

# Goodmans<sup>LLP</sup> Update

## Evolution Technologies Earns Two Crucial IP Victories in the Federal Court of Appeal

The Federal Court of Appeal has now fully reversed a judgment of the Federal Court of Canada that had threatened to devastate the business of [Evolution Technologies Inc.](#) (“Evolution”), a Canadian-owned designer and manufacturer of four-wheeled walkers (“rollators”) and other mobility-aiding devices. The effect of this result is that Evolution will continue to provide the Canadian marketplace with its premium, high quality, sturdy, safe and innovative rollators.

### The Underlying Patent Infringement Trial

Julian Liu, Evolution’s founder, started his business in the summer of 1994 in Port Coquitlam, British Columbia. Since then, Julian has focused Evolution on product development, introducing new models each year in what has become a popular and diverse product line. Evolution’s efforts have resulted in nine issued Canadian patents.

In the summer of 2012, the predecessor to Human Care Canada Inc. (“HCC”), another mobility-aiding device company, commenced a patent infringement action against Evolution in the Federal Court.

In December 2018, on the eve of the holiday period, a judgment was issued by the Federal Court enjoining Evolution from making, importing and selling its best-selling line of products, its Xpresso rollators, and ordering it to pay more than \$12 million to HCC on account of patent infringement. See: *Human Care Canada v. Evolution Technologies*, 2018 FC 1302 (the “trial judgment”).

### Evolution’s Successful Stay Motion

With its very existence at stake, Evolution retained the Goodmans IP Team, led by Andrew Brodtkin, Richard Naiberg, Jordan Scopa and Jaclyn Tilak, to take over its legal representation. The Goodmans IP Team immediately set about bringing an appeal of the trial judgment to the Federal Court of Appeal and seeking an emergency stay of the trial judgment so that Evolution’s business would not be disrupted pending the outcome of the appeal (the “stay motion”).

Within one week, the Goodmans team assisted Evolution to collect substantial factual and expert affidavit evidence that would show the Federal Court of Appeal that Evolution would suffer irreparable harm and be unable to pursue its appeal if it were required to satisfy the monetary award in the trial judgment and that it would suffer irreparable reputational and economic harm if required to comply with the injunction.

Evolution also undertook to put in place a number of safeguards in the operation of its business to ensure that HCC would not be financially prejudiced should Evolution’s appeal be unsuccessful. These proposed safeguards were consistent with those previously approved by the Federal Court of Appeal on stay motions. See: *Canwell Enviro-Industries v. Baker Petrolite*, 2001 FCA 288 at paras. 24-25; and *P.S. Knight v. Canadian Standards Association*, 2017 FCA 49 at paras. 22-23.

The Federal Court of Appeal issued a decision granting the stay motion substantially on the terms requested by Evolution. See: *Evolution Technologies v. Human Care Canada*, 2019 FCA 11.

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As a preliminary matter, the Court addressed HCC's argument that Evolution's stay motion should be dismissed on the basis that Evolution did not come to the Court with "clean hands" (para. 9). In particular, HCC accused Evolution of breaching court orders during the course of the underlying patent infringement action (para. 10). The Court readily concluded that HCC was in fact unable to demonstrate any breach of any court order (para. 15).

With respect to the monetary award in the trial judgment, the Court agreed with Evolution's financial expert's evidence that attempting to satisfy the most significant aspects of the monetary award would result in irreparable harm (paras. 26-30).

With respect to the injunctive aspect of the trial judgment, the Court agreed with Evolution that, given that HCC was unwilling to offer any undertaking in damages to Evolution should its appeal be successful, there would necessarily be irreparable harm to Evolution as it would have no basis in law to otherwise recover damages for its lost sales of Xpresso rollators during the pendency of the appeal (para. 31).

In assessing the balance of convenience, the Court concluded that the undertakings offered by Evolution to ensure that HCC would not be financially prejudiced if the appeal were unsuccessful were sufficient to safeguard HCC (para. 32). The Court also refused HCC's late request for a receiver, including because HCC failed to bring a proper motion pursuant to Rule 375 of the *Federal Courts Rules* (para. 33).

## Evolution's Successful Appeal

The Federal Court of Appeal heard Evolution's appeal from the trial judgement on June 12 and 13, 2019. The hearing of Evolution's appeal was notable for the Court's inspection, at the hearing, of the physical trial exhibits (i.e., the rollators). Evolution (and Goodmans) believed that a key to the appeal was to ensure that the panel truly understood, in hard, physical terms, the evidence that the trial judge had before her. Last Thursday, the Federal Court of Appeal released its decision on behalf of a unanimous panel, overturning the trial judgement. See: *Evolution Technologies v. Human Care Canada*, 2019 FCA 209.

Evolution had raised a series of strong arguments that justified overturning the trial judgement. The Court of Appeal explained that it needed to address only the first to allow the appeal. This argument concerned the claim term, "tension rod means for distributing the weight" (paras. 3-4).

Evolution argued, and the Court agreed, that the trial judge had accepted HCC's expert's construction of "tension rod means" as requiring the presence in a rollator of a means that is "primarily" in tension (paras. 4, 12 and 17-18). Relying in part on clear admissions made in HCC's Memorandum of Fact and Law, the Court rejected HCC's attempt to suggest at the hearing that the trial judge had in fact arrived at an altogether different construction (para. 17). The Court also agreed that the trial judge's construction of "tension rod means" was the correct construction (paras. 19-20).

Evolution also argued, and the Court accepted, that the trial judge erred in law by failing to apply this construction when assessing whether the Xpresso rollators contain a "tension rod means" by instead assessing whether the "bar" in the Xpresso rollators experiences any tension at all (paras. 4, 21, 23-25). In effect, the decision of the Court was based on the bedrock principle that the claims of a patent receive "one and the same interpretation for all purposes" (para. 25).

Finally, the Court accepted Evolution's position that there was no basis in the trial record to support a conclusion that the "bar" in the Xpresso rollators is "primarily" in tension (paras. 14, 21 and 26). As a consequence, given that all parties agreed that "tension rod means" is an essential element of the relevant claims, the Court concluded that the Xpresso rollators necessarily do not infringe the 392 Patent (para. 26) and allowed the appeal (para. 27).

## Conclusion

The Evolution litigation story highlights that an unsuccessful litigant at the trial level has a myriad of opportunities to protect its business interests and, at the same time, attempt to right what it perceives to have been judicial error. The litigation also serves as a reminder of the user-friendly nature of the Federal Court of Appeal, which, itself, during the holiday period, afforded to Evolution the access to justice that the circumstances demanded.

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