

SUMMARY JUDGMENT IN THE FEDERAL COURT: AN EFFECTIVE TOOL FOR RESOLUTION OF COMPLEX COMMERCIAL CASES

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I. Overview

The Federal Court was a late adopter of summary judgment, implementing rules for the procedure in 1994. For years, it was relatively ineffective. The success rate was low; many motions were dismissed on the basis that issues of credibility presented a genuine issue that required a trial to resolve. Particularly since the landmark *Hryniak* decision, the success rate for summary judgment/summary trial motions in the Federal Court has been extremely high, with some or all of the issues in the proceeding resolved in 87% of cases. However, a reason for the high rate of success may be that litigants tended to only use summary judgment/summary trial for those matters with discrete legal issues or limited facts in dispute.

In a recent trilogy of patent cases, the Federal Court has taken a robust approach to summary judgment/summary trial, showing that

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all or part of complex commercial disputes can be fairly adjudicated without a full trial.

Courts are now managing additional delays arising from the COVID-19 pandemic. There is an increasing need to use the scarce resources of the courts efficiently and effectively; summary judgment/summary trial is one tool to achieve that objective. While social distancing directives remain in place, the use of video technology for examinations and hearings should not be an insurmountable obstacle to this process.

II. Background

a) The Federal Court

The Federal Court is a national court of statutory jurisdiction. Matters before it include proceedings against the Crown, immigration, citizenship, national security, Indigenous peoples, human rights, admiralty, customs, intellectual property, tax, labour relations, transportation, communications and parole and corrections.

In 2019, approximately 9,500 proceedings were commenced in that court.¹ The majority of those cases are immigration matters, which individually require a relatively short amount of court time to resolve. By contrast, factual and legally complex commercial cases in intellectual property, admiralty and other areas are a small percentage of the court's filings, but use a considerable amount of the court's resources, and are a significant contributor to summary judgment jurisprudence.

b) Patent cases

Given the number of patent cases discussed in this paper, it would be useful to touch on some of the issues that are unique to them.

Patents are a time-limited monopoly granted by the federal government for new and useful inventions. An issued patent, granted after detailed examination by the Canadian Intellectual Property Office, generally has two portions. The description sets out the invention and a review of how it works. The description can also include a series of drawings illustrating the invention. The "claims" are a set of numbered paragraphs defining the invention.

The claims comprise the legal boundary of the conferred monopoly.² In short, if a thing made, used or sold by a defendant

1. <https://www.fct-cf.gc.ca/en/pages//about-the-court/reports-and-statistics/statistics-december-31-2019#cont>.

has all of the essential elements of a valid patent claim, the patent is infringed.

In patent cases, much turns on the meaning to be ascribed to the words or phrases used in the claims (the process of defining the words and phrases used in the claims is referred to as “claim construction”). The result of the claim construction exercise often determines the result as to whether the patent is valid and/or infringed. The claim terms are interpreted purposively through the eyes of a “person skilled in the art”. The skilled person has sometimes been noted as being the patent version of the ubiquitous “reasonable person” at the heart of so many other areas of law.³ Parties will almost always lead expert evidence to assist the court in construing the claim language. Claim construction is a question of law.⁴

Of course, expert evidence is frequently introduced in other Federal Court matters where the *Mohan*⁵ factors have been satisfied, and plays a significant role in the outcome of summary judgment motions.

III. History and development of Summary Judgment Rules in the Federal Court

The Federal Court adopted summary judgment rules in 1994. By contrast, summary judgment rules were enacted in Ontario in 1985 and in British Columbia in 1976.⁶

The first iteration of the Federal Court’s summary judgment rules⁷ provided that where a judge was satisfied that there was no genuine issue for trial with respect to a claim or defence, the judge shall grant summary judgment.⁸ If the only genuine issue was the amount to which the moving party was entitled, the judge could

2. *Free World Trust c. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024, 194 D.L.R. (4th) 232 (S.C.C.).

3. Stephen J. Perry and T. Andrew Currier, with contributions by Damian Kraemer, *Canadian Patent Law*, 3rd ed. (Markham, Ont.: LexisNexis, 2012) at 383.

4. *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67, [2000] 2 S.C.R. 1067, 194 D.L.R. (4th) 193 (S.C.C.) at para. 76, reconsideration/rehearing refused 2001 CarswellNat 283 (S.C.C.).

5. *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419, 89 C.C.C. (3d) 402 (S.C.C.).

6. *Rules of Civil Procedure*, O. Reg. 560/84, r. 20; *Supreme Court Rules*, B.C. Reg. 310/76, r. 18.

7. Rules 432.1 to 432.7. The *Federal Court Rules*, C.R.C., c. 663, were substantially revised in 1998. Since then, the summary judgment rules begin at Rule 213.

8. Rule 432.3(1).

order a trial or a reference to determine the amount.⁹ Even if a genuine issue was presented, summary judgment could be granted unless the judge was unable, on the whole of the evidence, to find the facts necessary to decide the questions of fact or law.¹⁰

In enacting a summary judgment rule mandating that the judge *shall* grant summary judgment where there was no genuine issue for trial, the Federal Court Rules Committee made a conscious choice against the adoption of the restrictive Ontario rule, preferring the rule in force in certain of the western provinces.¹¹

Notwithstanding the broad manner in which Federal Court Rules¹² were drafted, they were interpreted narrowly. Like summary judgment motions in provincial courts, many motions failed on the basis that credibility should only be assessed at a full trial.

A seminal decision that considered the new Federal Court summary judgment rule was *Granville Shipping Co. v. Pegasus Lines Ltd.*,¹³ an admiralty proceeding involving competing claims arising from the charter of a ship to deliver dairy products overseas. Justice Tremblay-Lamer summarized the general principles for summary judgment as:

1. the purpose of the provisions is to allow the court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried;
2. there is no determinative test but Stone J.A. seems to have adopted the reasons of Henry J. in *Pizza Pizza Ltd. v. Gillespie*. It is not whether a party cannot possibly succeed at trial, it is whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
3. each case should be interpreted in reference to its own contextual framework provincial practice rules (especially Rule 20 of the Ontario *Rules of Civil Procedure*) can aid in interpretation;
4. this court may determine questions of fact and law on the motion for summary judgment if this can be done on the

9. Rule 432.3(2).

10. Rule 432.3(4).

11. *Henkel Canada Corp. v. Conros Corp.*, 2004 FC 1747, 37 C.P.R. (4th) 508, [2005] 2 F.C.R. 470 (F.C.) at para. 17.

12. Until 2003, the Federal Court was comprised of two divisions – a trial division and an appellate division. In 2003, the court was split into two different courts, the Federal Court and the Federal Court of Appeal. At that time, the governing legislation and regulations were re-named the *Federal Courts Act*, R.S.C. 1985, c. F-7 and the *Federal Courts Rules*, SOR/98-106.

13. [1996] 2 F.C. 853, 111 F.T.R. 189, 62 A.C.W.S. (3d) 1095 (Fed. T.D.).

material before the court (this is broader than Rule 20 of the Ontario *Rules of Civil Procedure*);

5. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so;
6. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge. The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a “hard look” at the merits and decide if there are issues of credibility to be resolved. [Citations omitted.]

On the evidence before her, Justice Tremblay-Lamer concluded that questions of credibility were important in the matter, and that the conflicts would be better resolved by *viva voce* evidence. The motion for summary judgment was dismissed.

After *Granville*, judges consistently found that a conflict in the evidence that required an assessment of credibility to resolve was not amenable to resolution on a summary judgment motion, and required a full trial.¹⁴ In addition to defences on the merits, respondents to summary judgment motions were particularly motivated to raise as many factual issues and credibility disputes as possible.

*Trojan Technologies Inc. v. Suntec Environmental Inc.*¹⁵ was a patent infringement case relating to wastewater purification systems. The key issue was the interpretation of the terms “an electrical lead wire” and “a ballast incorporated in said frame” used in the claims. Both sides presented expert evidence. This would have typically presented a genuine issue for trial. Justice Gibson found that the disputed phrases were not issues of “rocket science”, and were rather a question of semantics.¹⁶ While there was competing expert

14. See, for example, *Nature's Path Foods Inc. v. Country Fresh Enterprises Inc.* (1998), 85 C.P.R. (3d) 286, 84 A.C.W.S. (3d) 816, 1998 CarswellNat 2412 (Fed. T.D.); *Dek-Block Products Ltd. v. Patio Drummond Ltée* (2000), 10 C.P.R. (4th) 185, 101 A.C.W.S. (3d) 1158, 2000 CarswellNat 2974 (Fed. T.D.), affirmed 2002 FCA 188, 20 C.P.R. (4th) 385, 226 F.T.R. 69 (note) (Fed. C.A.); *Budd Canada Inc. v. Noma Inc.* (2001), 10 C.P.R. (4th) 496, 102 A.C.W.S. (3d) 1147, 2001 CarswellNat 101 (Fed. T.D.); *Warner-Lambert Co. v. Concord Confections Inc.*, 2001 CFPI 139, 2001 FCT 139, 11 C.P.R. (4th) 516 (Fed. T.D.); and *Mil-Davie Inc. v. Hibernia Management & Development Co.*, 2003 CFPI 297, 2003 FCT 297, 121 A.C.W.S. (3d) 840 (Fed. T.D.).

15. 2003 FC 825, 26 C.P.R. (4th) 417, 236 F.T.R. 233 (F.C.), reversed 2004 CAF 140, 2004 FCA 140, 239 D.L.R. (4th) 536 (F.C.A.), leave to appeal refused (2004), 34 C.P.R. (4th) vi, 333 N.R. 393n, 2004 CarswellNat 3583 (S.C.C.).

16. *Ibid.*, at para. 20.

evidence, he determined that there was no serious issue of credibility.¹⁷ The patent was determined to be valid and infringed, and judgment granted.

The result was overturned by the Court of Appeal.¹⁸ In overturning the result below, the Court of Appeal included a lengthy discussion on credibility, quoting from a 1951 decision in *Faryna v. Chorny*:¹⁹

If a trial judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and cf. *Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only

17. *Ibid.*, at para. 71.

18. *Trojan Technologies Inc. v. Suntec Environmental Inc.*, 2004 FCA 140, 239 D.L.R. (4th) 536, 31 C.P.R. (4th) 241 (F.C.A.), leave to appeal refused (2004), 34 C.P.R. (4th) vi, 333 N.R. 393n, 2004 CarswellNat 3583 (S.C.C.).

19. (1951), [1952] 2 D.L.R. 354 at pp. 356-357, 4 W.W.R. (N.S.) 171, [1952] 4 W.W.R. 171 (B.C. C.A.).

half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case.

The Court of Appeal concluded that the motions judge was repeatedly called upon to make determinations based upon his assessment of the credibility of the expert witnesses. The jurisprudence was consistent that such determinations were best left to a judge who has had the opportunity to hear all of the evidence *viva voce*.²⁰

A similar result occurred in *MacNeil Estate v. Canada*,²¹ where the defendant moved to have an action dismissed on the basis that it was statute barred. Justice Hugessen granted the motion, and in doing so acknowledged that he was going counter to at least two decisions of the Ontario Court of Appeal (*Aguinie v. Galion Solid Waste Material Inc.*²² and *Smyth v. Waterfall et al.*²³) in which it had been held that the court, on summary judgment, ought not to make findings of fact, particularly where, as in this case, the issue is one of prescription and of "discoverability". Justice Hugessen found that the wording of Rule 216(3) was specific in instructing the court to make findings of fact where it can do so on the material and in a fair and just manner. He concluded that the Ontario rule appeared to be different, and the Ontario case law should not be followed in the Federal Court.²⁴

As it did in *Trojan*, the Court of Appeal overturned, ruling that the case law was clear – where there is an issue of credibility involved, the case should not be decided on summary judgment, but rather should go to trial because the parties should be cross-examined before the trial judge.²⁵

20. *Ibid.*, at paras. 28-29.

21. 2002 FCT 792, 222 F.T.R. 265, 115 A.C.W.S. (3d) 878 (Fed. T.D.).

22. (1998), 156 D.L.R. (4th) 222, 17 C.P.C. (4th) 219, 38 O.R. (3d) 161 (Ont. C.A.).

23. (2000), 4 C.P.C. (5th) 58, 50 O.R. (3d) 481, 136 O.A.C. 348 (Ont. C.A.).

24. *MacNeil Estate*, *supra*, at para. 7.

25. *MacNeil Estate v. Canada (Department of Indian & Northern Affairs)*, 2004 FCA 50, [2004] 3 F.C.R. 3, 316 N.R. 349 (F.C.A.) at para. 32.

This fundamental difference in the approach to summary judgment led to open conflict between the Federal Court and the Federal Court of Appeal. On a later summary judgment motion before Justice Hugessen in *Henkel Canada Corp. v. Conros Corp.*,²⁶ he offered an express rebuke of the Court of Appeal's approach to summary judgment:

MacNeil Estate v. Canada (Department of Indian and Northern Affairs), and *Trojan Technologies, Inc. v. Suntec Environmental Inc.*, appear to run counter to both the express wording of the subsection and the documented intention of the Rules Committee, which made a conscious choice against the adoption of the restrictive Ontario rule, preferring the rule in force in certain of the western provinces. This was a legislative, not judicial choice and not one that a court is free to reverse. Nor could the opinion of the Federal Court of Appeal, that a full, traditional trial is the only adequate fact-finding mechanism, be agreed with. A Court's fact-finding capacity, especially where expert witnesses are involved, rarely depends upon the appearances of witnesses in the box for it is not the ability of a witness to "sell" a particular thesis that matters, but rather the reasonableness and cogency of the thesis advanced when viewed in the light of all the evidence.²⁷

Justice Hugessen repeated these sentiments in *Cosaco Inc. v. Hot Kiss Inc.*²⁸ While that summary judgment motion was dismissed on the basis that expert survey evidence and evidence regarding third party users of certain trademarks was necessary to resolve the issues, he noted that *MacNeil* and *Trojan* "severely restricted" the reach of Rule 216(3).²⁹

The lack of a practical summary judgment remedy was not only frustrating to certain judges, but was also vexing to litigants looking for a timely and efficient resolution to their disputes. With summary judgment practically unavailable in cases with competing expert evidence, litigants explored other avenues to resolve complex cases effectively.

In United States patent litigation, parties typically hold a "Markman" hearing to construe the claims.³⁰ In a Markman hearing, the court will receive fact and expert evidence for the

26. 2004 FC 1747, 37 C.P.R. (4th) 508, [2005] 2 F.C.R. 470 (F.C.).

27. *Ibid.*, at para. 17.

28. 2005 FC 871, 140 A.C.W.S. (3d) 370, 2005 CarswellNat 1752 (F.C.).

29. *Ibid.*, at para. 10.

30. The term originates from *Markman v. Westview Instruments Inc.*, 116 S.Ct. 1384, 517 U.S. 370 (Pa., 1996).

purpose of construing the claims, both for the purposes of infringement and validity. The result can greatly assist the parties in reaching an out-of-court settlement.

Neither the *Federal Courts Rules* nor the *Patent Act*³¹ contemplate an early and distinct determination of claim construction. In *Realsearch Inc. v. Valone Kone Brunette Ltd.*³² the defendants moved for trial of an issue to construe the claims, a Markman hearing in all but name.

The motions judge granted the relief, finding that:

Without settlement, patent infringement actions in this Court often take many years to be resolved. I believe that this suggested new procedure might give an opportunity to parties to speed up the litigation in such actions. If, early in the litigation, the claims are construed, the parties can possibly better determine the relative merits of their positions. The chances of success for one party or the other could be better ascertained and assessed by each. The argument of infringement could significantly be strengthened, or weakened, depending on the claim construction arrived at by the Court. Likely, the argument of invalidity could be similarly improved or weakened.

The order was overturned by the Court of Appeal, finding that there was uncertainty as to the extent to which the duration of discoveries and trial would be reduced by the separate trial of this issue. The possibility of multiplicity of appeals was also an important factor.³³

At the same time, interlocutory injunctions were extremely rare. The Federal Court of Appeal's decision in *Centre Ice*³⁴ set the bar for irreparable harm very high, and most motions for interlocutory injunctions failed on that part of the test. For example, the last interim or interlocutory injunction granted by the Federal Court in a patent case before 2019 was in 1996.³⁵

31. R.S.C. 1985, c. P-4.

32. *Realsearch Inc. v. Valon Kone Brunette Ltd.*, 2003 FCT 669, 27 C.P.R. (4th) 274, [2003] 4 F.C. 1012 (Fed. T.D.) (reversed 2004 FCA 5, 31 C.P.R. (4th) 101, [2004] 2 F.C.R. 514 (F.C.A.)).

33. *Realsearch Inc. v. Valon Kone Brunette Ltd.*, 2004 FCA 5, 31 C.P.R. (4th) 101, [2004] 2 F.C.R. 514 (F.C.A.).

34. *Centre Ice Ltd. v. National Hockey League* (1994), 53 C.P.R. (3d) 34, 75 F.T.R. 240 (note), [1994] F.C.J. No. 68 (Fed. C.A.).

35. *Carbo Ceramics Inc. v. China Ceramic Proppant Ltd.*, 2004 FC 1046, 34 C.P.R. (4th) 423, [2004] F.C.J. No. 1286 (F.C.), reversed in part 2004 FCA 283, 34 C.P.R. (4th) 431, [2004] F.C.J. No. 1451 (F.C.A.). An interim injunction was granted in *Arysta Lifescience North America, LLC v. Agracity*

Realizing that the existing summary judgment rules proved to be less than effective, the Federal Courts Rules Committee released a discussion paper in 2006 acknowledging that decisions of the Federal Court of Appeal had interpreted the scope of Rule 216 rather restrictively, and a broader view that there may be a need for a summary judgment rule that allows parties to move for and courts to grant summary judgment in a greater range of circumstances.³⁶

The Federal Court did not stand alone in re-examining the effectiveness of summary judgment. At about the same time, the Government of Ontario commissioned a former Ontario Associate Chief Justice, the Honourable Coulter Osborne, Q.C., to assist in a process aimed at reforming the province's civil justice system. Motivating the later amendments to the Rules of Civil Procedure was the overriding objective of making the litigation system more accessible and affordable to Ontarians. Of all reforms, the amendments to the summary judgment rules were considered to be among the most important.³⁷

Following consultation, the *Federal Courts Rules* were amended in 2009 to include summary trial. In particular, to address the credibility issues that defeated many summary judgment motions before, the Rules contemplated a summary trial procedure where witnesses could be cross-examined before the presiding judge.³⁸

IV. Federal Courts Summary Trial Rules

The first guidance from the Federal Court on the new summary trial procedure came from a summary judgment motion.

In *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*,³⁹ the defendant moved for summary judgment five days after the summary trial rules came into effect.⁴⁰

The patent in issue in *Wenzel* was directed to downhole drilling equipment. The defendant asserted that the issue on the summary

Crop & Nutrition Ltd., 2019 FC 530, 2019 CF 530, 167 C.P.R. (4th) 375 (F.C.), additional reasons 2020 FC 388, 319 A.C.W.S. (3d) 297, 2020 CarswellNat 1647.

36. F. Giroux, *Summary Judgment in the Federal Court and in the Federal Court of Appeal: A Discussion Paper of the Rules Subcommittee on Summary Judgment, 2006*.

37. Teresa Walsh and Lauren Posloski, "Establishing a Workable Test for Summary Judgment: Are We There Yet?" in Todd L. Archibald and Randall Scott Echlin, eds., *Annual Review of Civil Litigation 2013* (Toronto: Carswell Thomson Reuters, 2013) at p. 7.

38. Rule 216(3).

39. 2010 FC 966, 87 C.P.R. (4th) 412, 373 F.T.R. 306 (Eng.) (F.C.).

40. *Ibid.*, at paras. 4 and 8.

judgment motion was very simple – that a plain English-language comparison of the patent in suit to a prior art reference would render the asserted patent invalid for obviousness and anticipation.⁴¹

Justice Snider dismissed the motion for summary judgment, finding that the infringement and validity issues involved competing expert evidence, and an assessment of credibility would be required.⁴²

While neither party directly advanced an argument that these issues could be determined by summary trial pursuant to Rule 216, Justice Snider found that the court had a duty to consider that alternative.⁴³

Citing authorities from British Columbia, Justice Snider enumerated the factors to consider when determining if a matter is suitable for determination by summary trial:

- Is the litigation extensive and will the summary trial take considerable time?
- Is credibility a crucial factor – and have the deponents of the conflicting affidavits been cross examined?
- Will the summary trial involve a substantial risk of wasting time and effort, and producing unnecessary complexity? and
- Does the application result in litigating in slices?⁴⁴

The court ultimately found that given the proximity of the actual trial date, and the lack of independent expert evidence available, allowing the motion for summary judgment to proceed as a summary trial would not be in the interests of justice.⁴⁵ (Later, after a 10-day trial, the patent was determined to be invalid.⁴⁶)

While the new summary trial rules were not used extensively, they did provide an efficient resolution of certain cases.

In *Louis Vuitton Malletier S.A. v. Singga Enterprises (Canada) Inc.*,⁴⁷ summary trial was granted in a case involving counterfeit luxury merchandise. The motion was heard after discovery, and with extensive evidence from private investigators. The monetary awards exceeded \$2M.

In *Teva Canada Limited v. Wyeth and Pfizer Canada Inc.*⁴⁸ summary trial was granted on the legal issue of whether the plaintiff

41. *Ibid.*, at para. 11.

42. *Ibid.*, at para. 31.

43. *Ibid.*, at para. 33.

44. *Ibid.*, at para. 37.

45. *Ibid.*, at para. 39.

46. 2011 FC 1323, 98 C.P.R. (4th) 155, 401 F.T.R. 74 (Eng.) (F.C.), affirmed 2012 FCA 333, 108 C.P.R. (4th) 247, [2014] 2 F.C.R. 459 (F.C.A.).

47. 2011 FC 776, [2013] 1 F.C.R. 413, 392 F.T.R. 258 (F.C.).

was entitled to pursue a claim for damages under the *Patented Medicines (Notice of Compliance) Regulations*. The evidence was not controversial, there were no issues as to credibility, and the novel legal issues could be dealt with as easily on the motion as they would otherwise have been after a full trial.⁴⁹

As of about 2014, notwithstanding its successful use in certain matters, summary judgment/summary trial was approached with caution by litigants. Unless there were clear bad actors (e.g. counterfeiters), or an extricable legal issue, many parties were hesitant to use summary judgment or summary trial as a procedure to resolve complex issues.⁵⁰

V. Hryniak

In *Hryniak*, the Supreme Court of Canada noted the trials were “increasingly expensive and protracted” and that “a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system”.⁵¹ As a result, the Supreme Court concluded that “summary judgment rules must be interpreted broadly, favoring proportionality and fair access to the affordable, timely and just adjudication of claims”.⁵² In particular, the court held that summary judgment motions were now a “legitimate alternative means for adjudicating and resolving legal disputes” rather than just “highly restricted tools used to weed out clearly unmeritorious claims or defences”.⁵³

The initial response to *Hryniak* from the Federal Court of Appeal was one of caution. In *Manitoba v. Canada*,⁵⁴ the action involved a claim by First Nations for damages arising from the construction of

48. 2011 FC 1169, 99 C.P.R. (4th) 398, 208 A.C.W.S. (3d) 177 (F.C.) (reversed 2012 FCA 141, 431 N.R. 342, 218 A.C.W.S. (3d) 311 (F.C.A.), leave to appeal refused (2012), 445 N.R. 397n, 2012 CarswellNat 4650, 2012 CarswellNat 4651 (S.C.C.)).

49. *Ibid.*, at para. 34.

50. For a review of the development of the Federal Courts' summary judgment rules, see also “Recent amendments to the Federal Courts Rules regarding summary judgment and summary trial” by Brian Daley and Julie Jauron www.cba.org/cba/cle/PDF/IP10_Daley_paper.pdf.

51. *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, 366 D.L.R. (4th) 641 (S.C.C.) at paras. 1-2.

52. *Ibid.*, at para. 5.

53. *Ibid.*, at para. 5; Karabus and Tjaden, “The Impact of *Hryniak v. Maudlin* on Summary Judgments in Canada One Year Later” (2015), 44 *Adv. Q.* 85-110 at p. 87-88.

54. *Manitoba v. Canada*, 2015 FCA 57, (*sub nom.* Lac Seul Indian Band v. Canada) 470 N.R. 187, 250 A.C.W.S. (3d) 240 (F.C.A.).

a dam. The province of Manitoba brought a summary judgment motion to dismiss the third party claim against it on the basis that Manitoba's liability was fully addressed in a 1943 agreement, and the applicability of a limitation period. The motion was dismissed in the first instance on the basis that there were genuine issues that required a trial to resolve.⁵⁵

On appeal, the Federal Court of Appeal was careful to note that *Hryniak* considered the summary judgment rules contained in Ontario's *Rules of Civil Procedure*. The summary judgment rules in the *Federal Courts Rules* are worded differently from those in Ontario.⁵⁶ The Federal Court of Appeal particularly referenced the Federal Court's aggressive summary trial procedure, concluding that *Hryniak* did not change the substantive content of Federal Court procedures. *Hryniak*, however did serve as a reminder of the imperatives and principles that reside in the summary judgment and summary trial rules – imperatives and principles that, by virtue of Rule 3,⁵⁷ must guide the interpretation and application of these Rules.⁵⁸

VI. Summary Judgment/Summary Trial in the Federal Court Post *Hryniak*

After the release of *Hryniak*, and up to and including the *Gemak* case discussed below, the Federal Court heard and determined 97 motions for summary judgment or summary trial. These are summarized in Schedule 1.

Of those 97 cases, at first instance, relief was granted in all but 11 matters. In almost all cases, the moving party was successful in obtaining all or part of the remedies sought. In some matters, the court granted summary judgment on issues against the interests of the moving party, even in the absence of a cross-motion.⁵⁹

55. *Lac Seul First Nation v. Canada*, 2014 FC 296, 240 A.C.W.S. (3d) 525, 2014 CarswellNat 1436 (F.C.) at para. 14, affirmed *Manitoba v. Canada*, 2015 CAF 57, 2015 FCA 57, 470 N.R. 187 (F.C.A.).

56. *Manitoba v. Canada*, 2015 FCA 57, (*sub nom.* Lac Seul Indian Band v. Canada) 470 N.R. 187, 250 A.C.W.S. (3d) 240 (F.C.A.) at para. 12.

57. Which requires that the Rules shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits.

58. *Manitoba*, *supra*, footnote 56, at para. 17.

59. For example, *Milano Pizza Ltd. v. 6034799 Canada Inc.*, 2018 FC 1112, 2018 CF 1112, 159 C.P.R. (4th) 275 (F.C.).

Appeal decisions were rendered in 33 of the above cases. On appeal, 17 were upheld in their entirety, seven reversed in part, and nine reversed in whole.

Considering the final result, some or all of the issues in the litigation were summarily resolved in 87% of the post-*Hryniak* motions for summary judgment or summary trial in the Federal Court, higher than the 75% of summary judgments granted or upheld in Ontario in the year following *Hryniak*.⁶⁰

At a high level, certain trends emerge.

Intellectual property litigants were the most frequent users of summary judgment/summary trial, bringing 35 of the 97 motions. This was followed by proceedings against the Crown (25); admiralty (20); First Nations (7); immigration (7); tax (1); transportation (1); and environmental (1).

There is no current philosophical conflict between the Federal Court and the Federal Court of Appeal regarding the appropriateness of summary determination. While certain decisions were overturned on appeal on the basis that the motions judge made errors of law⁶¹ or errors of fact,⁶² the Court of Appeal has generally embraced procedures to adopt the culture change mandated by *Hryniak*, and to make proceedings in the Federal Courts more efficient, faster and less expensive.⁶³

Issues that were historically not considered amenable to disposition without a trial, particularly whether claims were defeated by limitation periods, have been resolved summarily.⁶⁴

In 2014, and up to as late as 2016, motions judges continued to cite the “whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial” test, as opposed to the “no genuine issue for trial” test set out in the *Federal Court Rules*.⁶⁵ The fact that moving parties were largely able to meet this

60. Karabus and Tjaden, “The Impact of *Hryniak v. Maudlin* on Summary Judgments in Canada One Year Later” (2015), 44 *Adv. Q.* 85-110 at p. 86.

61. *Brown v. Canada*, 2014 CF 831, 2014 FC 831, 252 A.C.W.S. (3d) 320 (F.C.), reversed 2016 FCA 37, 394 D.L.R. (4th) 536, [2016] 4 F.C.R. 208 (F.C.A.).

62. *Timm c. R.*, 2015 CF 1391, 2015 FC 1391, 126 W.C.B. (2d) 482 (F.C.), reversed 2016 CAF 263, 2016 FCA 263, 272 A.C.W.S. (3d) 293 (F.C.A.).

63. *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108, 2020 CarswellNat 2184 (F.C.A.) at para. 5.

64. *Watson v. Canada*, 2017 CF 322, 2017 FC 322, 286 A.C.W.S. (3d) 51 (F.C.); *Lepage v. Canada*, 2017 CF 1136, 2017 FC 1136, 288 A.C.W.S. (3d) 167 (F.C.).

65. See, for example, *Collins v. R.*, 2014 CF 307, 2014 FC 307, 2014 D.T.C. 5066 (Eng.) (F.C.) at para. 29, affirmed 2015 FCA 281, [2016] 4 C.T.C. 51, 2016 D.T.C. 5004 (F.C.A.); *Canada (Minister of Citizenship and Immigration) v. Zakaria*, 2014 CF 864, 2014 FC 864, 30 Imm. L.R. (4th) 138 (F.C.) at para.

more restrictive standard suggests the factual and/or legal issues presented to the court for summary resolution heavily favoured one side of the debate.

Other factors are notable by their absence. Few summary judgment/summary trial motions involved competing expert evidence,⁶⁶ suggesting that litigants viewed a trial as a preferable option to a motion for summary determination to resolve a conflict in expert evidence.

In the main, while summary judgment/summary trial proved to be a very effective procedure in the Federal Court, litigants seemed reluctant to bring complex matters, or matters involving competing expert evidence, to the court for summary determination.⁶⁷ That has changed in light of a recent trilogy of cases.

VII. Canmar/ViiV/Gemak Trilogy

*Canmar Foods Ltd. v. TA Foods Ltd.*⁶⁸ was an action asserting infringement of a patent directed to a method for roasting oil seed. Immediately after the close of pleadings, the defendant moved for summary judgment on the basis that the patent was not infringed.

The asserted patent claims required that the oil seed (such as flax) be heated “in a stream of air” and the use of an “insulated or partially insulated roasting chamber or tower”. The defendant led fact evidence that it used infrared radiation, not a stream of air, to heat the seed and that the relevant portion of its apparatus was not insulated.

The court concluded that expert evidence was not required to construe the claims.⁶⁹ The “in a stream of air” and an “insulated or

36; *National Bank of Canada v. Rogers*, 2015 CF 1207, 2015 FC 1207, 260 A.C.W.S. (3d) 433 (F.C.) at para. 3, additional reasons 2015 CF 1390, 2015 FC 1390, 264 A.C.W.S. (3d) 337; *Davydiuk v. Internet Archive Canada*, 2016 CF 1313, 2016 FC 1313, 274 A.C.W.S. (3d) 69 (F.C.) at para. 56. Though its use has become considerably rarer, the court used this test as recently as 2019. See, for example, *Sibomana c. Canada*, 2019 CF 945, 2019 FC 945, 308 A.C.W.S. (3d) 371 (F.C.) at para. 28, affirmed 2020 CAF 57, 2020 FCA 57, 316 A.C.W.S. (3d) 652 (F.C.A.).

66. An exception, for example, is *Norwegian Bunkers AS v. Boone Star Owners Inc.*, 2014 CF 1200, 2014 FC 1200, (*sub nom.* Norwegian Bunkers AS v. Ship Samatan) 470 F.T.R. 59 (F.C.).

67. There are, of course, exceptions. In *Driving Alternative Inc. v. Keyz Thankz Inc.*, 2014 CF 559, 2014 FC 559, 126 C.P.R. (4th) 418 (F.C.) a trademark infringement claim involving licensing and director liability issues was allowed. In *Cascade Corp. v. Kinshofer GmbH*, 2016 FC 1117, 148 C.P.R. (4th) 406, 272 A.C.W.S. (3d) 828 (F.C.) a patent action was dismissed.

68. 2019 FC 1233, 2019 CF 1233, 170 C.P.R. (4th) 441 (F.C.).

69. *Ibid.*, at para. 81.

partially insulated roasting chamber or tower” terms were found to be essential elements of the claims.⁷⁰ Since these elements were not present in the defendant’s system, the court determined that there was no infringement; the action was dismissed.

The *Canmar* decision is noteworthy for a number of reasons. It was the first to consider recent amendments to the *Patent Act* which provide that communications made to the patent office during prosecution of the patent may be admitted into evidence to rebut any representation made by the patentee as to the construction of a claim.

It is also one of the few patent cases to make findings of claim construction without the use of expert evidence. Effectively, Justice Manson did what the defendant in *Wenzel* asked the court to do – determine the result on a plain English reading of the patent. It also recalls Justice Gibson’s comments in *Trojan* – that the language used in some patent claims is not “rocket science”.

To those outside the patent bar, the result may seem intuitive, and that it should not ordinarily require costly experts and a lengthy trial to determine what a “stream of air” is, and whether the defendant’s device includes it. But the ability of patent lawyers and experts to parse words and phrases should not be underestimated. While courts have cautioned against the kind of meticulous verbal analysis in which lawyers are too often tempted by their training to indulge,⁷¹ there has been a longstanding tradition of relying on experts to assist the court in viewing all patents through the eyes of a person of skill in the art, and to only resolve conflicting expert evidence at a full trial.

The approach taken in *Canmar* echoes the Supreme Court’s direction on the use of experts in trademark cases. For many years, it was *de rigueur* for trademark litigants to introduce survey evidence, particularly to assist the court in determining whether consumers would be likely to be confused between competing marks. *Masterpiece Inc. v. Alavida Lifestyles Inc.*⁷² involved a dispute about the registrability of the competing trademarks “Masterpiece the Art of Living” and “Masterpiece Living”, both used in association with retirement residences. The Supreme Court criticized the extensive expert evidence filed in the proceedings below, and encouraged lower courts to fulfill their gatekeeper role to

70. If an essential element is omitted or substituted in the product in question, the product does not infringe the asserted patent claim – *Gemak, infra*, at para. 124.

71. *Catnic Components Ltd. v. Hill & Smith Ltd.* (1981), [1981] F.S.R. 60, [1982] R.P.C. 183 (U.K. H.L.), affirmed (1982), [1983] F.S.R. 512 (U.K. H.L.).

72. 2011 SCC 27, [2011] 2 S.C.R. 387, 332 D.L.R. (4th) 1 (S.C.C.).

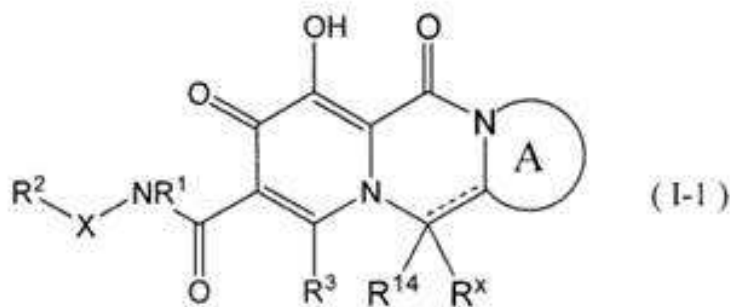
ensure that unnecessary, irrelevant and potentially distracting expert and survey evidence is not allowed to extend and complicate the proceedings.⁷³ While not expressly cited in *Canmar*, the overall approach to expert evidence is certainly consistent with *Masterpiece*.

The decision in *Canmar* has been appealed.⁷⁴

In *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*⁷⁵ the patent was entitled Polycyclic Carbamoylpyridone Derivatives Having HIV Integrase Inhibitory Activity. The patent claimed to disclose novel compounds possessing inhibitory activity against human immunodeficiency virus [HIV] integrase. It was asserted that Gilead's Bictegravir sodium, one of three medicinal components in Gilead's BIKTARVY product, infringed certain claims of the ViiV patent.

Unlike *Canmar*, the subject matter of the patent and the claims was far beyond the understanding of the average person. It would be familiar only to those with advanced degrees in organic chemistry. In essence, the plaintiff's claim turned on how the court would construe "Ring A" in the patent's claims. The relevant portion of claim 1 reads as follows:

1. A compound of the formula:



wherein:

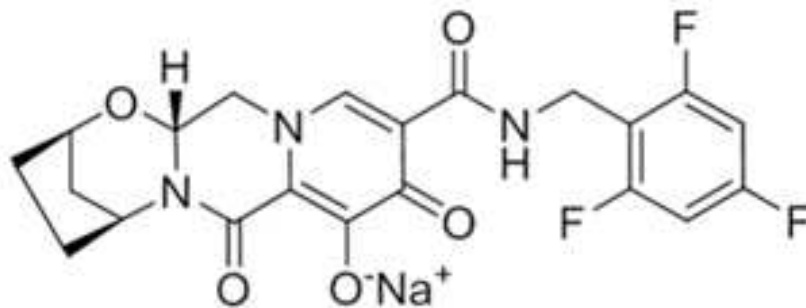
ring A is optionally substituted heterocycle;

73. *Ibid.*, at para. 76.

74. *Canmar Foods Ltd. v. TA Foods Ltd.*, Court File No. A-408-19.

75. 2020 CF 486, 2020 FC 486, 2020 CarswellNat 1166 (F.C.).

The chemical structure of the Gilead product was:



The plaintiff strongly opposed the motion, arguing a lack of expert opinion evidence and the inefficiency of litigating in slices. Both arguments were rejected. Evidence was presented from five experts, each of whom were cross-examined at the summary trial. The court determined that it had all the necessary expert evidence, in addition to the patent specification, to construe Ring A of the asserted claims and determine whether Gilead has made out its case of non-infringement.⁷⁶

The court concluded that a summary trial was the most efficient way to proceed. If bicitgravir did not fall within the scope of the claims, then ViiV's action would be dismissed in its entirety. Conversely, if bicitgravir did fall within the scope of the asserted claims, disposition of the claim construction issue would provide greater certainty and clarity for a trial of the remaining issues, including validity. Citing the *Teva* case referenced above, the court found that the summary judgment rules are to be used, not avoided or distinguished, and that the motion was appropriate and timely.⁷⁷

After a lengthy review and discussion of the evidence, the court concluded that the term as used in the claims excluded the structure in the defendant's compound. Since there could be no infringement, the action was dismissed.

The order has been appealed.⁷⁸

The third case in the Federal Court's recent trilogy of summary judgment/summary trial cases is *Gemak v. Jempak*.⁷⁹ It involved a patent for a dishwashing detergent composition. A summary

76. *Ibid.*, at para. 14.

77. *Ibid.*, at para. 18.

78. *ViiV Healthcare Company v. Gilead Sciences Canada, Inc.*, Court File No. A-115-20.

79. 2020 FC 644, 2020 CarswellNat 1660 (F.C.).

judgment motion was heard before the *ViiV* summary trial, but the reasons released subsequent to the reasons in *ViiV*. The asserted claims required that a percarbonate granule be “encapsulated” by a “blend” comprising carboxymethyl cellulose and two other ingredients. As in *ViiV*, the outcome of the proceeding turned on the construction of these claim terms. The defendant moved for summary judgment on the basis that there could be no infringement on a proper construction of the claims.

As is typical, the court was presented with competing expert evidence. The court was impressed with the defendants’ expert. She was the only witness who provided an informed and purposive construction of the terms at issue from the perspective of a skilled person. Her evidence on the common general knowledge was uncontested.⁸⁰

Moreover, the defendants’ witness (Dr. Kola) provided rational, science-based and helpful evidence as to how a skilled person would understand the asserted claims, as well as what the common general knowledge was available to the skilled person at the date of publication. These matters were addressed extensively in her affidavit and her expert opinion on claim construction.⁸¹ It appeared uncontested that the defendants put their best foot forward on the motion.

By contrast, the plaintiff did not meet the claim construction and infringement issues head on, but rather introduced expert evidence seeking to contradict Gemak’s experts, and thereby establish a genuine issue for trial.⁸²

The plaintiff’s expert found no favour with the court. On cross-examination, she was found to be evasive and defiant; she obfuscated matters and refused to concede the obvious.⁸³ On the substance of her evidence, her opinion did not construe the meaning of the key term “encapsulate”.⁸⁴ Despite having product samples, methods and expertise available to it, the plaintiff elected not to do any tests that went to the heart of the infringement issue.⁸⁵

The plaintiff’s apparent strategy was to assert that summary judgment will be granted only in the clearest of cases, to introduce some conflicting and competing evidence, and then argue that a genuine issue for trial exists. Such an approach would likely have

80. *Ibid.*, at para. 4.

81. *Ibid.*, at para. 102.

82. *Ibid.*, at para. 134.

83. *Ibid.*, at paras. 104-106.

84. *Ibid.*, at para. 108.

85. *Ibid.*, at para. 134.

succeeded in the days of *Trojan* and *MacNeil Estate*, and perhaps even *Wenzel*. But no longer. In *Gemak*, Justice Lafrenière concluded that the defendant had met its burden that its products do not infringe the asserted claims, and that the plaintiff did not demonstrate a genuine issue for trial.⁸⁶

The decision has been appealed.⁸⁷

The Federal Court of Appeal now has several opportunities to either endorse the Federal Court's more robust approach to summary judgment/summary trial, or pull it back to a more conservative course. But unless and until there is a change, "lead trump or risk losing" now has increased meaning, at least in the Federal Court. A respondent may not defeat a summary judgment motion by merely attacking the evidence presented by the moving party, and holding back evidence that may be presented later. Competing expert evidence alone should not be an effective bar to summary determination, particularly when the witnesses may be cross-examined before the judge as part of a summary trial.⁸⁸ The ability to cross-examine witnesses, particularly experts, before the motions judge goes a long way to address the obstacles that defeated so many earlier motions. As stated by Justice Hughes in *Teva* and endorsed by Justice Manson in *Canmar*, the Federal Court has shown a clear willingness to use the summary judgment/summary trial rules, not avoid or distinguish them.

VIII. Comparison to the Ontario Courts

While the Federal Court was historically aligned with some provincial courts (particularly Ontario) in a conservative approach to summary judgment, the recent resolution of complex commercial matters by way of summary judgment/summary trial illustrates the effectiveness of the procedure.

On summary judgment motions, Ontario courts have approached competing expert evidence with caution, particularly noting that determining complex issues by way of summary judgment deprives the court of the opportunity to ask questions of experts who have fielded contradictory reports. When there are competing experts, summary judgment is typically not considered appropriate.⁸⁹

86. *Ibid.*, at para. 135.

87. *Gemak v. Jempak*, Court File No. A-156-20.

88. See also *Flatwork Technologies, LLC v. Brierley*, 2020 FC 997, 2020 CarswellNat 4459, where a patent was determined to be invalid after a two-day virtual summary judgment motion.

89. *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001, 354 D.L.R. (4th) 121, [2012] O.J. No. 4123 (Ont. S.C.J. [Commercial List]) at paras. 88-89.

The Ontario Rules of Civil Procedure include a rule that allows oral evidence on a summary judgment motion (Rule 20.04(2.2)). In *Hryniak*, the Supreme Court ruled that the procedure to be followed on a motion for summary judgment is in two stages:

- a. the judge should first determine if there is a genuine issue requiring a trial based only on the evidence before him or her without using the fact-finding powers in Rule 20.04(2.1); and
- b. if there appears to be a genuine issue requiring a trial, Rules 20.04(2.1) and (2.2) permit the motion judge, at his or her discretion, to: (1) weigh the evidence, (2) evaluate the credibility of a deponent, or (3) draw any reasonable inference from the evidence to determine if the need for a trial can be avoided, provided that the use of those powers is not against the “interest of justice” (or conversely, that it is not in the “interest of justice” for these powers to be exercised only at trial).⁹⁰

Notwithstanding the instruction in *Hryniak*, and the benefits of witnesses being cross-examined before the trier of fact to resolve issues of credibility, it appears that use of Rule 20.04(2.2) has been infrequent.

An example of its effective use is *Lotin v. Gregor*,⁹¹ where the issue on summary judgment related to discrete impugned statements alleged to be defamatory. Justice Kimmel determined that even though the written record *prima facie* raised some issues requiring a trial that are dependent upon factual determinations about contentious matters, including about what was actually said and whether it was defamatory, she was satisfied that a trial was not required in order to resolve these issues. The court had confidence the necessary facts could be determined, and the relevant law applied, in order to reach a fair and just determination on the merits by hearing some oral evidence, weighing the evidence, evaluating the credibility of various witnesses and drawing reasonable inferences from the evidence without a full-blown trial.⁹²

additional reasons 2012 ONSC 5790, 40 C.P.C. (7th) 404, 225 A.C.W.S. (3d) 670; *Agro's Foods Inc. v. Economical Mutual Insurance Co.*, 2016 ONSC 1169, [2016] I.L.R. I-5869, 265 A.C.W.S. (3d) 75 (Ont. S.C.J.) at para. 35.

90. *Hryniak*, *supra*, footnote 51 at para. 66.

91. 2019 ONSC 1510, 305 A.C.W.S. (3d) 658, 2019 CarswellOnt 3448 (Ont. S.C.J.).

92. *Ibid.*, at para. 9.

But there have been few other uses of the procedure. In 2019, there were only five published decisions where the court heard oral evidence pursuant to Rule 20.04(2.2), including *Lotin v. Gregor*.⁹³

IX. COVID-19

In mid-March 2020, the COVID-19 pandemic brought courts in Canada, and around the world, to a virtual standstill. Civil courts, already straining under the number of files awaiting adjudication, were immediately reduced to hearing demonstrably urgent matters. April and May 2020 saw an increasing number of hearings, many of them interlocutory, taking place over Zoom or other platforms, but not as many as the courts would have heard in the ordinary course.⁹⁴ While many courts have responded with alacrity to the challenges of the pandemic, there will inevitably be an increased backlog of matters when operations return to something that resembles normal.

Maintaining access to justice will require the use of all means at the courts' disposal to provide fair process and fair adjudication of matters. In appropriate cases, summary trial/mini-trial can be an effective tool for adjudication without the time and expense associated with a full trial. More vigorous use of the summary trial/mini trial rules could be an effective tool in clearing the increasing backlog caused by COVID-19. But an obstacle to a more widespread adoption of this procedure may be a hesitation to using new technologies, such as videoconferencing, for substantive steps (examinations and hearings), particularly among counsel who have always conducted these steps in person.

There is a natural inclination to do things in a manner to which we have become accustomed. For many reasons, there is a strong preference to have important steps in a proceeding conducted in person. A chemistry develops between a witness and counsel cross-examining them; co-counsel exchange non-verbal cues, and

93. *Lotin v. Gregor*, *supra*; *AGC Flat Glass North America Ltd. v. Man-Shield (NWO) Construction Inc. et al.*, 2019 ONSC 1163, 98 C.L.R. (4th) 264, 304 A.C.W.S. (3d) 695 (Ont. S.C.J.), affirmed 2019 ONSC 3993, 307 A.C.W.S. (3d) 25, 2019 CarswellOnt 10537 (Ont. Div. Ct.); *Hookimawillile v. Payukotayno James and Hudson Bay Family Services*, 2019 ONSC 3514, 308 A.C.W.S. (3d) 326, 2019 CarswellOnt 11612 (Ont. S.C.J.); *Seng v. Seng*, 2019 ONSC 3803, 308 A.C.W.S. (3d) 205, 2019 CarswellOnt 10986 (Ont. S.C.J.), additional reasons 2019 ONSC 4582, 309 A.C.W.S. (3d) 36, 2019 CarswellOnt 13341; *Leydier v. 525400 Ontario Inc et al.*, 2019 ONSC 4042, 307 A.C.W.S. (3d) 668, 2019 CarswellOnt 11170 (Ont. S.C.J.).

94. @FedCourt_CAN_en. "During COVID19, the Federal Court has held 70 virtual hearings using Zoom. The court suggested a protocol to follow in *Rovi Guides, Inc. v. Videotron Ltd.*" *Twitter*, June 9, 2020.

discreetly pass notes among themselves; the mannerisms of the judge are carefully scrutinized in the hopes that a clue will be offered as to how the evidence or argument is being received. Courtrooms are neutral locations with an air of formality and solemnity. Adapting to new technologies, particularly in matters involving a large record, is daunting. It may also be as basic that humans are inherently social, and resolving important and complex issues among people through a computer screen from a home office or dining room annexed for that purpose is, to many, anathema.

But in light of the paramount objectives of maintaining access to the courts and providing fair process and fair adjudication of matters, conducting examinations and hearings over video platforms is less than ideal, but a necessary adaptation for the timely resolution of civil disputes. Resolving matters by way of summary judgment/summary trial (where appropriate) with an electronic hearing can be an efficient use of scarce judicial resources.

X. Conducting Hearings By Videoconference

The adoption and use of videoconference technology for examinations and hearings was underway long before COVID-19.

The *Criminal Code* includes provisions where a court may order that that a witness in Canada give evidence by audioconference or videoconference.⁹⁵

In a 2018 Ontario Superior Court matter involving human trafficking, the complainant was permitted to testify via video link from Nova Scotia. In making the order, the court noted that the current state of video technology can capture many of the non-verbal cues and expressions that could be used to assess the demeanour of the witness.⁹⁶

The Yukon Territory Territorial Court held that video evidence may sometimes enhance the ability to assess credibility, since the picture may be enlarged and replayed for the judge's benefit.⁹⁷ The court went on to praise the benefits of video technology in improving access to judicial services.⁹⁸

The Newfoundland and Labrador Court of Appeal considered the impact of video testimony in great detail in *R. v. Gibbs*.⁹⁹ In

95. Section 714.1.

96. *R. v. Lucas-Johnson*, 2018 ONSC 2370, 2018 CarswellOnt 6138, 146 W.C.B. (2d) 604 (Ont. S.C.J.) at para. 10.

97. *R. v. Heynen*, 2000 YTTC 502, 2000 CarswellYukon 6, [2000] Y.J. No. 6 (Y.T. Terr. Ct.) at para. 325, reversed in part on other grounds 2001 YKSC 534, 2001 CarswellYukon 133, [2001] Y.J. No. 122 (Y.T. S.C.).

98. *Ibid.*, at paras. 327-28.

Gibbs, the judge would be in a courtroom in Grand Bank, while the witnesses, accused and counsel would be in a courtroom in Clarendville. The evidence and arguments would be shared by videoconference. Following the Supreme Court in *N.S.*, the court held that a video-conferenced trial would not impair the trial to such an extent that it becomes unfair.¹⁰⁰ Further, there was no reason to believe that the judge's ability to evaluate the evidence or counsel's ability to cross-examine was impaired because of the videoconferencing.¹⁰¹

If the use of videoconferencing can meet the needs of criminal courts, where the liberty of the accused is at stake, then there should be no principled objection to the use of the same technology in civil matters.

Specifically in the context of the COVID-19 pandemic, in *Capic v. Ford Motor Company of Australia Ltd.*,¹⁰² the Federal Court of Australia was scheduled to hear a trial in a class action proceeding over allegedly defective gear boxes. The trial, which had already been set down twice, was scheduled to begin in June 2020. The respondent asked for an adjournment to later in the year; the applicant submitted that the trial could proceed on an electronic platform.

Justice Perram ordered that the trial continue as scheduled. While there would be certain inefficiencies and issues arising from the use of videoconferencing, proceeding in that fashion would not be unfair or unjust.

One of the issues addressed was the difficulty of all co-counsel not being in the same place together. This was to be overcome by the use of messaging applications such as WhatsApp. The court recognized that receiving, whilst in full flight, a WhatsApp message with a document attached is not the same experience as having one's gown tugged and a piece of paper thrust into one's hands. While the situation was far from ideal, that did not mean that the trial would be unfair or unjust.¹⁰³

Another factor considered was the possible impairment of the right to cross-examination. The respondent submitted that video-link technology tends to reduce the chemistry which may develop between counsel and the witness. While the court agreed this reduction was undesirable, there was no guarantee that a trial with everyone physically present in the courtroom could proceed in six

99. 2018 NLCA 26, 149 W.C.B. (2d) 557, 2018 CarswellNfld 179 (N.L. C.A.).

100. *Ibid.*, at para. 31.

101. *Ibid.*, at para. 42.

102. [2020] FCA 486 (Australia Fed. Ct.).

103. *Ibid.*, at para. 13.

months' time. It was not feasible nor consistent with the overarching concerns of the administration of justice to stop the work of the courts for such a period. Justice Perram summarized his reasons with "I think we must try our best to make this trial work. If it becomes unworkable then it can be adjourned, but we must at least try."¹⁰⁴ The court refused the adjournment, and directed the parties to confer about an appropriate digital platform and how expert evidence might be approached ahead of a further case management hearing.¹⁰⁵

The Australian approach was endorsed by Canada's Federal Court in *Rovi Guides, Inc. v. Videotron Ltd.*¹⁰⁶ There, a lengthy patent infringement trial was underway, and was adjourned when the court suspended operations because of the pandemic. Justice Lafrenière found that although oral testimony should generally be provided in open court and attendance in person is the rule and generally preferable, it does not necessarily follow that the ability of the court to assess the credibility of a witness or that the effectiveness of counsel in examining the witness will or may be impaired as a result of videoconferencing. He ordered the trial to continue by videoconference. In a subsequent order, detailed directions were given for the conduct and management of the electronic hearing.¹⁰⁷

The Australian approach in *Capic* has also been embraced in Ontario.

*Arconti v. Smith*¹⁰⁸ was a professional negligence claim where it was determined that the most efficient, affordable, and proportionate resolution of a summary judgment motion was a focused mini-trial in which the experts would be cross-examined and the parties could provide some minor supplementation of their evidence.¹⁰⁹ The steps leading to the hearing of the summary judgment motion were underway before the pandemic.

When social distancing measures were put in place as a consequence of the pandemic, the plaintiff could no longer proceed with the examination of an important witness in person,

104. *Ibid.*, at para. 25.

105. See also *Edwards Lifesciences Corporation v. Meril GmbH & Anor*, [2020] EWHC 2562 at [10], where the use of international videoconferencing in patent matters was described as "well-established".

106. 2020 CF 596, 2020 FC 596, 319 A.C.W.S. (3d) 125 (F.C.).

107. *Rovi Guides, Inc. v. Videotron Ltd.*, 2020 CF 637, 2020 FC 637, 2020 CarswellNat 1719 (F.C.).

108. 2020 ONSC 2782, 318 A.C.W.S. (3d) 203, 2020 CarswellOnt 6163 (Ont. S.C.J.).

109. *Ibid.*, at para. 12.

and objected to examination by videoconference because they maintained:

- a. that they need to be with their counsel to assist with documents and facts during the examination;
- b. it is more difficult to assess a witness's demeanour remotely;
- c. the lack of physical presence in a neutral setting deprives the occasion of solemnity and a morally persuasive environment; and
- d. the plaintiffs do not trust the defendants not to engage in sleight of hand to abuse the process.¹¹⁰

Each of these objections was rejected. Justice Myers extensively considered *Capic*, and ordered that the examination would proceed by videoconference. His conclusion was widely circulated among the profession:

In my view, the simplest answer to this issue is, "It's 2020". We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.¹¹¹

If full trials can take place over electronic platforms, then summary trials should be possible by these means as well. The fact that witnesses may be cross-examined virtually should not present an insurmountable obstacle for the resolution of conflicting evidence and assessment of credibility.

XI. Demeanour

Other than those matters which turn entirely on a question of law, judges are presented with the difficult task of resolving competing narratives from fact witnesses, and conflicts in expert testimony. Particularly in respect of experts, the task can be formidable. In ruling on an injunction motion in a patent case involving dryer sheets with a fabric softener, Justice Muldoon expressed his frustration with resolving competing expert evidence:

A judge unschooled in the arcane subject is at difficulty to know which of the disparate, solemnly mouthed and hotly contended "scientific verities" is, or are, plausible. Is the eminent scientific expert with the

110. *Ibid.*, at para. 18.

111. *Ibid.*, at para. 19.

shifty eyes and poor demeanour the one whose “scientific verities” are not credible? Cross-examination is said to be the great engine for getting at the truth, but when the unschooled judge cannot perceive the truth, if he or she ever hears it, among all the chemical or other scientific baffle-gab, is it not a solemn exercise in silliness? Reform is much needed in the field of non-mechanical patents’ litigation.¹¹²

When determining which witnesses’ evidence is to be preferred, a word frequently found in judgments, such as the one above, is “demeanour”.¹¹³

There is authority that demeanour – a person’s outward behaviour or bearing – is informative, but not determinative, of credibility.¹¹⁴ For many witnesses, giving evidence in court (whether in person or over video) is an unfamiliar, and even uncomfortable experience. They may appear nervous, even if their testimony is fully accurate and complete. Testifying by way of video may conceal certain mannerisms (tapping feet, fidgety hands) and artificially create others – a person looking directly at the image of her interlocutor on a computer screen can appear on camera as looking sideways or avoiding eye contact.

Even if the participants do not have the same experience over video that they would have in person, the use of video technology for cross-examinations still permits an assessment of credibility based on factors, particularly in respect of experts, that have been identified as significant:

- Is the evidence in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions?¹¹⁵
- Is the evidence inconsistent or improbable?¹¹⁶
- did the witness answer questions directly on cross-examination, or were they evasive?¹¹⁷
- Is the evidence consistent with undisputed facts?¹¹⁸

112. *Unilever PLC v. Procter & Gamble Inc.* (1993), 47 C.P.R. (3d) 479, 60 F.T.R. 241, 38 A.C.W.S. (3d) 1230 (Fed. T.D.) at para. 9, affirmed (1995), 61 C.P.R. (3d) 499, 98 F.T.R. 80 (note), 184 N.R. 378 (Fed. C.A.).

113. For a more complete review of “demeanour”, see Peter J. Sankoff, *The Law of Witnesses and Evidence in Canada* (Toronto: Thomson Reuters, 2019) at ch. 12.1(b).

114. *R. v. Lucas-Johnson*, *supra*, at para. 10.

115. *Faryna*, *supra*, at 357.

116. *Moffat v. Canada (Citizenship and Immigration)*, 2019 CF 896, 2019 FC 896, 308 A.C.W.S. (3d) 835 (F.C.).

117. *Gemak*, *supra*, at para. 104.

118. *Ritchie v. Sawmill Creek Golf & Country Club Ltd.* (2003), 27 C.P.R. (4th)

- Is expert evidence lacking required precision?¹¹⁹
- Was opinion evidence independent, or did counsel put words into the mouth of the expert?¹²⁰
- Is the evidence logically compelling?¹²¹
- Is the witness prone to speculation and influence?¹²²
- Did the witness emphasize those areas favourable to their interpretation, and show reluctance to respond to other questions?¹²³
- Is the evidence consistent or inconsistent with contemporaneous documents?¹²⁴
- Did the witness fail to concede something which seemed to be obvious or logical, and when the concession came, did so reluctantly and grudgingly?¹²⁵
- Is the testimony consistent or inconsistent with evidence given in other proceedings?¹²⁶
- Is the thesis advanced cogent and reasonable in the light of all the evidence?¹²⁷
- Did counsel overly interfere in the cross-examination, giving the impression that direct answers would harm the party's case?¹²⁸
- Does the witness have an interest in the outcome?¹²⁹

220, 124 A.C.W.S. (3d) 1151, [2003] O.T.C. 736 (Ont. S.C.J.) at para. 27, additional reasons (2003), 124 A.C.W.S. (3d) 886, [2003] O.T.C. 736, 2003 CarswellOnt 3055, reversed in part (2004), 35 C.P.R. (4th) 163, 189 O.A.C. 282, 133 A.C.W.S. (3d) 335 (Ont. Div. Ct.).

119. *Amgen Inc. v. Pfizer Canada ULC*, 2020 FC 522, 2020 CarswellNat 1266 (F.C.) at para. 122.

120. *Pfizer Canada Inc. v. Mylan Pharmaceuticals ULC*, 2011 FC 547, 93 C.P.R. (4th) 81, 394 F.T.R. 1 (Eng.) (F.C.) at para. 224, affirmed 2012 FCA 103, 100 C.P.R. (4th) 203, 430 N.R. 326 (F.C.A.).

121. *Amgen, supra*, at para. 199.

122. *Amgen, supra*, at para. 46.

123. *SNF Inc. v. CIBA Specialty Chemicals Water Treatments Ltd.*, 2015 CF 997, 2015 FC 997, 133 C.P.R. (4th) 259 (F.C.) at para. 64, affirmed *Ciba Specialty Chemicals Water Treatments Limited v. SNF Inc.*, 2017 CAF 225, 2017 FCA 225, 152 C.P.R. (4th) 239 (F.C.A.), leave to appeal refused *Ciba Specialty Chemicals Water Treatments Limited v. SNF Inc.*, 2018 CarswellNat 2884, 2018 CarswellNat 2885 (S.C.C.).

124. *Warren v. Warren*, 2019 ONSC 1751, 2019 CarswellOnt 4106, 303 A.C.W.S. (3d) 764 (Ont. S.C.J.) at para. 65.

125. *SNF, supra*, at para. 64.

126. *Ratiopharm Inc. v. Pfizer Ltd.*, 2009 FC 711, 76 C.P.R. (4th) 241, 350 F.T.R. 250 (Eng.) (F.C.) at para. 22, affirmed 2010 FCA 204, 87 C.P.R. (4th) 185, 405 N.R. 209 (F.C.A.).

127. *Henkel, supra*, at para. 17.

128. *Gemak, supra*, at para. 104.

129. *Emmanuel Simard & Fils (1983) Inc. v. Raydan Manufacturing Ltd.*, 2005 FC

- Did the expert appear as an independent advisor to the court, or as an advocate?¹³⁰

XII. Conclusion

Fundamentally, summary judgment/summary trial is only appropriate where it leads to a fair process and just adjudication. The Federal Court has shown that it can be both, even in complex commercial cases with conflicting expert evidence. It is an example that can be useful to litigants in other courts.

SCHEDULE 1

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
1.	<i>Southwind v. R.</i> , 2014 FC 296, 240 A.C.W.S. (3d) 525, 2014 CarswellNat 1436 (F.C.), affirmed <i>Manitoba v. Canada</i> , 2015 CAF 57, 2015 FCA 57, (<i>sub nom.</i> Lac Seul Indian Band v. Canada) 470 N.R. 187 (F.C.A.)	SJ	Crown	No
2.	<i>Collins v. R.</i> , 2014 CF 307, 2014 FC 307, 2014 D.T.C. 5066 (F.C.), affirmed 2015 CAF 281, 2015 FCA 281, [2016] 4 C.T.C. 51 (F.C.A.)	SJ and ST	Crown	Yes
3.	<i>Canada (Minister of Citizenship and Immigration) v. Houchaine</i> , 2014 CF 342, 2014 FC 342, 25 Imm. L.R. (4th) 109 (F.C.), add'l reasons 2014 CF 653, 2014 FC 653, 25 Imm. L.R. (4th) 125	SJ	Immigration	Yes
4.	<i>Canada (Minister of Citizenship and Immigration) v. Savic</i> , 2014 CF 523, 2014 FC 523, [2015] 3 F.C.R. 209	SJ	Immigration	Yes
5.	<i>Driving Alternative Inc. v. Keyz Thankz Inc.</i> , 2014 CF 559, 2014 FC 559, 126 C.P.R. (4th) 418 (F.C.)	ST	IP	Yes

973, 41 C.P.R. (4th) 385, 276 F.T.R. 164 (F.C.) at paras. 20-25, reversed 2006 CAF 293, 2006 FCA 293, 53 C.P.R. (4th) 178 (F.C.A.).

130. *Gemak, supra*, at para. 110.

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
6.	<i>Brown v. Canada</i> , 2014 CF 831, 2014 FC 831, 252 A.C.W.S. (3d) 320 (F.C.), reversed 2016 CAF 37, 2016 FCA 37, 394 D.L.R. (4th) 536 (F.C.A.)	SJ	IP	Yes
7.	<i>Terrace (City) v. Urban Distilleries Inc.</i> , 2014 CF 833, 2014 FC 833, 123 C.P.R. (4th) 242 (F.C.), reversed in part <i>Kitasoo First Nation v. Urban Distillers Inc.</i> , 2015 CAF 233, 2015 FCA 233, (<i>sub nom.</i> <i>Terrace (City) v. Urban Distilleries Inc.</i>) 477 N.R. 195 (F.C.A.)	SJ	IP	Yes
8.	<i>Canada (Minister of Citizenship and Immigration) v. Zakaria</i> , 2014 CF 864, 2014 FC 864, 30 Imm. L.R. (4th) 138 (F.C.)	SJ	Immigration	No
9.	<i>Louis Bull First Nation v. Canada</i> , 2015 FC 1066 (F.C.), reversed in part 2015 CAF 197, 2015 FCA 197, 2015 CarswellNat 4409 (F.C.A.)	SJ	First Nations	Yes
10.	<i>0871768 B.C. Ltd. v. "Aestival" (The)</i> , 2014 CF 1047, 2014 FC 1047, (<i>sub nom.</i> <i>0871768 B.C. Ltd. v. Ship Aestival</i>) 467 F.T.R. 1 (F.C.)	ST	Admiralty	Yes
11.	<i>Sadhu Singh Hamdard Trust v. Navsun Holdings Ltd.</i> , 2014 CF 1139, 2014 FC 1139, 128 C.P.R. (4th) 168 (F.C.), varied 2016 CAF 69, 2016 FCA 69, 136 C.P.R. (4th) 20 (F.C.A.)	ST	IP	Yes
12.	<i>MC Imports Ltd. v. Afod Ltd.</i> , 2014 CF 1161, 2014 FC 1161, 127 C.P.R. (4th) 245 (F.C.), affirmed <i>MC Imports Inc. v. AFOD Ltd.</i> , 2016 CAF 60, 2016 FCA 60, 397 D.L.R. (4th) 322 (F.C.A.)	ST	IP	Yes
13.	<i>Lum v. Dr. Coby Cragg Inc.</i> , 2014 CF 1171, 2014 FC 1171,	ST	IP	Yes

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	131 C.P.R. (4th) 234 (F.C.), reversed 2015 CAF 293, 2015 FCA 293, 134 C.P.R. (4th) 409 (F.C.A.)			
14.	<i>Leo Ocean S.A. v. Westshore Terminals Limited Partnership</i> , 2015 FC 130 (F.C.), reversed 2015 CAF 282, 2015 FCA 282, 480 N.R. 227 (F.C.A.)	ST	Admiralty	No ¹³¹
15.	<i>Brazeau v. Canada (Attorney General)</i> , 2015 CF 151, 2015 FC 151, 475 F.T.R. 74 (F.C.)	ST	Crown	Yes
16.	<i>Norwegian Bunkers AS v. Boone Star Owners Inc.</i> , 2014 CF 1200, 2014 FC 1200, 470 F.T.R. 59 (F.C.)	SJ and ST	Admiralty	Yes
17.	<i>Canada (Minister of Citizenship and Immigration) v. Omelebele</i> , 2015 CF 305, 2015 FC 305, [2015] 4 F.C.R. 499 (F.C.)	SJ	Immigration	Yes
18.	<i>Samson Indian Nation and Band v. Canada</i> , 2015 CF 836, 2015 FC 836, 255 A.C.W.S. (3d) 1037 (F.C.), affirmed <i>Buffalo v. Canada</i> , 2016 CAF 223, 2016 FCA 223, 487 N.R. 306 (F.C.A.), leave to appeal refused <i>Ermieskin Indian Band v. Canada</i> , 2017 CarswellNat 665, 2017 CarswellNat 666, [2016] S.C.C.A. No. 473 (S.C.C.), reconsideration / rehearing refused 2017 CarswellAlta 1107, 2017 CarswellAlta 1108 (S.C.C.), leave to appeal refused 2017 CarswellNat 667 (S.C.C.), reconsideration / rehearing refused 2017 CarswellAlta 1109, 2017 CarswellAlta 1110 (S.C.C.)	SJ	First Nations	Yes
19.	<i>Mohawks of Akwesasne v. St. Lawrence Seaway Authority</i> ,	ST	First Nations	No

131. Matter was sent back for reconsideration by the Federal Court of Appeal; parties reached a settlement prior to reconsideration – T-605-13.

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	2015 CF 918, 2015 FC 918, [2015] 4 C.N.L.R. 264 (F.C.)			
20.	<i>100193 P.E.I. Inc. v. R.</i> , 2015 CF 932, 2015 FC 932, 263 A.C.W.S. (3d) 648 (F.C.), reversed 2016 CAF 280, 2016 FCA 280, 4 L.C.R. (2d) 253 (F.C.A.), leave to appeal refused 2017 CarswellNat 2525, 2017 CarswellNat 2526 (S.C.C.)	SJ	Crown	Yes
21.	<i>Hillis v. Canada (Attorney General)</i> , 2015 CF 1082, 2015 FC 1082, 388 D.L.R. (4th) 730 (F.C.)	ST	Tax	Yes
22.	<i>Chanel S. de R.L. v. Lam Chan Kee Co.</i> , 2015 CF 1091, 2015 FC 1091, 137 C.P.R. (4th) 68 (F.C.), reversed 2016 CAF 111, 2016 FCA 111, 483 N.R. 15 (F.C.A.) ¹³²	ST	IP	Yes
23.	<i>Canpotex Shipping Services Ltd. v. Marine Petrobulk Ltd.</i> , 2015 CF 1108, 2015 FC 1108, 259 A.C.W.S. (3d) 204 (F.C.), reversed <i>ING Bank N.V. v. Canpotex Shipping Services Ltd.</i> , 2017 CAF 47, 2017 FCA 47, 277 A.C.W.S. (3d) 281 (F.C.A.), leave to appeal refused <i>Canpotex Shipping Services Limited, et al. v. ING Bank N.V., et al.</i> , 2017 CarswellNat 4747, 2017 CarswellNat 4748 (S.C.C.) ¹³³	ST	Admiralty	Yes
24.	<i>UPS Asia Group PTE Ltd. v. Belair Fabrication Ltd.</i> , 2015 CF 1141, 2015 FC 1141, 258 A.C.W.S. (3d) 455 (F.C.)	ST	Admiralty	Yes

132. Matter was reconsidered by the Federal Court using summary trial with direction from the Federal Court of Appeal; summary trial decision was further appealed (see case no. 36 on this list for reconsideration and appeal) – T-653-13.

133. Matter was reconsidered by Federal Court using summary trial with direction from the Federal Court of Appeal; summary trial decision was further appealed (see case no. 62 on this list for reconsideration and appeal of this matter) – T-109-15.

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
25.	<i>National Bank of Canada v. Rogers</i> , 2015 CF 1207, 2015 FC 1207, 260 A.C.W.S. (3d) 433 (F.C.), additional reasons 2015 FC 1390, 264 A.C.W.S. (3d) 337 (F.C.)	SJ	Admiralty	Yes
26.	<i>Pfizer Canada Inc. v. Teva Canada Limited</i> , 2015 FC 760 (F.C.), affirmed 2015 CAF 257, 2015 FCA 257, 480 N.R. 217 (F.C.A.)	SJ	IP	Yes
27.	<i>Pinder v. Canada (Minister of Environment)</i> , 2015 CF 1376, 2015 FC 1376, 262 A.C.W.S. (3d) 214 (F.C.), affirmed 2016 CAF 317, 2016 FCA 317, 274 A.C.W.S. (3d) 321 (F.C.A.)	SJ	Crown	Yes
28.	<i>Timm c. R.</i> , 2015 CF 1391, 2015 FC 1391, 126 W.C.B. (2d) 482 (F.C.), reversed 2016 CAF 263, 2016 FCA 263, 272 A.C.W.S. (3d) 293 (F.C.A.)	SJ	Crown	No
29.	<i>Apotex Inc. v. Pfizer Inc.</i> , 2016 CF 136, 2016 FC 136, [2017] 1 F.C.R. 3 (F.C.), affirmed 2017 FCA 201, 150 C.P.R. (4th) 211, [2019] 2 F.C.R. 263 (F.C.A.)	SJ	IP	Yes
30.	<i>Canada (Minister of Citizenship and Immigration) v. Modaresi</i> , 2016 CF 185, 2016 FC 185, 41 Imm. L.R. (4th) 258 (F.C.)	ST	Immigration	Yes
31.	<i>AGF Steel Inc. v. Miller Shipping Ltd.</i> , 2016 CF 447, 2016 FC 447, 265 A.C.W.S. (3d) 831 (F.C.)	SJ	Admiralty	Yes
32.	<i>AGF Steel Inc. v. Miller Shipping Ltd.</i> , 2016 CF 461, 2016 FC 461, 267 A.C.W.S. (3d) 258 (F.C.)	SJ	Admiralty	Yes
33.	<i>Platypus Marine, Inc. v. "Tatu" (The)</i> , 2016 CF 501, 2016 FC 501, 266 A.C.W.S. (3d) 463 (F.C.), reversed <i>Platypus Marine, Inc. v. Tatu</i>	SJ	Admiralty	Yes

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	<i>(Ship)</i> , 2017 CAF 184, 2017 FCA 184, 283 A.C.W.S. (3d) 236 (F.C.A.)			
34.	<i>E. Mishan & Sons, Inc. v. Supertek Canada Inc.</i> , 2016 CF 613, 2016 FC 613, 141 C.P.R. (4th) 254 (F.C.)	SJ	IP	Yes
35.	<i>E. Mishan & Sons Inc. v. Supertek Canada Inc.</i> , 2016 CF 986, 2016 FC 986, 270 A.C.W.S. (3d) 614 (F.C.)	ST	IP	Yes
36.	<i>Chanel S. de R.L. v. Lam Chan Kee Co.</i> , 2016 CF 987, 2016 FC 987, 140 C.P.R. (4th) 397 (F.C.), affd 2017 CAF 38, 2017 FCA 38, 144 C.P.R. (4th) 465 (F.C.A.)	ST	IP	Yes
37.	<i>Newman v. R.</i> (April 10, 2015), Doc. T-2163-14 (F.C.), reversed 2016 CAF 213, 2016 FCA 213, 406 D.L.R. (4th) 602 (F.C.A.)	SJ	Crown	No
38.	<i>Cabral v. Canada (Minister of Citizenship and Immigration)</i> , 2016 CF 1040, 2016 FC 1040, 46 Imm. L.R. (4th) 209 (F.C.), affirmed 2018 FCA 4, 56 Imm. L.R. (4th) 175, 287 A.C.W.S. (3d) 144 (F.C.A.)	SJ	Immigration	Yes
39.	<i>Cascade Corp. v. Kinshofer GmbH</i> , 2016 FC 1117, 148 C.P.R. (4th) 406, 272 A.C.W.S. (3d) 828 (F.C.)	ST	IP	Yes
40.	<i>Davydiuk v. Internet Archive Canada</i> , 2016 CF 1313, 2016 FC 1313, 274 A.C.W.S. (3d) 69 (F.C.)	SJ	IP	Yes
41.	<i>Williams v. Canada (Public Safety and Emergency Preparedness)</i> , 2017 FC 234 (F.C.), reversed 2017 CAF 252, 2017 FCA 252, 417 D.L.R. (4th) 173 (F.C.A.)	SJ	Crown	Yes
42.	<i>Moray Channel Enterprises Ltd. v. Gordon</i> , 2017 FC 250, 277 A.C.W.S. (3d) 679,	ST	Admiralty	Yes

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	2017 CF 250 (F.C.)			
43.	<i>Collett v. Northland Art Company Canada Inc.</i> , 2018 CF 269, 2018 FC 269, 290 A.C.W.S. (3d) 531 (F.C.)	ST	IP	Yes
44.	<i>Watson v. Canada</i> , 2017 FC 321, 290 A.C.W.S. (3d) 452, 2017 CarswellNat 8960 (F.C.)	SJ	First Nations	Yes
45.	<i>Watson v. Canada</i> , 2017 CF 322, 2017 FC 322, 286 A.C.W.S. (3d) 51 (F.C.)	SJ	First Nations	Yes
46.	<i>Milne v. Canada</i> , 2017 FC 569, 7 L.C.R. (2d) 1, 289 A.C.W.S. (3d) 317 (F.C.), affirmed 2018 FCA 113, 293 A.C.W.S. (3d) 92 (F.C.A.)	SJ	Crown	No
47.	<i>Premium Sports Broadcasting Inc. v. 9005-5906 Québec Inc. (Resto-bar Mirabel)</i> , 2017 CF 590, 2017 FC 590, 282 A.C.W.S. (3d) 159 (F.C.)	ST	IP	Yes
48.	<i>Badawy v. Igras</i> , 2017 FC 619 (F.C.), affirmed 2019 FCA 153, 305 A.C.W.S. (3d) 834, 2019 CarswellNat 2013 (F.C.A.)	SJ	IP	Yes
49.	<i>Louis Dreyfus Commodities Canada Ltd. v. Canadian National Railway Company</i> , 2017 FC 783, 284 A.C.W.S. (3d) 199, 2017 CF 783 (F.C.), affd 2019 FCA 9, 302 A.C.W.S. (3d) 869, 2019 CarswellNat 68 (F.C.A.)	ST	Transportation	Yes
50.	<i>Lepage v. Canada</i> , 2017 CF 1136, 2017 FC 1136, 288 A.C.W.S. (3d) 167 (F.C.)	SJ	Crown	Yes
51.	<i>Shelburne (Town) v. Farley Mowatt (Ship)</i> , 2017 CF 1184, 2017 FC 1184, 287 A.C.W.S. (3d) 4 (F.C.)	SJ	Admiralty	Yes
52.	<i>The Administrator of the Ship-source Oil Pollution Fund v. Beasse</i> , 2018 CF 39, 2018 FC 39, 288 A.C.W.S.	ST	Environmental	Yes

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	(3d) 488 (F.C.)			
53.	<i>Sibomana c. Canada</i> , 2018 CF 43, 2018 FC 43, 288 A.C.W.S. (3d) 665 (F.C.)	SJ	Crown	No
54.	<i>Saddle Lake Cree Nation v. Canada (Attorney General)</i> , 2018 CF 127, 2018 FC 127, 289 A.C.W.S. (3d) 539 (F.C.), reversed in part 2018 FCA 228, 302 A.C.W.S. (3d) 5, 2018 CarswellNat 7967	SJ	First Nations	No
55.	<i>Kaska Dena Council v. Canada</i> , 2018 CF 218, 2018 FC 218, 291 A.C.W.S. (3d) 52	SJ	First Nations	No
56.	<i>Flaro v. Canada</i> , 2018 CF 229, 2018 FC 229, 289 A.C.W.S. (3d) 540 (F.C.), reversed in part 2019 FCA 30, 301 A.C.W.S. (3d) 550, 152 W.C.B. (2d) 458 (F.C.A.)	SJ	Crown	Yes
57.	<i>Hociung v. Canada (Public Safety and Emergency Preparedness)</i> , 2018 CF 298, 2018 FC 298, [2018] 4 F.C.R. 82 (F.C.), reversed in part 2019 FCA 215, 309 A.C.W.S. (3d) 59, 157 W.C.B. (2d) 274 (F.C.A.), leave to appeal refused <i>Radu Hociung v. Minister of Public Safety and Emergency Preparedness</i> , 2020 CarswellNat 1328, 2020 CarswellNat 1329 (S.C.C.), reversed in part 2019 FCA 214, 157 W.C.B. (2d) 392, 309 A.C.W.S. (3d) 93 (F.C.A.)	SJ	Crown	No ¹³⁴
58.	<i>Ntemde c. Canada</i> , 2018 CF 410, 2018 FC 410, 295 A.C.W.S. (3d) 838 (F.C.)	SJ	Crown	Yes
59.	<i>Miller v. Canada</i> , 2018 CF 599, 2018 FC 599, 297 A.C.W.S. (3d) 287 (F.C.), affirmed 2019 FCA 61, 304	SJ	Crown	Yes

134. Judgment was quashed and sent back to the Federal Court for determination; motion was dismissed on June 16, 2020 after case management conference – T-1450-15.

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	A.C.W.S. (3d) 852, 2019 CarswellNat 962 (F.C.A.), leave to appeal refused 2019 CarswellNat 5902, 2019 CarswellNat 5903 (S.C.C.)			
60.	<i>Enright v. Canada</i> , 2018 FC 802, 2018 FC 802, 295 A.C.W.S. (3d) 394 (F.C.)	SJ	Crown	Yes
61.	<i>Hoffmann-La Roche Limited v. Pfizer Canada Inc.</i> , 2018 CF 932, 2018 FC 932, 158 C.P.R. (4th) 295 (F.C.)	SJ or ST	IP	No
62.	<i>Canpotex Shipping Services Limited v. Marine Petrobulk Ltd.</i> , 2018 CF 957, 2018 FC 957, 301 A.C.W.S. (3d) 65 (F.C.), affirmed <i>ING Bank N.V. v. Canpotex Shipping Services Limited</i> , 2020 FCA 83, 2020 CarswellNat 1444	SJ	Admiralty	Yes
63.	<i>Graymar Equipment (2008) Inc. v. Cosco Pacific Shipping Ltd.</i> , 2018 FC 974, 297 A.C.W.S. (3d) 226, 2018 CarswellNat 5488 (F.C.)	ST	Admiralty	Yes
64.	<i>Rice v. Canada</i> , 2018 FC 983, 2018 FC 983, 297 A.C.W.S. (3d) 321 (F.C.)	SJ	Crown	Yes
65.	<i>Quality Program Services Inc. v. Canada</i> , 2018 FC 971, 161 C.P.R. (4th) 83, 2018 CF 971 (F.C.), add'l reasons 2019 CF 19, 2019 FC 19, 302 A.C.W.S. (3d) 484, affirmed 2020 FCA 53, 316 A.C.W.S. (3d) 140, 2020 CarswellNat 457	ST	IP	Yes
66.	<i>St. Lawrence Seaway Management Corporation v. BBC Lena (Vessel)</i> , 2018 FC 1026, 2018 FC 1026, 88 C.C.L.I. (5th) 51 (F.C.)	SJ	Admiralty	Yes
67.	<i>Sadhu Singh Hamdard Trust v. Navsun Holdings Ltd.</i> , 2018 CF 1039, 2018 FC 1039, 160 C.P.R. (4th) 282 (F.C.), reversed in part 2019 FCA 295, 169 C.P.R. (4th)	SJ	IP	Yes

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	325, 313 A.C.W.S. (3d) 605 (F.C.A.)			
68.	<i>Energizer Brands, LLC v. The Gillette Company</i> , 2018 CF 1003, 2018 FC 1003, 159 C.P.R. (4th) 192 (F.C.), reversed in part 2020 FCA 49, 317 A.C.W.S. (3d) 121, 2020 CarswellNat 396 (F.C.A.)	SJ	IP	Yes
69.	<i>Milano Pizza Ltd. v. 6034799 Canada Inc.</i> , 2018 CF 1112, 2018 FC 1112, 159 C.P.R. (4th) 275 (F.C.)	SJ	IP	Yes
70.	<i>Rodriguez v. Canada</i> , 2018 CF 1125, 2018 FC 1125, 299 A.C.W.S. (3d) 75 (F.C.)	SJ	Crown	Yes
71.	<i>Evans v. Discovery Communications LLC</i> , 2018 FC 1153, 161 C.P.R. (4th) 116	SJ	IP	Yes
72.	<i>Canada (Ship-Source Oil Pollution Fund) v. Dodds</i> , 2019 CF 144, 2019 FC 144, 302 A.C.W.S. (3d) 8 (F.C.)	SJ	Admiralty	Yes
73.	<i>Canada (Ship-Source Oil Pollution Fund) v. Dodds</i> , 2019 CF 146, 2019 FC 146, 302 A.C.W.S. (3d) 7 (F.C.)	SJ	Admiralty	Yes
74.	<i>Warner v. Canada</i> , 2019 CF 329, 2019 FC 329, 303 A.C.W.S. (3d) 618 (F.C.)	SJ	Crown	Yes
75.	<i>Black & White Merchandising Co. Ltd. v. Deltrans International Shipping Corporation</i> , 2019 CF 379, 2019 FC 379, 304 A.C.W.S. (3d) 697 (F.C.)	SJ	Admiralty	No ¹³⁵
76.	<i>Glazer v. Canada (Attorney General)</i> , 2019 CF 436, 2019 FC 436, [2020] 2 C.T.C. 137	SJ	Crown	Yes
77.	<i>Gupta v. Canada</i> , 2019 CF 669, 2019 FC 669, 308 A.C.W.S. (3d) 250 (F.C.)	SJ	Crown	Yes

135. Matter was resolved by granting motion to strike; court only addressed summary judgment in the event it was wrong about its ruling on the motion to strike.

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
78.	<i>Labrador-Island Link General Partner Corporation v. Panalpina Inc.</i> , 2019 CF 740, 2019 FC 740, 307 A.C.W.S. (3d) 229 (F.C.), affirmed 2020 FCA 36, 317 A.C.W.S. (3d) 493, 2020 CarswellNat 235 (F.C.A.)	SJ	Admiralty	Yes
79.	<i>Beasse v. Canada</i> , 2019 CF 768, 2019 FC 768, 307 A.C.W.S. (3d) 454 (F.C.)	ST	Admiralty	Yes
80.	<i>Sibomana c. Canada</i> , 2019 CF 945, 2019 FC 945, 308 A.C.W.S. (3d) 371 (F.C.), affirmed 2020 CAF 57, 2020 FCA 57, 316 A.C.W.S. (3d) 652 (F.C.A.)	SJ	Immigration	Yes
81.	<i>Celine, Société Anonyme v. Tobey</i> , 2019 CF 1053, 2019 FC 1053, 168 C.P.R. (4th) 15	SJ	IP	Yes
82.	<i>Givenchy, Société Anonyme v. Tobey</i> , 2019 CF 1054, 2019 FC 1054, 167 C.P.R. (4th) 270 (F.C.)	SJ	IP	Yes
83.	<i>Christian Dior Couture, S.A. v. Tobey</i> , 2019 CF 1055, 2019 FC 1055, 168 C.P.R. (4th) 124 (F.C.)	SJ	IP	Yes
84.	<i>Louis Vuitton Malletier S.A. v. Tobey</i> , 2019 CF 1056, 2019 FC 1056, 166 C.P.R. (4th) 394 (F.C.)	SJ	IP	Yes
85.	<i>Canmar Foods Ltd. and TA Foods Ltd., Re</i> , 2019 CF 1233, 2019 FC 1233, 170 C.P.R. (4th) 441 (F.C.)	SJ	IP	Yes
86.	<i>Pharmascience Inc. v. Pfizer Canada ULC</i> , 2019 CF 1271, 2019 FC 1271, 169 C.P.R. (4th) 466 (F.C.), aff'd 2020 FCA 55, 316 A.C.W.S. (3d) 347, 2020 CarswellNat 544	ST	IP	Yes
87.	<i>Louis Vuitton Malletier S.A. v. Wang</i> , 2019 CF 1389, 2019 FC 1389, 173 C.P.R. (4th) 1	ST	IP	Yes
88.	<i>Iamgold Corporation v. Hap-</i>	ST	Admiralty	Yes

		Summary Judgment or Summary Trial	Type	One or more issues resolved?
	<i>ag-Lloyd Ag</i> , 2019 CF 1514, 2019 FC 1514, 312 A.C.W.S. (3d) 553 (F.C.)			
89.	<i>Rallysport Direct LLC v. 2424508 Ontario Ltd.</i> , 2019 CF 1524, 2019 FC 1524, 315 A.C.W.S. (3d) 756 (F.C.). Damages were assessed in a separate hearing at 2020 FC 794	SJ	IP	Yes
90.	<i>Canada v. Klesse</i> , 2020 CF 45, 2020 FC 45, 314 A.C.W.S. (3d) 236 (F.C.)	SJ	Crown	Yes
91.	<i>Canada v. Moodie</i> , 2020 CF 46, 2020 FC 46, 314 A.C.W.S. (3d) 234 (F.C.)	SJ	Crown	Yes
92.	<i>Canada v. Harman</i> , 2020 CF 47, 2020 FC 47, 314 A.C.W.S. (3d) 235 (F.C.)	SJ	Crown	Yes
93.	<i>Canada v. McKinna</i> , 2020 CF 48, 2020 FC 48, 314 A.C.W.S. (3d) 680 (F.C.)	SJ	Crown	Yes
94.	<i>Corey Bessner Consulting Inc. v. Core Consultants Realty Inc.</i> , 2020 CF 224, 2020 FC 224, 171 C.P.R. (4th) 355	ST	IP	Yes
95.	<i>Viiiv Healthcare Company v. Gilead Sciences Canada, Inc.</i> , 2020 CF 486, 2020 FC 486, 2020 CarswellNat 1166	ST	IP	Yes
96.	<i>Hinton v. Jempak Corporation</i> , 2020 FC 644, 2020 CarswellNat 1660 (F.C.)	SJ	IP	Yes
97.	<i>Flatwork Technologies, LLC (Powerblanket) v. Brierley</i> , 2020 FC 997	SJ	IP	Yes