
Jordana Sanft
416-596-1083
jsanft@litigate.com


Sana Halwani


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


Catherine Blair
416-865-3701
cblair@litigate.com

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Counsel Held the Pen, but the Expert Owned the Opinions: Federal Court Reinstates Its Ruling

The recent Federal Court decision in *dTechs EPM Ltd v British Columbia Hydro and Power Authority* is the latest instalment in a long-running dispute over Canadian Patent No 2,549,087 (the 087 Patent). We previously commented on the Federal Court of Appeal's (FCA) decision that addressed the independence of expert witnesses in patent cases.

The latest decision deals with the narrow question remitted by the FCA: could new evidence about how an expert prepared his reports have affected the weight given to his opinion and the finding that a specific claim of the 087 Patent was invalid? In the redetermination decision, the trial judge, Justice Fothergill, held that the new evidence did not raise independence concerns, and he reinstated the finding that the claim is invalid.

Background

The Trial & Appeal

In 2021, the Federal Court (FC) dismissed dTechs' infringement action against BC Hydro and Awesense Wireless and declared the asserted claims invalid for anticipation and obviousness.

During the assessment of BC Hydro's costs, dTechs obtained the working agreement and invoices of BC Hydro's expert, Mr. Shepherd. The invoices showed:

- No time entries for Mr. Shepherd writing the first drafts of his reports
- Time spent reviewing and commenting on drafts
- Time spent researching documents counsel provided

On appeal, dTechs argued the Court should have excluded Mr. Shepherd's evidence, or given it no weight, because it was not independent. The FCA disagreed in part. It found that the invoices showed only that Mr. Shepherd did not write the first drafts of his reports and that they were consistent with how he described his work in the reports themselves. The FCA upheld the finding of non-infringement.

The FCA, however, concluded the new evidence might have affected the weight given to Mr. Shepherd's opinion on the

invalidity of Claim 4. It allowed BC Hydro to seek a redetermination of Claim 4's validity and suggested the FC could first decide, as a preliminary issue, how the new evidence affected the weight given to Mr. Shepherd's evidence.

The Redetermination

The FCA ordered a redetermination on May 26, 2023, but the redetermination hearing did not take place until September 1, 2026. By then, Mr. Shepherd had died. The FC granted BC Hydro leave to file an affidavit from Mr. Falany, Mr. Shepherd's business partner, who had observed and assisted him in preparing the reports. The new evidence related solely to the circumstances in which the reports had been prepared.

A Narrow Inquiry

Justice Fothergill asked one question: did the new evidence change the weight given to Mr. Shepherd's evidence at trial?

Arguments the Court Rejected

The Court summarily rejected three arguments as irrelevant or beyond the scope of the redetermination:

- BC Hydro's reliance on the rule in *Browne v Dunn*
- dTechs' argument that Rule 279(c) of the *Federal Courts Rules* required the court to exclude Mr. Shepherd's evidence because he was no longer available for cross-examination
- dTechs' suggestion that the FC should conduct a fresh admissibility analysis under *White Burgess*

The Timeline of the Reports

Justice Fothergill instead focused on what the new evidence showed about the timing of three events:

- When Mr. Shepherd received a key prior art publication
- When he held videoconferences with counsel,
- When he reviewed drafts of his report

The prior art in question was a 2003 academic study that the trial judge had found, based partly on Mr. Shepherd's evidence, to anticipate Claim 4. dTechs argued that Mr. Shepherd first received the article on May 26, 2020, the same day counsel sent him a 57-page first draft of his report. dTechs also noted the final report was nearly three times longer than that draft.

Mr. Falany explained that he and Mr. Shepherd renamed files with their date of receipt. On that basis, Justice Fothergill found that Mr. Shepherd had received the prior art nearly a month

earlier, on April 28, 2020. This was consistent with invoice entries recording numerous conferences with counsel, document review, and research in the intervening period.

The Preparation of the Reports

Mr. Falany described the drafting process. Over many videoconferences, counsel worked from a “living document” that began as headings and questions, and recorded Mr. Shepherd’s answers in real time.

Justice Fothergill found this account was consistent with how Mr. Shepherd had described the preparation of his report in the report itself. It also explained why his invoices contained no entries for “drafting.” Justice Fothergill was satisfied the reports reflected Mr. Shepherd’s own opinions and concluded the new evidence did not affect the weight given to his evidence.

Key Takeaways

- **Counsel can play an active role**. This redetermination decision applies the FCA’s guidance on challenges to the independence of experts. It confirms there is nothing improper about counsel in patent cases taking an active role in preparing expert reports.
- **Ownership of the opinion is what matters**. The report drafting process is a proper subject for cross-examination at trial, but the key question remains whether the expert considers the opinions in the report to be their own.
- **The reasoning likely extends beyond patents**. Although *dTechs* arose in the patent context, we see no principled reason to confine its reasoning to patent cases. The Federal Courts accepted counsel’s active involvement because the issues are complex, especially the legal analytical framework within which the expert’s technical opinions must fit. We expect courts, or at least the Federal Courts, to reach a similar conclusion in other complex areas of intellectual property, such as copyright cases, where disputes involving artificial intelligence and emerging technologies may necessitate complex expert reports.