

Federal Court



Cour fédérale

**Date: 20206015**

**Docket: T-449-17**

**Citation: 2020 FC 688**

**Vancouver, British Columbia, June 15, 2020**

**PRESENT: Case Management Judge Kathleen Ring**

**BETWEEN:**

**FARMOBILE, LLC**

**Plaintiff/  
Defendant by Counterclaim**

**and**

**FARMERS EDGE INC.**

**Defendant/  
Plaintiff by Counterclaim**

**ORDER AND REASONS**

[1] On May 8, 2020, the Defendant/Plaintiff by Counterclaim, Farmers Edge Inc. [Farmers Edge] submitted a notice of motion for summary judgment to the Court dismissing the patent infringement action brought by the Plaintiff/Defendant by Counterclaim, Farmobile, LLC [Farmobile]. Farmers Edge also requested a case management conference to set a schedule for the motion.

[2] The notice of motion was referred to the Court for directions as to filing pursuant to Rule 72 of the *Federal Courts Rules*, SOR/98-106 [Rules], because it potentially did not comply with Rule 213(1). Rule 213(1) requires a party bringing a motion for summary judgment to do so any time “before the time and place for trial have been fixed” [hereinafter, the “Timing Condition”].

[3] It appeared this matter engaged the Timing Condition. As will be described in greater detail below, a trial date has been set down in this matter on three separate occasions. Most recently, the trial was fixed to commence on June 1, 2020. By Order dated April 20, 2020, the trial was adjourned *sine die* as a result of the COVID-19 pandemic.

[4] The Court directed that it would receive the notice of motion but await Farmobile’s position on Rule 213(1) before allowing its filing. Following review of correspondence received from both parties, the Court directed the parties to file written submissions that specifically address the application of the Timing Condition to the motion for summary judgment.

[5] A case management conference was held by videoconference on May 27, 2020. I heard submissions from the parties as to whether Farmers Edge should be permitted to bring its intended motion for summary judgment.

[6] Farmers Edge’s primary position is that the Timing Condition is not engaged because no trial date is currently scheduled. Even if the Timing Condition were engaged, Farmers Edge argues that the Court should exercise its discretion pursuant to Rule 55 to dispense with compliance with the Timing Condition and allow its proposed summary judgment motion to proceed.

[7] For its part, Farmobile submits that the Timing Condition is triggered because a trial has been set down on three occasions. Further, it argues that Farmers Edge’s motion for summary judgment should not be permitted to proceed under Rule 55 because it will not save resources or dismiss Farmobile’s claim.

[8] The issues to be determined on this motion are:

- (a) Is the Timing Condition engaged?
- (b) If the Timing Condition is engaged, should the Court allow the summary judgment motion to proceed under Rule 55?

[9] For the reasons that follow, I find that Farmers Edge’s motion should not be permitted to proceed.

I. Is the Timing Condition Engaged?

[10] Rule 213(1) states that “[a] party may bring a motion for summary judgment or summary trial on all or some of the issues raised in a pleading *at any time* after the defendant has filed a defence but *before the time and place for trial have been fixed* [emphasis added].”

[11] A brief review of the procedural history of this matter — as regards trial scheduling — is required to properly contextualize Farmers Edge’s request:

- (a) By Order dated January 29, 2019, the Chief Justice fixed a 10-day trial of this matter commencing on **December 9, 2019**, in Winnipeg.

- (b) By Order dated August 26, 2019, the trial was adjourned *sine die*, on consent of the parties, with a direction to Farmobile to submit a request for a new trial date to the Judicial Administrator by September 3, 2019.
- (c) By Order dated October 10, 2019, the Chief Justice fixed a 10-day trial of this matter commencing on **February 10, 2020**, in Winnipeg.
- (d) After changing counsel, Farmers Edge filed a contested motion on November 12, 2019, to adjourn the trial due to an expert's conflict. By Order dated December 4, 2019, the trial was again adjourned *sine die*, with a direction to Farmobile to submit a request for a new trial date to the Judicial Administrator by December 11, 2019.
- (e) By Order dated January 28, 2020, the Chief Justice fixed a 12-day trial of this matter commencing on **June 1, 2020**, in Winnipeg.
- (f) By Order dated April 20, 2020, the trial was again adjourned *sine die* due to the COVID-19 pandemic and the Court's Practice Directions and Orders relating thereto, which suspended the running of timelines under Orders and Directions of the Court in response to the pandemic.

[12] Farmers Edge submits that the Timing Condition is not engaged because its summary judgment motion was brought after the trial was adjourned *sine die*, so the time and place for trial is currently not fixed. According to Farmers Edge, the purpose underlying the Timing Condition is to supervise the use of summary judgment when the time and place for trial is

already fixed to avoid derailing trial without justification. It says that Farmobile's position is contrary to this purpose and the plain and ordinary text of Rule 213(1).

[13] Farmobile submits that the Timing Condition is triggered because the trial has been fixed three times now. It argues that Farmers Edge's request offends the spirit of Rule 213(1), as allowing the motion to proceed in tandem with trial preparations would delay the trial of this matter and result in considerable duplication of effort.

[14] The current version of Rule 213(1) was enacted in 2009. There appears to be no reported jurisprudence that interprets the rule's phrase "before the time and place for trial have been fixed" in the context of a summary judgment motion tendered for filing after the initial trial date has been fixed but within a discrete time interval during which the trial is adjourned *sine die*.

[15] Rule 213(1) imposes a temporal limit on a party's right to bring a motion for summary judgment. A party must bring such a motion before the time for trial "has been fixed". The words in Rule 213(1) must be read in their entire context harmoniously with the Court's trial scheduling process and the overarching objective of the Rules.

[16] As stated in the Notice to the Profession relating to adjournments dated May 8, 2013, "[t]he Federal Court operates on a guaranteed, fix-date system. When the Court has fixed a date for trial, parties are expected to proceed on that date." It follows that, in order to be ready for trial, parties must focus their time and resources on trial preparation once a trial date has been fixed.

[17] The requirement on each party to continue advancing their case to trial does not suddenly disappear or change simply because a trial date is temporarily adjourned *sine die* due to exceptional and unforeseen circumstances. Rather, parties are expected to maintain their focus on trial preparation so that the matter reaches trial in a timely manner. This is consistent with the objective, which is clearly expressed in Rule 3, to bring the trial on as quickly as possible and in the most efficient and cost-saving manner: *Sawbridge Band v Canada*, (1998), 157 FTR 236 at para 6.

[18] The preparation of evidence for and the hearing of a summary judgment motion runs contrary to this objective. It distracts parties from trial preparation and thereby delays the trial.

[19] When Rule 213(1) is construed within this larger context, I conclude that it is intended to preclude a party from bringing a motion for summary judgment, without leave of the Court (Rule 55), after the first trial date is fixed, even if it is later adjourned. It furthers the objective of ensuring that cases set down for trial (three times in this case) advance towards trial as quickly as possible, and avoids the delay occasioned by the additional step of preparing for and hearing of a summary judgment motion. Rule 55 affords the requisite flexibility by permitting the Court to dispense with compliance with the Timing Condition in appropriate circumstances.

[20] Additionally, I must reject the interpretation of the Timing Condition proposed by Farmers Edge because it leads to an absurd result. On the facts of this case, the consequence of such a narrow interpretation is that Farmers Edge would have been afforded three brief sporadic windows of opportunity to bring a motion for summary judgment over the past year-and-a-half since the first trial date was fixed (*ie* between August 26 – October 9, 2019, December 4, 2019 – January 27, 2020, and April 20, 2020 to present, after the trial was adjourned *sine die*). Apart

from those brief time intervals, Farmers Edge would have otherwise been prevented by the Timing Condition from bringing a summary judgment motion while a trial date was fixed: January 29 – August 25, 2019, October 10 – December 3, 2019, and January 28 – April 19, 2020.

[21] Accordingly, I conclude that the Timing Condition, properly interpreted, prevents Farmers Edge from filing a motion for summary judgment at this stage, as of right, because a trial date was previously fixed (three times) in the proceeding. I must therefore address Farmers Edge's alternative request seeking leave of the Court to dispense with compliance with the Timing Condition pursuant to Rule 55.

## II. Should the Court Allow the Motion to Proceed under Rule 55?

[22] Pursuant to Rule 55, the Court may vary a rule or dispense with compliance with the Rules in special circumstances. It is open to the Court under Rule 55 to permit a motion for summary judgment to proceed notwithstanding that a trial date has already been fixed: *Hoffmann-La Roche Limited v Pfizer Canada Inc*, 2018 FC 932 at para 4 [*Hoffman*].

[23] The decision to dispense with compliance with Rule 213 is discretionary and must be considered based on the facts of the particular case before the Court. It must bear in mind the principle of proportionality and the efficient use of the parties' and judicial resources. In determining whether to exercise this discretion, the Court stated that it must consider whether permitting the motion to be brought will promote the just, most expeditious, and least expensive determination of the proceeding on its merits. *Hoffman* at para 5.

[24] In *Hoffman*, the Court considered the following factors in disposing of a request to dispense with Rule 213 in the context of an action commenced under the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133 [PMNOC Regulations] (para 5):

- A. Whether special circumstances exist;
- B. Whether there will be a significant savings of costs, savings of time and efficiencies from permitting the motion to proceed, including a consideration of whether the motion seeks a determination of all or a portion of the issues raised in the action, whether the motion can reasonably be heard and determined sufficiently in advance of the existing trial date, and which procedural steps and expenses could be avoided if the motion is successful;
- C. Whether any of the parties would be prejudiced by permitting the motion to proceed;
- D. The level of cooperation of the moving party exhibited to date in the proceeding as required by section 6.09 of the PMNOC Regulations; and
- E. Whether the moving party seeks to bring the motion in a timely manner.

[Emphasis original]

[25] Farmers Edge submits that each of these factors supports its proposed summary judgment motion and should therefore be allowed to proceed.

[26] Farmobile argues that Farmers Edge should not be granted leave to proceed with its summary judgment. According to Farmobile, the proposed motion will not save resources or dismiss its claim. It says that Farmers Edge has delayed in bringing its motion, so allowing it to proceed now would prejudice Farmobile.



[27] Turning to the first factor, Farmers Edge argues that the COVID-19 pandemic is a special circumstance that renders summary judgment appropriate. The motion can be heard remotely, without the need for travel or an in-person hearing.

[28] Without question, the COVID-19 pandemic is an unprecedented event that significantly impacted the operation of courts across Canada. However, I do not accept the underlying premise advanced by Farmers Edge that its summary judgment motion should be allowed to proceed because it can be conducted remotely, whereas the trial cannot be conducted remotely, during the COVID-19 pandemic (according to Farmers Edge).

[29] The Federal Court is committed to remaining accessible to Canadians during this extraordinary time. To that end, it has expanded the range of matters that it is prepared to adjudicate by video conference and teleconference. For example, in *Rovi Guides, Inc v Videotron Ltd*, 2020 FC 596 [*Rovi Guides*], the Court ordered the resumption of the trial of a patent infringement action, commencing on May 25, 2020. It directed that the trial be conducted remotely using the eTrial Tool Kit and Zoom, or such other platform as may be directed by the Court. Justice Lafrenière stated at paragraph 21:

[21] Until a vaccine to prevent COVID-19 is widely available in Canada, or until public health officials lift stay-at-home orders and relax restrictions so as to allow people to travel safely, assemble and return to work, hearings of the Federal Court will have to be conducted remotely using the appropriate, available technology. Given that Court facilities will remain closed for the foreseeable future, Videotron's objection must be rejected since it would result in delaying the trial indefinitely.

[30] As regards the second factor, Farmers Edge has not discharged its burden of satisfying the Court that there *will* be a *significant* savings of costs, time, and efficiencies by permitting the

motion to proceed. In its notice of motion, Farmers Edge asserts that the motion's duration is one half-day. Farmobile vehemently rejects this time estimate as being "wildly unrealistic" given the length of the patent and the number of factual issues, affidavits, and legal issues, *etc.* Farmobile estimates that, optimistically, the hearing would take at least three or four days.

[31] Even on a cursory review of the notice of motion, I find it difficult to fathom how the motion can be heard in the highly compressed timeframe proposed by Farmers Edge. The notice of motion raises multiple claim construction issues relating to allegations of non-infringement of specific claim terms. For example, Farmers Edge asserts that each of the asserted claims pertain to a farming data exchange system or server system comprising an "Implement Profile", and that the FarmCommand system contains no such "Implement Profile". To further illustrate the point, it asserts that Claim 20 and its dependant claims pertain to a "Matching Function", and that the FarmCommand system includes no such "Matching Function".

[32] Farmers Edge has not provided its proposed affidavits in support of its summary judgment motion to the Court. Instead, counsel states that the evidence in support of its motion will only be delivered if the motion proceeds. As such, the Court is being asked to find that the proposed motion will result in "significant" savings and efficiencies without any clear indication of the nature or volume of evidence to be adduced on the motion.

[33] This litigation has been specially managed for several years and it is now at a very advanced stage. The parties were only two-and-a-half months from their 10-day trial commencing June 1, 2020, when the Court imposed the first suspension period due to the COVID-19 pandemic. The pleadings underwent numerous amendments. The parties completed voluminous document production and conducted multiple rounds of examinations for discovery.

The proceeding was the subject of numerous interlocutory motions. Expert reports in chief were due for filing on March 20, 2020, merely four days after the first suspension period was imposed. The parties' expert reports in chief were — or should have been — very near completion.

[34] Even if the motion succeeds, it will not result in a full adjudication of every issue in the litigation. Farmers Edge confirmed at the case management conference that the motion will not address its counterclaim for invalidity.

[35] Accordingly, in the particular circumstances, I am not satisfied that Farmers Edge has demonstrated significant savings of costs or time, or efficiencies resulting if the motion is permitted to proceed.

[36] Turning to the third factor considered in *Hoffman*, I am satisfied that Farmobile will suffer some prejudice if the summary judgment motion is allowed to proceed. The parties are in the final stages of trial preparation with a set schedule to trial. Accordingly, if the motion proceeds at this late stage, it will inevitably result in some duplicate costs and efforts and distract the parties from completing their final trial preparation in a timely manner.

[37] Finally, I find that Farmers Edge has not provided a satisfactory explanation for its delay in bringing a summary judgment motion. Farmers Edge has known about the alleged grounds of infringement that it asserts on this motion since at least May 2019, when Farmobile expressed its intention to amend its pleading in this regard. Farmers Edge did not move for summary judgment on the issue of infringement until May 8, 2020 (a full year later).

[38] Farmers Edge contends that its motion was not ripe for determination until it completed its fact discovery of Farmobile. I am not persuaded by this argument. The notice of motion indicates that the basis for Farmers Edge's motion for summary judgment is that it has not infringed various claims of the '742 Patent because its FarmCommand system does not include specified elements or functions required by those claims. Facts relating to the FarmCommand system are facts that fall squarely within Farmers Edge's knowledge. It follows that Farmers Edge will be relying on its own evidence to make its case for summary judgment.

[39] Even if Farmers Edge is correct that completion of its fact discovery of Farmobile was required, Farmers Edge has not demonstrated that it brought its summary judgment motion in a timely manner. When questioned at the May 27, 2020 case management conference about the timing of its fact discovery of Farmobile, counsel for Farmers Edge acknowledged that the discovery was completed on January 23, 2020. Farmers Edge has not adequately explained why it waited almost four months after that discovery's completion before moving for summary judgment. Accordingly, this factor weighs against permitting the motion to proceed.

[40] On balance, having carefully considered the above factors in light of the particular facts of this case, I conclude that this is not an appropriate case to exercise my discretion to dispense with compliance with Rule 213(1). Farmers Edge's request to proceed with a motion for summary judgment is therefore dismissed.

[41] Farmobile seeks costs of \$5,000.00 payable forthwith in any event of the cause. Given that it successfully resisted Farmers Edge's request to proceed with its proposed summary judgment motion, I conclude that costs should be awarded to Farmobile. Costs are hereby fixed

in the amount of \$5,000.00, inclusive of disbursements and taxes, payable by Farmers Edge to Farmobile in any event of the cause, but not forthwith.

**ORDER**

**THIS COURT ORDERS that:**

1. Farmers Edge's proposed motion for summary judgment shall not be permitted to proceed.
2. Costs are hereby fixed in the amount of \$5,000.00, inclusive of disbursements and taxes, payable by Farmers Edge to Farmobile in any event of the cause.

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"Kathleen M. Ring"  
Case Management Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-449-17

**STYLE OF CAUSE:** FARMOBILE, LLC v FARMERS EDGE INC.

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** MAY 27, 2020

**ORDER AND REASONS:** CASE MANAGEMENT JUDGE KATHLEEN M. RING

**DATED:** JUNE 15, 2020

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