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Increase in Summary Judgment and Trial Procedures Expected

New life has been breathed into summary judgment and trial procedures by the Federal Court of Appeal in the recent decision of *Sterling Lumber Company v. Harrison* (2010 FCA 21) released on January 10, 2010.

Previously, the Federal Court had a restrictive approach to summary motions, particularly in patent litigation. The Court would decline summary procedures where there was a conflict in evidence, and most IP litigation involves conflicting expert testimony (such as claim construction), resulting in limited use of summary procedures.

In *Sterling* the Defendant to a patent lawsuit brought a summary judgment motion for anticipation. This was based on examination for discovery testimony of the inventor admitting the prior sale of a device which (in the inventor's opinion) was the same as the asserted patent claim, more than 1 year prior to the patent's earliest claim date.

The motion Judge refused to grant summary judgment, holding that there was insufficient evidence as to the proper construction of the patent claim.

However, on appeal by the Defendant, the Federal Court of Appeal held that the admission by the inventor was sufficient to anticipate the claim. The onus was on the Plaintiff to rebut this evidence, by proving that the inventor's claim construction was erroneous or that he had misspoken/misunderstood when answering the question.

The Federal Court of Appeal emphasized that the obligation is on the party opposing summary judgment (here the Patentees) to 'put their best foot forward'. That is, to provide evidence on the merits, whether arguing the case is inappropriate for summary judgment or otherwise. By not providing proof that the previously sold product differed from the claim language, the matter was subject to a summary judgment finding the claim anticipated.

Recently, new rules amending the *Federal Courts Rules* (Summary Judgment and Summary Trial) were passed which will impact IP litigation in Canada. The main change under the new Rules is that conflicting evidence can now be resolved on a summary judgment or trial motion by the Court, so long as it is not unjust to do so. The rule is modeled after Rule 18(A) of the British Columbia*Supreme Court Rules*, which has allowed many complex commercial cases to be resolved summarily through affidavit evidence, rather than live witness testimony.

While the motion in appeal in Sterling arose under the old summary judgment rules, the reasoning will continue to apply under the new rules, lending them even greater momentum.

Consequently it is expected that there will be an increasing number of IP cases seeking summary judgment or summary trial in Canada. We may also see fresh attempts to bring a 'Markman hearing' approach to claim construction.

In light of these changes parties should ensure that documents and experts are identified early in any patent case, as there may be as little as 10 days to prepare a defence to a summary judgment or trial motion.