



Andrew Moeser  
416-649-1815  
amoeser@litigate.com



Amber Blair  
416-238-7473  
ablair@litigate.com

May 4, 2023

# Shocking Result? Summary Trial on Battery Jump Starter Patent Fails to Get Going

Patent infringement cases are complex and technical, and historically Canadian courts were reluctant to endorse summary disposition in the patent context. However, in recent years there has been an increased trend towards the application of summary proceedings in this area. In particular, we have previously commented on decisions of the Federal Court (“FC”) (*Canmar*, *Kobold*, and *Janssen*) and Federal Court of Appeal (“FCA”) (*Canmar* and *ViiV*) that demonstrate the Court’s willingness to approve summary proceedings in patent cases under the appropriate circumstances. Last fall, the FCA decision in *Gemak* was interpreted by some commentators as a return to the historical position, but in our view, *Gemak* can be viewed as tapping the brakes on summary judgment rather than signalling a more sweeping reversal of the trend towards summary adjudication.

Recently, in *Noco Company, Inc v Guangzhou Unique Electronics Co, Ltd*, the FC dismissed the Defendants’ motion for summary trial, and the Court’s reasons are a reminder that summary disposition is appropriate in some but not all patent cases. In particular, the FC held that summary trial was not appropriate where:

- (1) the motion was not case-dispositive;
- (2) the moving party had raised multiple claim construction and infringement issues;
- (3) there were factual disputes that were not fully addressed by the motion record; and
- (4) there were serious issues of credibility, but the summary trial proceeded entirely on a paper record.

This decision is also noteworthy because the Court dismissed the motion at the threshold step – whether the issues are suitable for summary trial – without proceeding to consider the merits of the claim construction and infringement issues raised by the moving party.

## Background

In this action, the Plaintiff (NOCO) alleged certain vehicle

battery jump starters the Defendants sell in Canada infringe certain claims of Canadian Patent No. 2,916,782 (“the 782 Patent”). The Defendants allege non-infringement and counterclaim their newer jump starters equipped with a CC-209 printed circuit board (CC-209 Products) do not infringe any claim of the 782 Patent.

On this motion, the Defendants sought judgment on their counterclaim, specifically a declaration of non-infringement for their newer CC-209 Products. The motion was not framed as dispositive, which meant that validity and infringement issues relating to the Defendant’s older products would be left for trial regardless of the outcome of the motion.

The Defendants’ rationale for the motion was that the Plaintiff had obtained a “*de facto* injunction” by persuading Amazon.ca to de-list the Defendants’ CC-209 Products, and the Defendants sought a declaration of non-infringement to restore their only retail channel in Canada.

The Defendants’ notice of motion was framed as a motion for summary judgment or summary trial, having not settled on which was more appropriate at the time of filing. The Defendants subsequently elected to proceed as a summary trial. NOCO asserted the Defendant’s election did not change the nature of the motion and given the hearing length (one day) and lack of any *viva voce* evidence, NOCO argued that the Court should treat the motion as one seeking summary judgment.

The Defendants submitted expert evidence on infringement relating to one product, the T8 Pro, which they alleged was representative of all the CC-209 products for the purposes of determining non-infringement. NOCO did not accept that the T8 Pro was representative of all CC-209 Products and submitted that there was insufficient evidence before the Court to make a summary decision.

### **Nature of Summary Trial and Summary Judgment**

Some members of the IP bar have mused about whether there is any practical difference between summary judgment and summary trial, especially where a summary trial proceeds entirely on a paper record.

In this case, Justice Pallotta notes that although summary judgment and summary trial are distinct processes with separate tests, when faced with a motion for summary disposition based on a paper record, similar factors may guide the Court’s analysis of whether the matter is suitable for summary adjudication. Further, she emphasized that the Court should look at the issues and evidence raised by the specific

motion at hand as opposed to making sweeping statements for the types of cases suitable for summary adjudication.

Treating the motion as one for summary trial, the first issue was whether the issues were suitable for summary trial.

### **Not Suitable for Summary Adjudication**

Applying the suitability test to the facts of this motion, the Court found the Defendants had failed to present a sufficiently narrow and well-defined non-infringement issue. Instead, the Court stated that the Defendants had advanced multiple, alternative non-infringement arguments, and advanced evidence and argument on claim elements that were not strictly necessary to resolve those infringement issues, but instead appeared to relate to a comprehensive construction of claim 1 of the 782 Patent.

Further, the Court found that there was insufficient evidence about whether the T8 Pro product was representative of the broader CC-209 class, or even whether this categorization would reliably and unambiguously define a class of products, including future products, for the purposes of a declaration of non-infringement.

The Court also noted that summary disposition would not lead to an efficient resolution of the action because other infringement and validity issues would proceed to trial regardless of the outcome.

The Court dismissed the motion at this threshold step without proceeding to consider the construction and infringement issues raised by the Defendant.

### **Credibility on a Paper Record**

The Court also addressed two motions brought by NOCO relating to evidence in the summary trial: a motion to strike out parts of a reply affidavit from the Defendant's expert witness, and a motion for leave to file a supplemental affidavit from NOCO's expert witness. In addressing both motions, the parties each raised issues with the credibility of the other side's witnesses. Often, concerns about credibility or clarification of evidence can be addressed by calling oral evidence on the motion itself. However, both the evidence motions and the summary trial itself proceeded on a paper record, with the affiants being cross-examined out of court.

In *Gemak*, the FCA cautioned against deciding serious issues of credibility on motions for summary judgment (as we summarized in our previous commentary). Here, the Court found the concerns raised in *Gemak* were similarly applicable to a summary trial that proceeds entirely on a paper record.

### **Implications**

This decision offers useful guidance on factors to consider in a summary proceeding.

Sufficiently narrow and well-defined issues must be presented to the Court to be suitable for summary adjudication. The need for a focused motion is particularly important where, as here, the motion is not intended to resolve the entire case. A party moving for summary trial should also devote sufficient attention to the suitability step, rather than assuming that once the hearing begins the Court will immediately proceed to consider the merits.

Prudent litigants should also consider the benefit of *viva voce* evidence in a summary trial. This is particularly important where there may be serious concerns about credibility or clarification of evidence that can be more readily addressed in court.