Federal Court of Appeal | Cour d'appel fédérale

Date: 20210616

Dockets: A-115-20
A-43-20
A-13-20
A-477-19

Citation: 2021 FCA 122

CORAM: **STRATAS J.A.**
LASKIN J.A.
MACTAVISH J.A.

BETWEEN:

VIIV HEALTHCARE COMPANY, SHIONOGI & CO., LTD. and VIIV HEALTHCARE ULC

Appellants

and

GILEAD SCIENCES CANADA, INC.

Respondent

Heard by online video conference hosted by the Registry on April 19, 2021.

Judgment delivered at Ottawa, Ontario, on June 16, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: LASKIN J.A.
MACTAVISH J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellants (collectively "ViiV") appeal from three interlocutory orders of the Federal Court (all *per* Manson J.). ViiV also appeals a summary judgment dismissing its patent infringement action against the respondent, Gilead (*per* Manson J.): 2020 FC 486.

[2] For the reasons that follow, I would dismiss the appeals with costs.

A. Background and the appeals from the interlocutory orders

[3] The patent in issue, Canadian Patent No. 2,606,282, owned by some of the ViiV companies, covers several classes of chemical compounds.

[4] ViiV took the view that Gilead's compound, bictegravir, a component of a drug for treating HIV, infringed its patent. So it brought an action against Gilead for patent infringement. Gilead counterclaimed on the basis that ViiV's patent was invalid.

[5] In August 2019, roughly eighteen months into the action, Gilead brought a motion for summary trial under Rule 216 on the issue of patent infringement. The Federal Court scheduled the motion to be heard in January 2020.

[6] ViiV objected to the bringing of the motion and stated it would move to adjourn or quash it. However, ViiV did not complete its filings on the motion to quash until December 2019, just before the hearing of the summary trial. By that time, the parties had done significant preparations for the summary trial. For example, voluminous expert evidence had already been filed: 2020 FC 11 at paras. 10-12.

[7] The Federal Court dismissed the motion to adjourn or quash: 2020 FC 11. It held that the summary trial would go ahead. But whether it would grant summary judgment was a different

matter. It said it would rule on the appropriateness of that at the summary trial itself: 2020 FC 11 at para. 22.

[8] In file A-13-20, ViiV appeals the Federal Court's dismissal of the motion to quash. The Federal Court conducted a factually suffused, discretionary assessment of the circumstances relevant to whether the summary trial should go ahead as scheduled. As well, the Federal Court found that many of the materials in support of the motion to quash were improper and the motion to quash was brought very late: 2020 FC 11 at paras. 12 and 19. In the course of its reasons, the Federal Court also offered some observations about the propriety of motions to quash. These observations will be addressed later in these reasons. Overall, ViiV has not established any reviewable error on the part of the Federal Court and so I would dismiss this appeal.

[9] Along the way, the Federal Court dismissed two other interlocutory motions brought by ViiV:

- The Federal Court dismissed ViiV's motion to compel production of certain documents: 2019 FC 1579. ViiV appeals this in file A-477-19.

- The Federal Court dismissed ViiV's hearsay objection to the admission into evidence of the product monograph of bictegravir: Order dated January 24, 2020. ViiV appeals this in file A-43-20.

Both of these appeals should be dismissed.

[10] As for the appeal concerning the production of certain documents, there are two reasons why it should be dismissed. First, the documents are relevant only to a variant theory of infringement and later in these reasons I reject that theory. Second, ViiV argues that the productions are relevant to Gilead's counterclaim on the basis that the patent is invalid. But Gilead undertakes that it will discontinue its invalidity counterclaim if it is successful on all appeals. Given that I propose that very result, Gilead will discontinue its invalidity counterclaim and so the productions sought by ViiV are irrelevant.

[11] As for the appeal concerning the admissibility of the product monograph of bictegravir, I would also dismiss it. In the end, even if the Federal Court erred, its consideration of the monograph is of no moment. The record shows that the parties agreed on most of the structure of bictegravir, including, as we shall see, the most important part: it has a bridged bicyclic ring at the "Ring A" position. The parties only disagree about some stereochemistry which is irrelevant to the infringement issue: Excerpts from Plaintiffs' Fresh as Amended Written Representations, para. 54, A-43-20 Appeal Book Vol. 1, Tab 5 (Appendix 3), at 156-158. In response to questions at the hearing, ViiV could not say how this case would have been decided differently if the product monograph were excluded from evidence.

B. The summary trial issues

(1) Introduction: a review of the principles

[12] When a motion for summary judgment or summary trial is brought, how should the Court proceed? What exactly is the methodology the Court should follow? These days, the answer is rather unclear.

[13] Some suggest that the Court can consider first whether a motion for summary judgment or summary trial should be entertained at all and, if not, the Court, on its own initiative, can dismiss it right away: *e.g.*, *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd*., 2010 FC 966, 87 C.P.R. (4th) 412 at paras. 5-7. Others suggest that a party can bring a motion to quash a motion for summary judgment or summary trial on the basis that it should not be entertained at all. Still others, such as the Federal Court here (2020 FC 11 at para. 22), suggest that motions to quash should not be brought. And others never consider the issue unless a party has raised it.

[14] Lack of clarity also stems from the fact that judges and counsel often address whether a summary judgment motion or a summary trial is "appropriate" but a review of the case law shows that "appropriate" means different things to different judges. For some, "appropriate" is a shorthand for whether the summary proceedings should be entertained at all: *Bosa Estate v. Canada (Attorney General)*, 2013 FC 793, 436 F.T.R. 288 at para. 22; *Premium Sports Broadcasting Inc. v. 9005-5906 Québec Inc. (Resto-bar Mirabel)*, 2017 FC 590 at para. 5;

Collins v. Canada, 2014 FC 307, 2014 D.T.C. 5066. For others, "appropriate" is a shorthand for whether a judgment should be granted based on the facts and the law before them: *Cabral v. Canada (Citizenship and Immigration)*, 2016 FC 1040, 46 Imm. L.R. (4th) 209; *Trevor Nicholas Construction Co. Limited v. Canada (Minister of Public Works)*, 2011 FC 70, 328 D.L.R. (4th) 665. And others seem to mix and match by using "appropriate" to embrace both of these issues: *Tremblay v. Orio Canada Inc.*, 2013 FC 109, [2014] 3 F.C.R. 404 at paras. 24-27; *Teva Canada Limited v. Wyeth and Pfizer Canada Inc.*, 2011 FC 1169, 99 C.P.R. (4th) 398; *0871768 B.C. Ltd. v. Aestival (Vessel)*, 2014 FC 1047, 467 F.T.R. 1 at paras. 58-63; *Burns Bog Conservation Society v. Canada*, 2012 FC 1024, 417 F.T.R. 98 at para. 65.

[15] Better clarity on this would benefit judges and counsel alike. The quest for clarity begins with an understanding of three basic operative principles concerning the practice and procedure of the Federal Courts.

[16] First, the practice and procedure of the Federal Courts draws upon two sources, one primary, one secondary. The primary source is the *Federal Courts Rules*, S.O.R./98-106. The Rules set out standards expressly and by necessary implication. They supply most of the substantive content of the practice and procedure of the Courts. The secondary source is the plenary powers of the Courts—the powers that the Courts possess by virtue of being courts under section 101 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, Appendix II, No. 5. These allow the Courts, among other things, to run and govern their essential back-office operations, such as the Registry, and to regulate their proceedings and the litigants who prosecute and defend them. The plenary powers of the Courts are always live. They can be

drawn upon by the Courts when just and appropriate as long as there is no legislative text in the way.

[17] The second operative principle is that the *Federal Courts Rules* generally permit the parties to prosecute and defend their cases as they see fit. The general default position in the Federal Courts system is that litigation is party-run. Putting aside specific court orders or directions that might be issued in particular cases and putting aside the rules on case management, parties can file documents at any time within the deadlines set by the Rules and they can file motions whenever they wish. But this is only a default position.

[18] The third operative principle is the centrality in our practice and procedure of Rule 3 of the *Federal Courts Rules*. Rule 3 provides that the *Federal Courts Rules* shall be interpreted and applied so that "every proceeding" is determined "on its merits" in "the just, most expeditious and least expensive" way. Inherent in Rule 3 is the concept of proportionality: *Canada (Board of Internal Economy) v. Canada (Attorney General)*, 2017 FCA 43, 412 D.L.R. (4th) 336 at para. 11. The words "every", "most" and "least" in Rule 3 deserve particular attention. They encourage interpretations and applications of the Rules that are proactive in preventing, eliminating or minimizing conduct that causes delay and cost.

[19] The three operative principles guide us in answering practical questions of procedure and practice. Take this one for example. A party brings a motion. The motion appears to have little merit but it is quite harmful in terms of the time and the expense it will cause. Can the opposing party bring a motion to quash it or, alternatively, to adjourn it? This question squarely arises in

this case, as ViiV brought a motion in the Federal Court to quash or adjourn Gilead's summary trial motion.

[20] The operative principles, above, suggest that in rare circumstances motions to quash or to adjourn a motion can be brought. When brought early and dealt with quickly before time is wasted and the resources of the Court and the parties are squandered, they can proactively advance the objectives of Rule 3 and stop harmful litigation conduct in its tracks. In this way, motions to quash or adjourn are analogous to motions under the Rules concerning scheduling, case-management and the restraining of abuses of process. Thus, although not expressly permitted by a specific rule, they fall under Rule 4.

[21] A motion to quash is not the place to raise substantive defences to the motion, no matter how strong; the responding motion record under Rule 369(2) is the place to do that. As well, it should not be a time-wasting and resource-exhausting exercise in itself. No matter which side is doing it, filibustering proceedings by bringing useless, unnecessary motions has no place in the Federal Courts system.

[22] In appropriate circumstances, can the Court act on its own initiative to refuse to entertain a problematic motion, *i.e.*, one where the time and the expense it will cause is disproportionate to its benefit?

[23] Yes. The Court need not wait for a responding motion. The Court is not stuck in a purely passive role, standing idly by and watching helplessly as a problematic motion tips the proceeding into an abyss of delay, waste and chaos.

[24] The Court is a scarce community resource that must be preserved and managed in the public interest: *Canada v. Olumide*, 2017 FCA 42, [2018] 2 F.C.R. 328 at paras. 17-20. Using its plenary powers, the Court can act on its own initiative to invite submissions and then, when warranted, can issue orders, directions or both to advance the Rule 3 objectives. For example, this Court has relied on its plenary powers as a court to act proactively to deal with problematic litigation conduct: see *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at para. 38 and cases cited therein; see also *Fabrikant v. Canada*, 2018 FCA 171, *Fabrikant v. Canada*, 2018 FCA 224, *Mazhero v. Fox*, 2014 FCA 219, *Philipos v. Canada (Attorney General)*, 2016 FCA 79, [2016] 4 F.C.R. 268 and many others.

[25] However, the Court should not be quick to act on its own initiative. The general principle that litigation in the Federal Courts system is party-run, not Court-run, deserves respect and must be given due weight. Put another way, the parties deserve deference and a good margin of appreciation in the litigation choices they make. But deference does not mean unquestioning acceptance and no margin of appreciation is limitless.

[26] Quite aside from the foregoing, the Court always has a wide discretion guided by the objectives of Rule 3 to issue directions or orders concerning scheduling and the manner in which the motion is to be prosecuted, defended and argued.

[27] The Court must always respect the principles of procedural fairness. Before making any ruling that may affect the interests of the parties, the Court must invite submissions and consider them.

[28] How do these principles play out in summary judgment motions and summary trial motions under Rules 213-216?

[29] Where a motion for summary judgment or summary trial or its timing seems problematic in the sense described above, a motion to quash or adjourn may be brought subject to the qualifications set out above. Absent such a motion, the Court—acting on its own initiative in accordance with the principles set out above—can invite submissions and then decide the issue whether a motion for summary judgment or summary trial should be entertained at all or should be adjourned. Quite aside from this, in dealing with any motion for summary judgment or summary trial, the Court has a wide discretion governed by the objectives of Rule 3 concerning scheduling and the manner in which the motion is to be prosecuted, defended and argued.

[30] I turn now to the specific wording of Rules 213-216.

[31] Rule 213 provides that “[a] party may bring a motion for summary judgment or summary trial on all or some of the issues raised in the pleadings” any time after “the defendant has filed a defence” but “before the time and place for trial have been fixed”.

[32] Rule 215 governs when the Court may grant summary judgment. It provides that if the Federal Court "is satisfied that there is no genuine issue for trial with respect to a claim or defence", the Court shall grant summary judgment. There is "no genuine issue for trial" where the judge has "the evidence required to fairly and justly adjudicate the dispute" on a summary basis, *i.e.*, where "the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result": *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 at paras. 49 and 66; see also *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v. Aga*, 2021 SCC 22 at para. 25 and *Manitoba v. Canada*, 2015 FCA 57, 470 N.R. 187 at para. 11.

[33] Put another way, "a case ought not to proceed to trial, with all the consequences that would follow for the parties and the costs involved for the administration of justice, unless there is a genuine issue that can only be resolved through the full apparatus of a trial": *Canmar Foods Ltd. v. TA Foods Ltd*., 2021 FCA 7 at para. 24.

[34] Even if there is a "genuine issue of fact or law for trial with respect to a claim or defence", the Court may "nevertheless determine that issue by way of summary trial": Rule 215(3). In such cases, judges have greater powers to decide disputed questions of fact: *Manitoba* at para. 16; *Milano Pizza Ltd. v. 6034799 Canada Inc.*, 2018 FC 1112, 159 C.P.R. (4th) 275 at para. 32.

[35] Rule 216 governs the Court's discretion as to whether to hold a summary trial. The Court may decline to do so if "the issues raised are not suitable for summary trial" or "a summary trial would not assist in the efficient resolution of the action": Rule 216(5). The Rule also provides that even if the amounts involved are high, the issues are complex or the evidence is conflicting, "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": Rule 216(6).

[36] What do the words "issues…not suitable for a summary trial" and "assist in the efficient resolution of the action" in Rule 216(5) mean? What is "unjust" within the meaning of Rule 216(6)?

[37] These words "must be interpreted [and applied] broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims": *Hryniak*, above at para. 5. In other words, they must be interpreted and applied consistently with the objectives in Rule 3.

[38] Appropriately mindful of the wording of these Rules and Rule 3, the Federal Court has developed useful factors relevant to whether the prerequisites in the Rules for summary judgment or summary trial have been met: *Wenzel* at paras. 38; *Bosa Estate* at para. 22; *Tremblay* at para. 24.

[39] Also highly useful is the concise, comprehensive and accurate summary of the law under Rules 215 and 216—including the effect of the Supreme Court's decision in *Hryniak*—in *Milano Pizza* at paras. 24-40.

[40] Some of the cases cited in *Milano Pizza* show that in some cases summary proceedings just add to the cost and duration of litigation. But other cases cited in *Milano Pizza* show that in some cases summary proceedings can improve access to speedy, cost-efficient justice.

[41] It is hard enough for parties to drive all the way to the final destination of trial and final determination of the merits of the litigation; to have their journey interrupted along the way and put through summary proceedings is harder still. But a summary procedure can sometimes provide the parties with an express route to their final destination. It all depends. The wise exercise of judicial discretion is called for: taking the words of the Rules, viewing them in light of the objectives of Rule 3 and examples in the case law, and applying them to the particular circumstances of the case.

[42] At the end of the day, the Court must be satisfied that the prerequisites in the Rules for summary judgment or summary trial, understood in light of Rule 3, are met and that it is able to grant summary judgment, fairly and justly, on the evidence adduced and the law.

(2) Applying these principles to this case

[43] In file A-115-20, ViiV seeks to overturn the Federal Court's finding that a "summary judgment [trial] was an appropriate proceeding to advance the litigation and narrow the issues in dispute" given the "narrow and well-defined issues before the Court". The Federal Court found that given the facts and the law before the Court, it was in a position to grant judgment: 2020 FC 486 at paras. 1 and 11-18.

[44] ViiV contends that the Federal Court ignored the issue of onus of proof. I disagree: see 2020 FC 486 at paras. 19-22.

[45] ViiV also submits that the Federal Court erred in law or in fact in granting summary judgment in this case. But ViiV's submissions do not identify an extricable legal question on which the Federal Court erred. In substance, ViiV asks this Court to reweigh the matter and come to a different conclusion.

[46] On appeal, that is not our task. If the Federal Court does not commit legal error and does not commit palpable and overriding error in applying the law to the circumstances of the litigation before it, this Court cannot interfere: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. We are especially loath to interfere where, as here, a particular judge of the Federal Court is either case-managing or is closely involved in regulating the course of the proceedings. ViiV has not demonstrated any reversible error on the part of the Federal Court.

[47] In the course of its reasons on the motion to quash or adjourn, the Federal Court suggested it has no authority to consider preliminary motions to quash motions for summary judgment or motions for summary trial: 2020 FC 11 at paras. 25-26. Given the analysis above concerning the availability of motions to quash or adjourn, this is incorrect.

C. The Federal Court's finding that the patent, properly construed, did not cover bictegravir

[48] The Federal Court found bictegravir did not infringe the patent. As a result it granted summary judgment in favour of Gilead. ViiV challenges this, alleging a number of legal grounds for reversal. These are described below. In my view, there are no grounds to set aside the Federal Court's grant of summary judgment in favour of Gilead.

[49] The Federal Court's judgment turned on its construction of claims 1, 11 and 16 of the patent and the construction of "Ring A" described in those claims.

[50] The parties agree that Gilead's drug, bictegravir, is substantially the same as the compounds described in claims 1, 11 and 16 except at the "Ring A" position.

[51] Claim 1 describes "Ring A" as an "optionally substituted heterocycle". Claim 11 describes it as an "optionally substituted and optionally condensed 5- to 7- membered heterocycle containing 1 to 2 hetero atom(s)". And Claim 16 describes it as an "optionally substituted and optionally condensed 5- to 7- membered heterocycle…[where] two of the substituents taken together with the neighboring atom(s), may form an optionally substituted carbocycle or optionally substituted heterocycle". The question, one of construction, was whether these include bridged bicyclic rings—the type of structure at the "Ring A" position of bictegravir.

[52] In the Federal Court, ViiV argued that “Ring A” covers bridged bicyclic rings and so bictegravir offends the patent. Gilead argued that “Ring A” does not include bridged bicyclic rings and so bictegravir is outside of the patent.

[53] The Federal Court agreed with Gilead. It found that “Ring A” as defined in claims 1, 11 and 16 includes only spiro and fused bicyclic rings, not bridged bicyclic rings.

[54] In the course of its reasons, the Federal Court found the claims themselves were unclear, such that a person ordinary skilled in the art (“POSITA”) would not know what is covered and what is not. As a result, the POSITA would have to resort to the patent disclosure to determine the scope of “Ring A”.

[55] On appeal, ViiV submits that the Federal Court made many errors of law in construing the claims.

[56] Construction of a patent is a question of law: *Whirlpool Corp. v. Camco Inc.*, 2000 SCC 67, [2000] 2 S.C.R. 1067 at paras. 61 and 76. However, the Federal Court is entitled to deference in its appreciation of the evidence, particularly the expert evidence, which affects the construction: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada Inc.*, 2012 FCA 109, 432 N.R. 292 at para. 20; *Wenzel Downhole Tools Ltd. v. National-Oilwell Canada Ltd.*, 2012 FCA 333, [2014] 2 F.C. 459 at para. 44; *Bell Helicopter Textron Canada Limitée v. Eurocopter*, 2013 FCA 219, 449 N.R. 111 at paras. 73-74; *ABB Technology AG v. Hyundai Heavy Industries Co., Ltd.*, 2015 FCA 181, 475 N.R. 341 at paras. 22-24. In particular, the appreciation of expert

evidence as to how a POSITA would understand the claims and any specific wording as well as what common general knowledge was available to the POSITA at the date of publication is a question of fact reviewable under the palpable and overriding error standard: *Bombardier Recreational Products Inc. v. Arctic Cat, Inc.*, 2018 FCA 172, 159 C.P.R. (4th) 319 at paras. 15-16; *Apotex Inc. v. Astrazeneca Canada Inc.*, 2017 FCA 9 at paras. 29-30; *Tearlab Corporation v. I-MED Pharma Inc.*, 2019 FCA 179, 166 C.P.R. (4th) 367 at para. 29. For these things, the standard of review is the hard-to-meet standard of palpable and overriding error: *Cobalt Pharmaceuticals Company v. Bayer Inc.*, 2015 FCA 116, 474 N.R. 311 at para. 15; *ABB Technology* at para. 24.

[57] ViiV says the Federal Court erred in law by referring to the patent disclosure when construing the claims.

[58] I disagree. It is trite law that a patent must be read contextually in light of the entire patent and all of the necessary expert evidence: *Jansen Inc. v. Teva Canada Limited*, 2015 FC 184, 128 C.P.R. (4th) 129 at paras. 92-93; *Teva Canada Limited v. Janssen Inc*., 2018 FC 754, 157 C.P.R. (4th) 391 at para. 236. Part of the necessary context is the disclosure: *Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, [1981] 1 S.C.R. 504, 122 D.L.R. (3d) 203 at 520-521 S.C.R.

[59] ViiV submits that the Federal Court erred in law by resorting to the disclosure even though it found the claims “clear and unambiguous”.

[60] Again, I disagree. ViiV plucks the phrase “clear and unambiguous” from the Federal Court’s reasons and mischaracterizes it. A reading of the whole paragraph—not just one sentence in it—shows that the Federal Court found it necessary to go beyond the terms of the claim: 2020 FC 486 at para. 128.

[61] The reasons of first-instance courts are to be read holistically, making due allowance for awkward expression and efforts to synthesize reams of information: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3 at paras. 35 and 55; *Mahjoub v. Canada (Citizenship and Immigration),* 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 68; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at paras. 49-51. This means, among other things, that isolated sentences in reasons must be read in the context of the reasons and the record before the Court. When this is done here, it is obvious that the Federal Court understood correctly the role of disclosure in construing patent claims.

[62] ViiV says the Federal Court erred by construing the patent without biology/virology evidence from Gilead. ViiV does not say there was no biology/virology evidence at all before the Court; nor does it say such evidence is necessary to construe Ring A. It says, as a general matter, there should be a full POSITA team and there was not one here so the appeal must be allowed. It says this based on authorities that tell us that patents must always be construed contextually.

[63] I disagree. It is true that patents should be construed contextually in light of the entire patent and all of the necessary expert evidence. Put negatively, this means that one cannot create a fiction by cherry-picking part of a patent or part of the POSITA team. But this does not mean

that to understand a specific portion of a claim a court must always take into account every conceivable part of the context, whether or not it is useful to the construction. Where, as here, some piece of context does not assist with the construction, the Court need not consider it.

[64] In this case, biology/virology evidence would not have assisted in the interpretation of "Ring A". ViiV's own expert on the subject said as much: 2020 FC 486 at para. 79. And if virology/biology evidence were required, the Court had access to it: ViiV led an expert on biology/virology. Tellingly, ViiV does not refer to its biology/virology evidence at all on this appeal.

[65] ViiV submits that the Federal Court improperly limited claims 1, 11 and 16 to the preferred embodiments and that in doing this, the Federal Court impermissibly read language into the claims.

[66] Again, I disagree. As ViiV concedes, the Federal Court charged itself correctly on the law in this area: Appellant's memorandum of fact and law at para. 75. In reality, ViiV takes issue with how the Federal Court applied this law to the facts—a question of mixed fact and law with no extricable legal question for which the standard of review is palpable and overriding error.

[67] ViiV quibbles about the force of some authorities and the meaning of the term "may" in claim 16 of the patent. But it does not argue—let alone demonstrate—that the Federal Court made any palpable and overriding error such as obviously illogical findings, findings that are not supported by the record, or a complete disregard of evidence: see, e.g., *Mahjoub* at para. 62. The

Federal Court knew the law in this area, and clearly preferred Gilead's expert evidence to that of ViiV: 2020 FC 486 at paras. 130-136.

[68] Next, ViiV submits that even if bictegravir does not fall within the scope of claims 1, 11 and 16, it infringes the patent because it is a mere variation of a non-essential element of the patent. However, during the summary trial, ViiV conceded that "Ring A" is essential. ViiV's concession means the variant argument is not open to it.

[69] To try to limit the force of this concession, ViiV tries to chop the patent up into smaller and smaller pieces. It says it conceded only that Ring A, as a whole, is essential but it did not concede that certain forms of Ring A are essential. In saying this, ViiV is attempting to resile from the breadth of its concession in the Federal Court. This it cannot do. Its approach smacks of the "spirit of the invention" approach to patent infringement. Under this now-discredited approach, patent holders get two kicks at the can: first, they can try and show literal infringement and then, if unsuccessful, they can try to show infringement "in spirit". The Supreme Court has rejected this approach due to its uncertainty and unpredictability: *Free World Trust v. Électro Santé Inc.*, 2000 SCC 66, [2000] 2 S.C.R. 1024.

D. Proposed disposition

[70] Therefore, I would dismiss the four appeals with costs.

"David Stratas"
J.A.

"I agree
J.B. Laskin J.A."

"I agree
Anne L. Mactavish J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-115-20, A-43-20, A-13-20, and A-477-19

APPEAL FROM THE ORDER AND JUDGMENTS OF THE HONOURABLE MR. JUSTICE MANSON DATED JANUARY 24, 2020, DECEMBER 17, 2019, APRIL 6, 2020 AND JANUARY 31, 2020 RESPECTIVELY IN NO. T-226-18

STYLE OF CAUSE:	VIIV HEALTHCARE COMPANY, SHIONOGI & CO., LTD., AND VIIV HEALTHCARE ULC v. GILEAD SCIENCES CANADA, INC.
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DATED:	JUNE 16, 2021

APPEARANCES:

Donald M. Cameron Scott MacKendrick Melanie Szweras Michael Fenwick Anastassia Trifonova	FOR THE APPELLANTS
Tim Gilbert Nisha Anand Andrew Moeser Kevin P. Siu Andrea Rico Wolf Colin Carruthers	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Bereskin & Parr LLP Toronto, Ontario	FOR THE APPELLANTS
Gilbert's LLP Toronto, Ontario	FOR THE RESPONDENT