



March 20, 2009

Chantelle Bowers
Secretary of the Rules Committee
of the Federal Court of Appeal
and the Federal Court
90 Sparks Street, 10th Floor
Ottawa, ON K1A 0H9

Dear Ms. Bowers:

Re: Proposed Amendments to the *Federal Courts Rules* (Summary Judgment and Summary Trial) *Canada Gazette, Part I, January 24, 2009*

On behalf of the National Intellectual Property Section of the Canadian Bar Association (CBA Section), I am pleased to comment on the proposed changes to the *Federal Courts Rules*, published in the *Canada Gazette*. These proposed amendments would amend the current rules governing motions for summary judgment and would introduce a summary trial procedure.

The CBA Section supports these proposed changes in principle, and we support the Court's initiatives to seek ways in which the conduct and disposition of litigation may be streamlined. As a general comment, there should be accessible litigation pathways that enable intellectual property disputes to be resolved at an early stage and in a cost effective manner.

The proposed changes are a significant step in the right direction. In particular, the availability of a summary trial procedure should mitigate the limited availability of summary judgment that has arisen from the judicial interpretation of current Rules 213 to 219.

However, we have comments and concerns about the proposed rule amendments that we wish to bring to your attention.

Proposed Rule 213

Rule 213 would provide:

213. (1) A party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings at any time after the defendant has filed a defence but before the time and place for trial have been fixed....

...

(3) A motion for summary judgment or summary trial in an action may be brought by serving and filing a notice of motion and motion record at least 20 days before the day set out in the notice for the hearing of the motion.

Summary judgment motions require counsel to focus their submissions on those aspects of the evidence that are undisputed. In the case of summary trials, counsel must be able to show how any material dispute on the evidence can be resolved on the basis of other, undisputed evidence. However, Rule 213(3) would require the party seeking summary judgment to prepare its memorandum before it has seen any of the respondent's evidence, as motion records for motions seeking summary judgment or summary trial must contain a memorandum of fact and law (Rules 364 and 366). Without being able to identify disputes on the evidence with any precision, or at all, counsel for the moving party may not bring the proper focus to the evidence, wasting the time of counsel and the Court.

We suggest that proposed Rule 213(3) require the parties to exchange in advance draft motion records (i.e. all affidavits, Requests to Admit, examination for discovery transcripts, etc.), without the memorandum of fact and law. An appropriate timeline could be:

- (a) Applicant serves Notice of Motion and motion record, excluding its memorandum of fact and law, at least 30 days in advance of the hearing;
- (b) Respondent serves its motion record, excluding its memorandum of fact and law, at least 20 days in advance of the hearing;
- (c) Applicant serves its memorandum of fact and law and files its complete motion record, at least 15 days in advance of the hearing;
- (d) Respondent serves its memorandum of fact and law and files its complete motion record, at least 10 days in advance of the hearing.

This proposed timeline preserves the existing 10 days for the respondent to prepare its evidence, provides five extra days for each party to prepare their respective arguments after receiving the evidence, and preserves the existing 10 days for the Court to receive and review the complete motion records. While our recommendation would add an extra 10 days to the entire process, the process still takes place within one month.

A variation of the foregoing could require the moving party to serve its notice of motion and all supporting evidentiary materials at least 30 days in advance of the proposed hearing, with the respondent's evidence falling due 20 days before the hearing. The respective motion records would then be filed 15 days (applicant) and 10 days (respondent) before the scheduled hearing date.

Findings of Credibility

Applications for summary judgment are rarely granted under the current Rules because the responding party is typically able to marshal an argument that issues of witness credibility arise from the evidence. The jurisprudence has developed that issues of witness credibility may only be resolved by *viva voce* testimony given at trial. We would suggest that the proposed rules incorporate express authority for the Court to make findings of credibility based on the evidentiary record on the motion, especially where the evidence is undisputed or is otherwise compelling.

Intertwined issues

Intellectual property litigation is often characterized by complex, intertwined issues. The proposed rules provide that each party is limited to bringing a single application for summary judgment or summary trial, unless leave of the Court is obtained. However, if summary judgment is granted for one aspect of a case, potential overlap in either the issues or the evidence may inadvertently lead to "litigating by installment."

It may be useful for the proposed Rules to provide some guidance concerning severability of issues or to address the relevance of summary judgment on one issue with respect to other issues to be decided at

trial. This may arise where findings of fact made on summary judgment may be relevant to one or more issues defined by the pleadings.

Preliminary challenge

In view of the foregoing, the Rules Committee may wish to consider whether permitting a preliminary challenge to suitability of a summary trial is advisable.

Conclusion

The CBA Section appreciates the efforts of the Rules Committee to improve and advance the procedures for summary disposition of intellectual property litigation. We appreciate the opportunity to provide input on the proposed changes to the Rules and would be pleased to discuss these issues further.

Sincerely,

(Original signed by Kerri A. Froc for Cynthia L. Tape)

Cynthia L. Tape
Chair, National Intellectual Property Section