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Federal Court Refuses to Schedule a Summary Trial If No Significant Savings of Cost or Time

As part of our series on summary proceedings in IP cases, we previously commented on the Federal Court of Appeal's guidance on when and how a court should determine if summary trial is appropriate. In this post, we consider Associate Judge Horne's recent decision in *Toronto-Dominion Bank v Dyas* ("*TD Bank*"), which deals with when a Case Management Judge should schedule (or refuse to schedule) a summary trial.

In *TD Bank*, Associate Judge Horne refused to schedule a summary trial notwithstanding that the defendant was presumptively able to bring a motion for summary trial pursuant to Rule 213 of the *Federal Courts Rules* because a trial date had yet to be set. Associate Judge Horne relied on his previous decision in *Janssen v Sandoz*, in holding that a Case Management Judge has residual discretion to refuse to schedule a summary trial in "rare circumstances", and he found such circumstances were met in *TD Bank*.

The specific circumstances that were determinative in this case were:

- The defendant sought to schedule a summary trial three years into the trademark infringement action.
- Adjudicating the matter by summary trial would not have resulted in a significant savings of cost or time. The date requested for summary trial was only two months before the soonest availability for trial, and the defendant estimated that summary trial would take 1-2 days, whereas the entire trial would take 4-5 days.
- The schedule proposed by the Defendants for summary trial would require acceleration of the agreed-upon schedule for expert evidence, which would prejudice the plaintiff.

In our view, this decision is likely an efficient allocation of resources and a reasonable exercise of the Court's ability to control its own process. For example, if a Case Management Judge is convinced that "rare circumstances" exist that militate against even scheduling a summary trial, it is likely more

efficient to direct the parties' efforts towards moving the case forward in the ordinary course, as opposed to scheduling a summary trial that is clearly not appropriate and then putting the burden on the responding party to bring a motion to quash.

This case is also a reminder that, all else being equal, earlier is better when it comes to signalling an intention to bring a summary trial.