

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



Jim Lepore
416-865-2881
jlepore@litigate.com

June 21, 2021

The Train Has Left the Station: The Federal Court of Appeal Confirms That Opposition Won't Derail a Summary Trial

As part of our series on summary adjudication, we previously commented on the Federal Court's recent use of a summary trial to resolve a patent infringement dispute. The abbreviated procedure of a summary trial addresses many of the Federal Court's traditional concerns with summary judgment (e.g., lacking live evidence).

Where the parties agree to adjudication through summary trial, the Federal Court has readily resolved patent infringement disputes in this way (see *Cascade Corporation v Kinshofer GmbH*). However, the subject of our previous comment – *ViiV Healthcare Company v Gilead Sciences Canada* (the "**Summary Trial**") – demonstrated that the Federal Court is also willing to resolve disputes using a summary trial procedure when faced with major opposition from one of the parties (in this case the plaintiffs).

The Summary Trial resulted in a finding of non-infringement and the dismissal of the plaintiffs' claim. Consistent with the plaintiffs' previous opposition to the Federal Court's procedure, they appealed the Summary Trial, including appealing the dismissal of their preliminary motion that sought to adjourn the summary trial (which the plaintiffs styled as a "meta-motion").

The Federal Court of Appeal's decision in *ViiV Healthcare Company v Gilead Sciences Canada, Inc*. (the "**Appeal**") affirms that summary trial may be appropriate for resolving patent infringement actions and provides guidance to litigants considering summary adjudication.

The Summary Trial, the Appeal, and the implications flowing from these decisions are set out in greater detail below. As a top line:

- A party may bring a motion to quash or adjourn a motion for summary judgment or summary trial in "rare circumstances," but it must be brought in a timely fashion and cannot raise substantive defences.

- The Federal Court of Appeal identified three key principles for interpreting Rules 213-216 of the *Federal Courts Rules* (the "***Rules***"), which relate to summary judgment and summary trial. First, the practice and procedure of the Federal Court draw upon (i) the *Rules* and (ii) the Court's plenary powers. Second, a presumption that parties are free to prosecute and defend their cases as they see fit. Third, the general considerations of efficiency and fairness, which are set out in Rule 3 of the *Rules*.
- In deciding whether summary adjudication is appropriate, the Federal Court of Appeal confirmed its view that the Federal Court and Federal Court of Appeal's pre-*Hryniak* jurisprudence remains relevant.

Background to the Summary Trial

The plaintiffs (collectively "**ViiV**") sued the defendant ("**Gilead**") in February 2018. ViiV alleged that Gilead infringed its Canadian Patent No. 2,606,282 (the "282 Patent") by making, using, selling, or offering to sell bictegravir as a component in its HIV product (BIKTARVY). In August 2019, Gilead advised the Federal Court that it intended to pursue a summary trial. The litigation was still in the early stages (i.e., documentary discovery and examinations for discoveries had not yet been completed).

In parallel with delivering their responding summary trial evidence, the plaintiffs also brought a motion that sought to adjourn or stay the motion for summary trial. This preliminary motion was dismissed by Justice Manson, who also ultimately heard and decided the Summary Trial.

In deciding the Summary Trial, Justice Manson found that the summary trial procedure was appropriate and timely in the circumstances, Gilead had met its burden of showing that bictegravir did not infringe the asserted claims of the 282 Patent, and the action was dismissed.

The Appeal Decision

In the Appeal, the Federal Court of Appeal gave relatively brief reasons for affirming Justice Manson's findings on the substantive summary trial issues relating to construction and non-infringement. However, Justice Stratas for the Federal Court of Appeal addressed the procedural issues relating to summary adjudication in greater detail.

The Federal Court of Appeal confirmed that a party may bring a motion to quash or adjourn a motion for summary judgment or summary trial in "rare circumstances." This finding is notable for two reasons. First, it departed from the view of Justice Manson

below, who had commented that such preliminary motions were not available under the *Federal Courts Rules* (2020 FC 11 at paras. 24-26). Second, the Federal Court of Appeal itself noted that there was a "lack of clarity" on this issue in the existing jurisprudence. For example, there were cases such as *Collins v Canada* (2014 FC 307, aff'd 2015 FCA 281), which held that arguments about the appropriateness of summary trial should be raised only at the summary trial hearing itself.

Although confirming the availability (in principle) of such motions, the Federal Court of Appeal clarified that any such preliminary motion: (a) must be brought early; (b) should not raise substantive defences; and (c) cannot itself be a time-wasting and resource-exhausting exercise that would filibuster the case. In the case at bar, the Federal Court of Appeal noted the motion judge's findings that many of the materials supporting the motion to quash were improper, and the motion to quash itself was brought "very late."

In coming to this conclusion, the Federal Court of Appeal identified three key principles for interpreting Rules 213-216 of the *Rules*, which relate to summary judgment and summary trial. First, the practice and procedure of the Federal Court draw upon (i) the *Rules* and (ii) the Court's plenary powers. Second, a presumption that parties are free to prosecute and defend their cases as they see fit. Third, the general considerations of efficiency and fairness, which are set out in Rule 3 of the *Rules*.

Here, one omission is noteworthy. ViiV had urged that the Federal Court of Appeal interpret Rules 213-216 by considering British Columbia's summary trial rules on which the Federal Court's summary trial rules were modeled. More specifically, ViiV had pointed to Rule 9-7(11) of British Columbia's *Supreme Court Civil Rules*, which explicitly provides that a party may bring a preliminary application to have a summary trial adjourned or dismissed in advance of the summary trial hearing itself. Presumably, the Federal Court of Appeal did not consider it necessary to look to British Columbia's summary trial rules given the guidance that was available from the three principles identified by Justice Stratas.

Finally, the Federal Court of Appeal provided guidance in deciding whether summary adjudication is appropriate in the circumstances of any particular case. It recognized the importance of the seminal Supeme Court of Canada decision in *Hryniak* before confirming that the pre-*Hryniak* jurisprudence from the Federal Court and Federal Court of Appeal relating to summary adjudication remains useful. Significantly, the Federal Court of Appeal stated that "the Federal Court has developed useful factors relevant to whether the prerequisites in the *Rules*

for summary judgment or summary trial have been met" in the pre-*Hryniak* decisions in *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, *Bosa v Canada (Attorney General)*, and *Tremblay v Orio Canada Inc.* This guidance is unsurprising given the Federal Court of Appeal's previous confirmation that the *Rules* reflect *Hyrniak*.

Implications

At the conclusion of our previous comment, we noted several considerations for litigants who are considering bringing a summary trial in a patent infringement action, all of which remain relevant following the disposition of this Appeal.

In addition, the Appeal has now provided practical guidance to parties responding to what they think is an improper use of summary adjudication in the Federal Court:

- Appropriateness of the summary procedure should usually be addressed at the hearing on the merits unless it is a rare case where it is clear that summary adjudication should not even be entertained;
- Any motion to quash summary adjudication should be brought as soon as possible;
- Limit any such motion to considerations of efficiency and fairness, without getting into substantive defences; and
- Keep any such motion focused, or else risk being accused of filibustering proceedings.