such was the case in *Jane Doe (#4) v. Newfoundland and Labrador English School District*, 2022 NLSC 114, on which John Doe relies. However, the cases are different. In *Jane Doe (#4)* at paragraph 16, the respondent specifically conceded that it had no credibility concerns, whereas in this case, the Province has not made that concession. In short, the fact that the Province has not been able to refute or identify conflict with John Doe's affidavit evidence by adducing conflicting affidavit evidence does not mean that there are no general credibility concerns.

[28] Whether to resolve credibility issues on summary trials can be tangly. In *Brook Construction*, at paragraph 94, Green C.J.N.L. said that the question is "the degree to which credibility issues may be involved". And, even when all parties agree that a summary trial is appropriate, the judge may not have a sufficient "comfort level" from the record before the Judge to resolve conflicting evidence respecting credibility issues on summary trial (see *Marco No. 2*, at para. 76, principle 13; and *Swain v. Vickers*, 2019 NLSC 17, at paras. 67-69, 73-74).

[29] In this case, John Doe's application sought a ruling that the Province was vicariously liable for his damages caused by Father Bromley. John Doe is the plaintiff. As a plaintiff, he must prove his case. John Doe was the only witness. The Province's only ability to defend John Doe's claim rested on being able to challenge John Doe's credibility respecting all elements of his claim. The Province asserts its right to do so, which involves full cross-examination of John Doe. Such full cross-examination could involve extensive cross-examination of John Doe on all the evidence he put forward in his affidavit, as well as any new evidence. The ability to adduce additional evidence from John Doe and cross-examine him on all of it would enable the Province to defend the claim. In the Province's submission, the Court would then be able to evaluate John Doe's general credibility with a view to determining the veracity of his claim.

[30] The Judge ruled that "observing the demeanor of the Plaintiff during a full direct and cross-examination by counsel" was the only way to conduct the credibility

analysis necessary to decide the veracity of his claim. We agree. The comprehensive direct and cross-examination would go to John Doe's general credibility, essential to determining whether he proved his claim to the requisite burden of proof necessary for the Court to decide his claim.

[31] Such a general credibility assessment would be neither discrete nor contained; its potential extent is well beyond what is contemplated by the summary trial rule and related jurisprudence.

[32] A case involving the late Father Bromley (*Hynes v. Bromley Estate*, 2009 NLTD 127) pertains. *Hynes* was decided in the context of an application for summary judgment (as opposed to summary trial) against the Estate of Ronald Bromley. At paragraph 24, the Court reasoned:

[24] Mr. Hynes rests his argument in large part on the fact that there is no evidence to refute his allegations. This is mainly because Father Bromley is deceased. In my view, a plaintiff cannot automatically obtain summary judgment just by asserting facts which cannot be refuted by other evidence. The burden remains on a plaintiff to prove his case on a balance of probabilities regardless of whether there is contradictory evidence available. To permit a plaintiff to obtain summary judgment when there is strong opposition to the credibility of his evidence would, in my view, compromise the integrity of the justice system. ...

Similarly, the Province must be able to defend John Doe's claim by testing his credibility through cross-examination pertaining to all elements of his claim.

[33] In the result, John Doe has not shown that the Judge improperly exercised his discretion by dismissing the application so as to afford the Province the ability to cross-examine John Doe following a full direct examination. Further, we are of the view that it would have been unjust to decide this case on John Doe's application (rule 17A.03(2); *Brook Construction*, at para. 32).

[34] This is not to say that general credibility can never be decided on a summary trial. As expressed in *Marco No. 2*, a closed list of factors cannot be given for determining whether a judge, in exercising discretion to proceed with a summary trial, "is confident that the court has the factual substratum necessary to make an informed decision on the merits" (at para. 76, principle 14). The justice of proceeding with a summary process will depend on many factors, such as those listed at paragraph 76, principle 15 of *Marco No. 2*:

- [76] 15. (a) the amount involved;
- (b) the complexity of the matter;
- (c) its urgency;
- (d) any prejudice likely to arise by reason of delay;
- (e) the cost of taking the case forward to a conventional trial in relation to the amount involved; and
- (f) the course of the proceedings to date.

[35] Further, there is no principled reason why serious or substantial cases that involve historical sexual abuse do not lend themselves to summary trial disposition. Such cases may well be able to be disposed of by summary trial provided the issues are discrete, well defined, and contained, and the judge is confident that the record before the court is sufficient to fairly decide the matter (see *Jane Doe #4*). However, cases that involve complex interwoven issues are different, as are cases involving “the potential for lengthy and possibly conflicting *viva voce* evidence that will necessarily involve credibility assessments” (*Brook Construction*, at para. 43). Those types of cases may require a conventional trial.

(3) Did the Judge Misapply the Principles of Access to Justice by Failing to Consider Alternative Remedies?

Submissions of the Parties

[36] John Doe argues that the Judge’s dismissal of his application for summary trial offends the principles of “proportionality and fair access to affordable, timely and just adjudication of claims”, as directed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at paragraphs. 1-5. He submits that the Judge denied him access to justice by deciding his application on credibility concerns without allowing the alternative remedy he proposed, which was to permit him to augment his affidavit evidence with direct *viva voce* testimony with full cross-examination to follow. In John Doe’s submission, his proposal would address the Judge’s credibility concerns in accordance with the principles of access to justice. John Doe further argues that the Judge erred in principle by not addressing this argument in his reasons.

[37] To support his alternative argument, John Doe points out that during oral argument, counsel for the Province stated that the Province’s main concern was to have the opportunity to cross-examine him within the context of a full examination in chief, and said that “if the summary trial process could provide that, I mean, well, I guess that would address our concerns ...” (Threshold Hearing Transcript, at 40).

[38] The Province submits that its counsel's comments need to be considered in context. Conceptually, the Province argues, there must be a difference between a summary trial and a conventional trial, or else there would be no need for the summary trial rule at all.

[39] The exchange between counsel for the Province and the Judge is set out below:

Mr. Rodgers: Obviously it's no secret our main concern is that we want to have a full cross-examination after hearing a full direct, examination in chief, from — if the summary trial process could provide that, I mean, well, I guess that would address our concerns, but then, like I said, to me, conceptually from a logical legal perspective, we're just into a, it's just a trial.

The Court: It is, and that's why, I guess, going back to Chief Justice Green's analysis in *Marco*, that's why it was carved out.

Mr. Rodgers: Yeah.

The Court: If we cross this line we're into a conventional trial.

...

Mr. Rodgers: we do feel this is inappropriate because of general credibility. If Justice, you disagree and you find that, no you know, despite my arguments you feel that no, this can be done, if the summary trial process encompassed an examination in chief and a direct (sic) and if somehow that was going to happen quicker than the conventional trial, I mean, I guess, then. But to me that seems like something different.

(Threshold Hearing Transcript, at 40-41)

[40] The Province adds that there are important steps within the conventional trial process that are not available in a summary trial. These include the filing of a certificate of readiness, a pre-trial conference, a settlement conference, and a potential application to bifurcate the proceeding.

Guiding Principles

[41] Writing for a unanimous Court in *Hryniak*, Justice Karakatsanis summarized the importance of the summary trial process to promote timely and affordable access to justice:

[1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

[2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

[3] Summary judgment motions provide one such opportunity. ...

[42] This was the approach explained by Justice Green in *Marco No. 2*. In *Marco, No. 2*, Green J. stated that the then-new summary trial rule was intended to achieve “an expeditious and inexpensive determination of proceedings on their merits, by screening out claims that cannot survive the ‘good hard look’ ”(*Marco No. 2*, at para. 76, principle 1). Further, Justice Green stated, “The court, in the exercise of its inherent jurisdiction to control its own process and under the *Rules* themselves, may modify the strictures of particular procedural requirements to meet the exigencies of a specific case provided always, of course, any such modification can be done without trenching on the rights of other parties to a fair and proper hearing” (*Marco Ltd. Newfoundland Processing Ltd. et al*, 1995 CanLII 10518 (NLSC) at para. 12) (Emphasis added).

[43] In *Szeto v. Dwyer*, 2010 NLCA 36, at paragraph 55, principle 2, this Court confirmed that the purpose of the *Rules* is to direct the conduct of litigation in an expeditious, cost-effective, and fair manner. In *Szeto*, the Court stated that, “The rules must act as a comprehensive functioning system; the court and parties are exhorted to ensure that the interpretation and application of a particular rule is not counterproductive to the overall intent of the rules to ensure expeditious and cost-effective determinations” (*Szeto*, at para. 55, principle 2).

Discussion

[44] Importantly, *Hyrniak* was decided in the context of Ontario’s summary judgment rule. Summary trial regimes are different across the country, and the Ontario rule considered in *Hyrniak* is not identical to the one in Newfoundland and Labrador (*Brook Construction*, at para. 42). The Ontario rule explicitly provides for “evaluating the credibility of a deponent” and that a judge may “order that oral evidence be presented by one or more parties” (*Rules of Civil Procedure*, RRO 1990, Reg 194, rule 20.04(2.1-2.2)).

[45] In this jurisdiction, the approach is more restrained. The wording of Rule 17A does not contain the same express provisions as the Ontario rule; the presumption is that affidavit evidence will suffice, and that cross-examination will be limited (*Brook Construction*, at para. 25; and *Marco No. 2*, at para. 76, principle 6). Further, our rule 29.09(1)(c) that governs applications provides that “leave of the court” is required for the presentation of oral evidence “by any witness in person”.

[46] John Doe’s request was to expand on and add to his affidavit evidence and to be cross-examined by the Province on all elements of his claim. Unlike the cases referred to in paragraph 26 above, John Doe’s request did not involve discrete or contained issues that could be resolved in short order. John Doe was effectively requesting the opportunity to testify as though he were in a conventional trial. In the circumstances of this case, such a request was neither expeditious nor cost-efficient, and in our view runs contrary to the principles of proportionality and expeditiousness supporting the summary trial rule. Moreover, acceding to his request would effectively allow John Doe to circumvent the trial list and have his matter heard ahead of others. While this may have facilitated more timely access for John Doe, it would, for no principled reason, have been at the expense of others awaiting trial or hearing.

[47] Although the Judge’s written reasons did not specifically address John Doe’s alternative proposal, the Judge’s exchange with counsel and reasons for decision demonstrate that he was alive to and considered John Doe’s alternative proposal.

[48] The Judge was also concerned that damages could be significant and would remain to be resolved in any event (at para. 33). The relief John Doe sought would have effectively bifurcated liability and damages. While his liability claim may have been resolved, damages would remain to be assessed.

[49] The difficulty with bifurcating civil trials where significant issues of credibility are interwoven between liability and damages was recognized in *Walsh v. T.R.A. Company Limited*, 2018 NLSC 178, at paragraph 6, and *John Doe (G.E.B. #36) v. Roman Catholic Episcopal Corporation of St. John's*, 2015 NLTD(G) 81, at paragraphs 10, 26, 39. Such situations “run the risk of duplicative proceedings or inconsistent findings of fact”, effectively thwarting the “interest of justice” (*Hryniak*, at para. 60; and *Brook Construction*, at para. 96). In short, if the Judge had permitted John Doe to testify as requested, little may have been gained in efficiency and cost saving.

[50] The Judge’s conclusion, “that the Province should be given the chance to fully test the credibility of John Doe (#46) on the issues of liability and damages in the context of a full trial” (Decision, at para. 35), was made in accordance with the principles of access to justice for both parties. His decision is supportable on the well-established principles guiding summary trials and his exercise of discretion is entitled to deference (*Brook Construction*, at para. 49, citing *Hryniak*, at para. 81).

[51] One final observation. The Province contends that a settlement conference is only available if the matter proceeds in the ordinary course towards a conventional trial. This is not so. A judge is not prevented from presiding at a settlement conference in any proceeding. Rule 39.03 states “Notwithstanding any other rule, a judge in a proceeding may, on his or her own initiative or at the request of a party, order the parties to attend a pre-trial conference or a settlement conference” (see *Knudsen v. Williams*, 2021 NLSC 85, at paras. 52-53).

CONCLUSION

[52] In summary, we see no error in the Judge’s discretionary decisions respecting consideration of the threshold issue and credibility concerns. Neither do we see conflict with the principles of access to justice in the Judge’s decision to decline John Doe’s alternative request.

DISPOSITION

[53] We would dismiss the appeal.

[54] Given the novel issue respecting the scope of summary trials in John Doe's situation and the interplay with the principles of access to justice, we would make no order as to costs.

L.R. Hoegg J.A.

G.L.C. Noel J.A.

I concur:

F.J. Knickle J.A.