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# A COMING OF AGE FOR THE FEDERAL COURT SUMMARY TRIAL IN INTELLECTUAL PROPERTY LITIGATION

DESPITE A TEPID INITIAL RESPONSE, RECENT POPULARITY SHOWS PEOPLE ARE EMBRACING THE SUMMARY TRIAL AS A MORE AFFORDABLE VEHICLE TO HAVE EVEN COMPLEX ISSUES DECIDED EARLY

**2022 has seen a significant increase** in the number of IP cases being decided under the Federal Court's summary trial provisions. Between 2009, when the summary trial rules were introduced, and 2021, on average the court decided less than two IP cases each year. So far in 2022, it has issued no less than eight decisions from motions for summary trial in actions for patent, trademark, and copyright infringement. Despite a somewhat tepid welcome, summary trials have from the outset proven an effective tool for the efficient adjudication of discrete and, in many cases, dispositive IP issues. Recent popularity shows that, whatever reluctance may have existed, parties are embracing the summary trial as a more affordable vehicle to have even complex issues decided early.

Like summary judgment, summary trial provides an alternative to a full trial and is consistent with overarching judicial policy of promoting timely and affordable access to the civil justice system.[1] However, unlike summary judgment where a moving party must show a case is so doubtful that it does not deserve consideration by the trier of fact,[2] the onus of proof on a motion for summary trial is on a balance of probabilities.[3] The rules provide that if the court is satisfied that there is sufficient evidence for adjudication – regardless of the amounts involved, the complexities of the issues, and the existence of conflicting evidence – the court may grant judgment either generally or on an issue, unless the court is of the opinion that it would be unjust to decide the issues on the motion.[4] A party bringing a motion for summary trial may therefore face the risk of its claim or defence being dismissed, whereas a failed motion for summary judgment simply means the case continues to trial.

Although the rules require the court to dismiss a motion if the issues raised are not suitable for summary trial,[5] challenges presented by the complexity of IP cases and conflicting fact and expert testimony have not dissuaded the court from proceeding. Across all areas of IP, judges have remarked on the value of cross-examination before the court as a tool to resolve credibility issues and disputed questions of fact on motions for summary trial.[6] As the court observed in *Vidéotron Ltée v. Technologies Konek Inc.*, "The parties provided affidavits and detailed expert reports. The deponents and experts were cross-examined. It is difficulty [sic] to imagine what additional evidence would be presented at a trial."[7]

Counsel are also coming to this realization. This year alone, the Federal Court has held issues of patent construction and infringement (including under the PMNOC regulations),[8] inventorship,[9] passing-off and trademark infringement,[10] and copyright infringement[11] were appropriate for summary trial. Presumably, the list will expand. If not before, certainly in 2022, summary trials have demonstrated their worth as alternatives to the conventional trial with little to no sacrifice to the fact-finding process. This is a good thing for parties involved in IP disputes and a trend that should be embraced.

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**BERESKIN & PARR LLP** is a leading Canadian full-service intellectual property law firm serving clients across all industries around the world. Founded in 1965, the firm has grown to be one of the largest IP firms in Canada with offices located in major economic and technology centres. Bereskin & Parr is made up of more than 75 lawyers and patent and trademark agents, many of whom are recognized as leading practitioners in their specialized fields. The firm has established a depth of legal talent and systems to service clients in every aspect of patent, trademark, and copyright law and IP litigation. The firm and its award-winning professionals are consistently ranked as the benchmark for IP law in Canada.

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[1] *Hryniak v. Mauldin*, 2014 SCC 7 at para 2.
[2] *Premakumaran v. Canada*, 2006 FCA 213 at para 8.
[3] Notably, however, there remains some uncertainty as to whether the moving party bears the onus on all issues or whether once it demonstrates a summary trial is appropriate, the burden and onus of the underlying actions applies. See, e.g. *Janssen Inc. v. Pharmascience Inc.*, 2022 FC 62, paras 57–58; *Mud Engineering Inc. v. Secure Energy (Drilling Services) Inc.*, 2022 FC 943, paras 27–28.
[4] Federal Courts Rules, SOR/98–106, s 216(6).
[5] Federal Courts Rules, SOR/98–106, s 216(5).
[6] *Corey Bessner Consulting Inc. v. Core Consultants Realty Inc.*, 2020 FC 224, para 33; *Janssen Inc. v. Apotex Inc., 2022 FC 107, para 45; Vidéotron Ltée v. Technologies Konek Inc.*, 2022 FC 256, para 19.
[7] *Vidéotron Ltée v. Technologies Konek Inc.*, 2022 FC 256, para 24.
[8] *Janssen Inc. v. Apotex Inc.*, 2022 FC 107; *Janssen Inc. v. Pharmascience Inc.*, 2022 FC 62; *Steelhead LNG (ASLNG) Ltd v. Arc Resources Ltd*, 2022 FC 998.
[9] *Mud Engineering Inc. v. Secure Energy (Drilling Services) Inc.*, 2022 FC 943.
[10] *Mainstreet Equity Corp. v. Canadian Mortgage Capital Corporation*, 2022 FC 20; *Lululemon Athletica Canada Inc. v. Campbell*, 2022 FC 194; *Dragona Carpet Supplies Mississauga Inc. v. Dragona Carpet Supplies Ltd*, 2022 FC 1042.
[11] *Vidéotron Ltée v. Technologies Konek Inc.*, 2022 FC 256.