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April 9, 2020

Full Steam Ahead: Opposition Wonâ€™t Derail a Patent Infringement Summary Trial

In 2014, the Supreme Court of Canada recognized that the most painstaking procedure is not always the best procedure to resolve disputes – a culture shift was required to create timely and affordable access to the civil justice system (see *Hryniak*). This touchstone for access to justice is reflected in several courts' rules of procedure, including the Federal Court of Canada.

Nevertheless, the Federal Court has historically held that the abbreviated procedure of summary judgment is generally not the preferred means of resolving patent infringement actions (see here). Typically, the court has held that such determinations are best left to a trial judge who has had the opportunity to hear all of the evidence live (see *viva voce*). This remains the case notwithstanding the culture shift encouraged by the Supreme Court of Canada.

However, summary judgement is not a litigant's only option in the Federal Court. Rule 213 of the *Federal Courts Rules* allows a party to bring a motion for a summary trial on all or some of the issues raised in the pleadings. The abbreviated procedure of a summary trial (modelled after British Columbia's summary trial rules) addresses many of the Federal Court's concerns with summary judgement (e.g., lack 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*).

Justice Manson's decision in ViiV Healthcare Company v Gilead Sciences Canada, shows that the Federal Court will also resolve disputes using a summary trial procedure when faced with major opposition from one of the parties (in this case the plaintiffs).

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.

Significantly, the litigation was still in the early stages (i.e., documentary discovery and discoveries had not yet been completed).

Gilead's motion for summary trial asked the Court to determine the proper construction of a single claim element and, based on that construction, determine whether bictegravir falls within the scope of those claims. The Federal Court summarized the construction issue at paragraphs 9-10 and 48.

The Summary Trial Decision

Justice Manson, a veteran of British Columbia's summary trial procedure, found that "[d]espite ViiV's continued attempts to derail the summary trial," "Gilead's motion is both appropriate and timely."

Gilead, as the party seeking summary trial, bore the burden of demonstrating that adjudication through summary trial was appropriate. Gilead also bore the burden of proving bictegravir was non-infringing because it was affirmatively alleging non-infringement in its motion.

The parties put forward five experts—two put forward by the plaintiffs, and three put forward by the defendants. These experts provided reports and were cross-examined during the summary trial. Neither party called any fact witnesses. Gilead established the structure of bictegravir through the admission of Gilead's BIKTARVY product monograph.

The Court considered the factors developed in the context of British Columbia's summary trial procedure, summarized in *Wenzel Downhole Tools v National-Oilwell Canada Ltd* ("Wenzel"), to determine whether the case at hand was suitable for summary trial:

- The amount involved;
- The complexity of the matter;
- The urgency of the matter;
- Any prejudice likely to arise by reason of delay;
- The cost of taking the case forward to a conventional trial in relation to the amount involved;
- The course of the proceedings;
- Whether the litigation is extensive and the summary trial will take considerable time;
- Whether credibility is a crucial factor and the deponents of the conflicting affidavits have been cross examined;
- Whether the summary trial involves a substantial risk of

wasting time and effort, and producing unnecessary complexity;

- Whether the motion results in litigating in slices; and
- Any other matters which arise for consideration (the "Summary Trial Factors").

The Federal Court rejected ViiV's arguments that lack of expert evidence and the concern about litigation in slices weighed against adjudication through summary trial as not applicable to the case at hand. The Court found that disposition of the claims construction issue provided efficiencies (i.e., it will either be dispositive of ViiV's claim or provide greater certainty and clarity for trial on the remaining issues). Justice Manson found that Gilead had met its burden, and summary trial was appropriate and timely.

Implications

This decision makes clear that the summary trial procedure is not reserved for cases where it will determine every issue – instead, the Court has discretion to determine whether it is appropriate to deal with issues by way of summary trial. It is worthwhile to consider this decision in context to anticipate where the Court may exercise this discretion.

In *Wenzel*, the Court considered the Summary Trial Factors set out above in the context of patent litigation and ultimately decided that "several factors weigh against directing the parties towards a motion for summary trial". In particular, the Court noted that patent infringement actions are inherently complex and technical, often requiring the assistance of expert witnesses and resolution of contradictory evidence on the subject. Owing in part to this complex and technical nature, the Court in *Wenzel*, found that the cost, time, and possibility of litigation in slices made adjudication through summary trial unviable.

Justice Manson distinguished *Wenzel* on the basis that the matter at hand had extensive expert evidence and would lead to efficiencies should it not be dispositive. While the difference in expert evidence is stark—five experts in the matter at hand as compared to no experts in *Wenzel*— there is an argument that a summary trial in *Wenzel* would have also narrowed the issues for trial in the event it was not determinative (e.g., it would have dispensed with the need for claims construction during an infringement analysis). In that event, however, the efficiencies were limited because "much the same evidence would still be considered at trial."

The timing of the request in *Wenzel* and the case at hand is

also likely significant. The motion for summary adjudication in *Wenzel* was brought very late in the day (i.e., following the pre-trial conference). In contrast, Gilead sought summary adjudication before the completion of documentary discovery and before examinations for discovery. As seen in *Wenzel*, this engages the “wasted time and effort” factor more meaningfully – the Court must grapple with whether the time and expense of a summary trial would be better spent preparing for an impending trial.

In light of the above, it is likely prudent for litigants considering summary trials for patent infringement actions to:

- Advance expert evidence on the issues as one would during a trial on all issues;
- Advance the necessary fact evidence as one would during a trial on all issues;
- Pursue issues that are unlikely to require duplicative consideration in the event the summary trial is not determinative (e.g., non-infringement); and
- Bring the motion for summary trial as soon as possible.