Federal Court  Cour fédérale

Case and Trial Management Guidelines for Complex Proceedings and Proceedings under the *PM(NOC) Regulations*

October 16, 2020
(last amended on October 18, 2023)

These guidelines are to be interpreted in a manner that seeks to secure the just, most expeditious and least expensive determination of every proceeding on its merits. They are intended to complement and not derogate from the *Federal Courts Rules*, nor constrain the discretion of judges or associate judges to depart from these guidelines having regard to the particular circumstances of each case.

More specifically, this update includes instructions for subsequent case management conferences (paragraph 36) and timing for submissions on costs (paragraph 40).

These guidelines consolidate and replace the following:

- Notice to the Parties and the Profession re: Streamlining Complex Litigation dated May 1, 2009;
- Notice to the Parties and the Profession re: Case Management: Increased Proportionality in Complex Litigation Before the Federal Court, dated June 24, 2015;
- Notice to the Profession re: Experimental Testing dated May 12, 2016;
- Notice to the Parties and the Profession re: Case Management Guidelines for NOC Applications dated May 2016; and
- Notice to the Parties and the Profession re: Guidelines for Actions Under the *Amended PM(NOC) Regulations*, dated September 21, 2017.

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A. CASE AND TRIAL MANAGEMENT GUIDELINES FOR COMPLEX PROCEEDINGS

General

1. These consolidated guidelines are to be read in conjunction with the most recent Consolidated General Practice Guidelines (the "Consolidated Guidelines"). In the event of a conflict, the Consolidated Guidelines take precedence.

2. **Applicability**. Paragraphs 3 to 27 apply to complex proceedings, or proceedings which are expected to require at least five (5) trial days.

Paragraphs 28 to 40 below are specific to proceedings under the *Patented Medicines (Notice of Compliance) Regulations* ("*PM(NOC) Regulations*") and take precedence over any potentially conflicting paragraphs.

3. **Election for short-notice trial**. On consent, parties can request to be added to a short-notice trial waiting list. Earlier trial dates may be offered to parties on this list.

Discovery

4. **Electronic documents**. The Court encourages parties to proceed electronically, and if they so choose, to set out specifics for electronic production of documents, including the following:

a) Whether or not documents will be produced electronically;

b) Electronic searchability of documents (through optical character recognition);

c) Format of production of electronic documents (such as PDF for documents, and JPEG for images);

d) The use of a consistent naming convention for documents;

e) Unique identification codes for documents; and

f) Cost-effective litigation support software for electronic production (if applicable).

5. **Discovery planning**. The scope of documentary discovery and examinations for discovery shall be among the topics for early discussion with the case management judge. Such discussions should include the potential utility, content and timing of discovery plans, the representative(s) to be examined, the timing of documentary production and the scheduling of examinations for discovery and where applicable, the discovery of inventors. All discussions should be guided by the principle of proportionality. Parties should also be prepared to discuss the knowledge of their representative(s).

In creating their discovery plan, parties are to make a *bona fide* effort to agree on and set realistic timetables. Missed deadlines set at case management conferences, without adequate justification, can result in consequences, including significant costs.

6. Limits on oral discovery. Unless the Court orders otherwise, oral discovery per party shall not exceed:

a) One (1) day for trials scheduled for 5 days or less;

b) Two (2) days for trials scheduled for 6 to 10 days;

c) Three (3) days for trials scheduled for 11 to 20 days; and

d) Four (4) days for trials scheduled for 21 days or more.

Any follow-up discovery will be limited to one (1) day per party.

7. Examination for discovery

a) Subject to paragraph 6(e), examinations for discovery shall be conducted by way of a single comprehensive examination;

b) No questions are to be taken under advisement;

c) Questions should be answered unless clearly improper or prejudicial, or would require the disclosure of privileged information;

d) Answers provided under reserve of objection pursuant to Rule 95(2) will be considered by the trial judge, if the objection is not sustained; and

e) With leave of the Court, a follow up examination may be conducted, addressing answers to undertakings, questions ordered to be answered and documents ordered to be produced.

Motions

8. Limits on refusal motions

a) No refusal motion may be brought until all parties have completed their examinations for discovery of any adverse party as provided under Rule 235.

b) Such motions will be limited to one (1) hour per day of discovery of each party's representative; and

c) Significant cost sanctions may be imposed against unsuccessful/unreasonable parties.

No motions may be brought within 60 days of the trial date without leave of the case management judge or trial judge.

Any motion for commission evidence shall be brought as soon as it is deemed necessary to the party seeking such order and, in any event, no later than two (2) months before trial.

Expert Evidence

9. **Strict enforcement of the limit on the number of experts**. Absent exceptional circumstances, the Court will strictly enforce the limit of five (5) expert witnesses called by each party in a proceeding as provided by Rule 52.4.

10. **Outlining areas of agreement between experts**. With the help of their experts early on in the proceeding, parties must make *bona fide* efforts to agree on issues of fact and law, including interpretation/construction of science, technology and other expert evidence. Expert reports shall state where the experts agree and disagree, and provide the reasons for disagreement.

11. **Experimental Testing (patent infringement/invalidity only)**. In an action for infringement or invalidity of a patent, where a party intends to establish any fact in issue by experimental testing conducted for the purpose of litigation, it shall, no later than two (2) months before the scheduled service of its expert report(s) to which the testing relates, provide reasonable notice to the other parties as to:

    - the facts to be proven by such testing;
    - the nature of the experimental procedure to be performed;
    - when and where the adverse parties' counsel and representative(s) can attend to watch the experiment(s); and
    - when and in what format the data and test results from such experiment(s) will be shared with the adverse parties.

    Where the minimum two-month notice requirement is unworkable (for example, with regard to responding reports), the time period may be abridged by the case management judge.

    Where the parties cannot agree on these matters, the case management judge and/or trial judge may resolve them at a case management conference.

    Unless a party intending to rely on such experiments has so advised the other parties, the party shall not, without leave of the Court, lead evidence at the trial or hearing as to any experiments conducted by or for it for the purpose of the litigation.

12. **Expert Reports to be relied upon at trial**. Expert reports in chief to be relied upon at trial shall be submitted to the Court in both electronic and paper format at least one (1) month before trial, subject to any direction from the trial judge extending or abridging that time.

    By submitting an expert report to the Court, the party is undertaking to the Court to call such expert as a witness at trial, unless a previous agreement with opposing parties and the trial judge has been made. If the calling of an expert is contingent on a subsequent event at trial, the expert report shall not be delivered until such undertaking to call the witness can be made.

Pre-trial Preparation

13. **Trial management conference**. A trial management conference shall be requisitioned by the parties to take place at least two (2) months prior to trial, subject to an extension or abridgement by direction of the case management judge or trial judge. (For proceedings under the *PM(NOC) Regulations*, see item 30 below.)

    An agenda for the trial management conference should be proposed at the time it is requisitioned. The requisition shall identify and propose the timing of any motions that need be brought before the case management judge or trial judge. Hours of sitting will be established by the trial judge either at the trial management conference or at least two (2) weeks prior to trial, after hearing from the parties, and shall include any necessary breaks for holidays or otherwise.

    The parties shall canvass the timing of closing arguments either at this trial management conference or with the trial judge at the beginning of the trial. Both the timing and the time ultimately allotted will be in the trial judge's sole discretion, after hearing from the parties.

    As part of this conference, counsel should discuss the timing and mode of delivery of trial documents. In this regard, the Court encourages counsel to provide digital versions of written evidence, submissions, authorities, and any other important documents, via a USB key. Hyperlinks to case law are also helpful to the trial judge.

14. **No new demonstrative evidence at trial**. Parties are strongly encouraged to exchange any demonstrative evidence they seek to use at trial at least 60 days before trial.

    Unless the Court orders otherwise, any objections to such evidence must be raised with the case management judge and/or trial judge at least 45 days before trial.

    For proceedings under the *PM(NOC) Regulations*, see item 33 below.

15. **Experts: early engagement and qualifications**. Counsel are expected to make a *bona fide* effort to consult and engage experts early in the pre-trial stage to properly assess their

case's merit. Where an expert is intended to be called at trial, counsel should also provide opposing counsel with early notice of their experts' views regarding issues in dispute.

Any objections to expert reports or expert qualifications, including those contemplated by Rules 52.5 and 262(2), should be made to the case management judge within 30 days of service of the reports and no later than 30 days prior to trial.

The trial judge has the sole discretion as to whether to hear any such objections prior to or during the trial, if raised by the parties before the 30-day pre-trial period. The parties shall exchange short statements of each expert's proposed expertise and reach agreement when possible. Costs consequences may follow any unsuccessful challenge to expert qualifications.

16. **A proposed schedule is required**. A proposed schedule for the use of trial time, including the order and estimated duration of the testimony of witnesses and opening statements, shall be submitted to the Court and trial judge at least two (2) weeks before trial. Any disagreement regarding the schedule will be decided by the trial judge, in his or her sole discretion, after hearing from the parties. In the alternative, parties may agree to use a "chess clock" and use their allocated time as they see fit, provided that they provide the Court with a schedule indicating the dates upon which each witness will be called.

17. **A Joint Statement of Issues**. The parties shall make a *bona fide* effort to prepare a joint statement of issues to be delivered two (2) weeks before trial. For those issues upon which an agreement cannot be reached, each party shall deliver its own statement.

18. **Claims charts**. The parties shall prepare claim charts to be delivered at least two (2) weeks before trial.

19. **Science and technology primers prior to trial**. Parties may be required—jointly or separately—to provide science and technology primers to the Court before trial, at a time that the Court, in its sole discretion, will determine after consultation with counsel for the parties. Parties are encouraged to be proactive in identifying circumstances when such a primer may be helpful.

20. **Exchanging a description of proposed areas of fact witness testimony**. The parties shall exchange a brief description of the proposed areas of testimony of fact witnesses at least two (2) weeks before trial.

    The parties should make a *bona fide* effort to discuss the use of witness statements and fact stipulations where cross-examination may not be necessary.

21. **Confidential information in an expert report**. The parties shall identify before trial any evidence in an expert report or fact witness statement that is considered confidential and not to be admitted on the public record. The parties shall seek a confidentiality order where

appropriate. Any motion for a confidentiality order shall be brought at least two (2) weeks before trial.

22. **Agreed statement of facts and joint book of documents**. The parties shall submit an electronic and paper version of an agreed statement of facts and an agreed joint book of documents at least two (2) weeks before trial, including admissions on authenticity, to the extent possible. The trial judge has discretion to limit the number of paper copies of documents to be filed, on request by either party.

Counsel should agree on the authenticity and admissibility of as many documents as possible. Disagreements should be addressed before trial. The parties should carefully document their agreement regarding the documents and file the agreement with the Court along with the documents. The parties are strongly encouraged to fully explore the extent to which requests to admit and explanations of grounds for denial can assist to streamline the issues in dispute. Where necessary, formal mechanisms contemplated by the *Rules* should be used, such as Requests to Admit under Rules 255-256. Blanket denials and other forms of uncooperative behaviour will be subject to sanction, including through the imposition of elevated costs payable forthwith.

23. **Pre-trial conference memorandum**. The parties shall advise the Registry at the time of filing their pre-trial conference memorandum whether the trial judge may have access to said memorandum, or portions thereof. In the absence of the parties' consent, no such access will be provided.

24. **Compendia and slide decks**. A compendium in both electronic and paper format shall be provided to the trial judge, and shall include only the relevant excerpts of the key evidence to be relied upon by each party. The length of the compendium and the number of copies to be provided shall be determined at the trial judge's discretion after hearing from the parties.

Best efforts should be made to provide a joint compendium by the parties. Where counsel are unable to agree in this regard, separate compendia shall be provided to the Court. Leave of the Court is required if a party wishes to file more than one compendium.

If counsel intends on presenting a slide deck in addition to its compendium, leave from the trial judge should be requested at least two (2) weeks before trial.

25. **Testimony by videoconference**. For in-person hearings, counsel may request that one or more out-of-town witnesses be permitted to testify by videoconference. Any such request should be made at least forty-five (45) days before the start of trial and will be subject to leave of the Court and available resources.

Counsel will be responsible for ensuring the proper and effective functioning of video technology to be used by their witnesses. No less than thirty (30) days before the date scheduled for the commencement of the trial or hearing of a proceeding, the parties should discuss arrangements for the provision of such remote testimony by writing to the Judicial Administrator of the Court. At least fourteen (14) days prior to the date scheduled for the hearing, the parties must make a joint submission in writing to the Judicial Administrator regarding the arrangements they propose.

26. **Special equipment and facilities**. Any special equipment or facilities needed by the parties for trial, which has not been discussed at the pre-trial conference, shall be requisitioned no later than three (3) weeks before trial. The Court Registry will endeavour to accommodate all reasonable requests.

27. **Written arguments - 50 pages or less at the end of trial**. Unless otherwise directed, written arguments in both electronic and paper format shall be provided at the end of trial, at a time and in a length and format to be determined by the trial judge, after hearing submissions from counsel for the parties. Unless directed otherwise, written arguments shall not exceed fifty (50) pages.

B. PROCEEDINGS UNDER THE *PM(NOC) REGULATIONS*

28. **Letter to the Registry**. The Statement of Claim shall be accompanied by a letter to the Registry which:

a) Identifies the proceeding as a proceeding under the *PM(NOC) Regulations*;

b) Identifies any other on-going proceedings before the Court involving the same patents and/or medicinal ingredient(s);

c) Requests that the proceeding be specially managed pursuant to subsection 6.1(1) of the *Regulations*; and

d) Indicates whether the statutory stay has been renounced under paragraph 7(5)(b) of the *Regulations*.

29. **Notice of Intention to Respond**. The second person (defendant) must file and serve a Notice of Intention to Respond within ten (10) days of service of the Statement of Claim. The Notice of Intention to Respond must indicate:

a) Whether the second person intends to challenge the validity of any claims in the patent; and

b) Whether there will be a counterclaim relating to the validity seeking a declaration of invalidity and impeachment.

30. **Requisition of first case management conference**. The first person (plaintiff) must requisition a case management conference within seven (7) days of service of the Notice of Intention to Respond. The requisition letter should address the steps set out in the *PMNOC Timetable Checklist*. This includes providing:

a) a jointly-proposed timetable of all steps leading up to trial, including:

i. deadlines for voluntary productions;

ii. deadlines for producing documents that are not primarily in English or French, as well as how and when translation issues will be dealt with, and who will bear the cost;

iii. deadlines for serving affidavits of documents;

iv. deadlines for requesting particulars;

v. deadlines for exchanging claims charts;

vi. deadlines for completing examinations for discovery;

vii. deadlines for exchanging notices to admit and the consequences of failing to admit a fact; and

viii. duration, city, and language of trial.

b) dates of mutual availability for trial, to be completed no later than twenty-one (21) months from the date of commencement of the proceeding;

c) identification of any motions contemplated by the parties, including motions relating to:

i. protective or confidentiality orders;

ii. production pursuant to subsections 6.04(1) and 6.04(2) of the *Regulations*; and

iii. relief pursuant to sections 6.07 or 6.08 of the *Regulations*.

Where counsel cannot agree on a joint timetable, parties should make separate submissions to the Court in advance of the initial case management conference.

31. Initial case management conference. An initial case management conference shall be requested within twenty-eight (28) days of Statement of Claim issuance. The topics for the initial case management conference will include:

a) Scheduling all steps in the action in a timely and reasonable fashion (see the Checklist);

b) Dealing with procedural matters that should be addressed at an early stage; and

c) Exploring settlement prospects.

32. Subsequent case management conferences. The Court expects counsel to confer amongst themselves before requesting any case management conference or bringing any motion. A case management conference should be requested before any motion is brought. Regular case management conferences will be convened to discuss the timetable and narrowing the issues for trial.

Two (2) days prior to each case management conference, the parties shall provide a joint letter to the Court addressing:

a) A proposed agenda for the case management conference;

b) An update on the status of the proceeding; and

c) An update on steps that have been taken to settle the proceedings or narrow the issues (without disclosing any settlement offers that have been exchanged).

33. **No new demonstrative evidence at trial**. Parties must exchange any demonstrative evidence that they seek to use at trial at least thirty (30) days before trial. Objections to any demonstrative evidence must be raised with the Court at least twenty (20) days before trial.

34. **Pre-trial conferences**. No pre-trial conferences shall be held in proceedings under the *PM(NOC) Regulations*.

35. **First trial management conference**. The parties shall requisition a first trial management conference forthwith upon the trial dates being fixed. This trial management conference will serve as an initial meeting with both the case management judge and the trial judge to discuss issues leading to trial on a preliminary basis.

36. **Further trial management conference**. A further trial management conference should be held at least thirty (30) days prior to trial. This trial management conference will address, amongst other things:

a) Identification of patents and/or claims still in dispute;

b) Specific claim construction disputes; and

c) A trial schedule, including the dates upon which each witness will testify. In the alternative, parties may agree to use a "chess clock" and use their allocated time as they see fit, provided that they provide the Court with a schedule indicating the dates upon which each witness will be called.

37. **Tutorial session**. At the request of, and at a time specified by, the trial judge, the parties shall provide a tutorial session in a form to be agreed to by the parties or on direction of the Court. Parties are encouraged to be proactive in identifying circumstances when such a session may be helpful.

38. **Evidence at trial**. Parties will ordinarily be expected to adduce evidence-in-chief by way of affidavit, subject to variation by the case management judge or trial judge prior to trial, for example to facilitate a short overview presentation by expert witnesses, prior to the commencement of cross-examination. Such affidavits shall be served and filed in accordance with the schedule fixed by the Court, and the witness should be made available for cross-examination at trial.

Where fact evidence will be adduced by *viva voce* testimony, counsel shall submit an outline of the areas of testimony of any fact witnesses in advance of trial, in accordance with the schedule fixed by the Court.

Parties may agree that certain fact evidence may be introduced without cross-examination, and are encouraged to adduce stipulations of such testimony to streamline the necessity for trial testimony.

39. **Trial length**. The length of a trial under the *PM(NOC) Regulations* shall be no longer than ten (10) days, unless the Court determines that additional time is required.

40. **Submissions on costs**. Parties shall submit submissions on costs at the end of the evidentiary phase of the trial, with their final written arguments or as agreed to by the trial judge. Parties are encouraged to reach an agreement as to a lump sum for an amount to be awarded to the prevailing party.