

Federal Court



Cour fédérale

Federal Court Practice 2017

Recent Court Initiatives

21st Annual Intellectual Property Law: The Year in Review

Thursday, January 19, 2017

Overview

1. Access to Justice
2. Notice to the Profession – Experimental Testing
3. Case Management Guidelines for NOC Applications
4. Use of Compendia & Outlines of written submissions for Trial
5. Claim construction charts
6. Pre-Trial Case Management Conferences

1. Access to Justice

Reducing Time and Costs

- Amending/simplifying the Federal Courts Rules
- Case Management
- Recommendations of Case Management Working Group
- Recommendations from IP Bar
- Increased emphasis on mediation/dispute resolution – including with assistance of third parties

2. Notice to the Profession – Experimental Testing

- Modified having regard to IPIC submissions and after consultation with the Court

3. Case Management Guidelines for NOC's

- Summary nature: two to five days absent extraordinary circumstances
- Earlier CMC involving both the case management judge and the hearing judge
- Encouraging earlier requisitions for hearing dates
- Five expert witnesses limit, absent leave of the Court
- Early claim construction
- Hearing Management Conference – two (2) months before the hearing

3. Case Management Guidelines for NOC's (continued)

- Further Hearing Management Conference at least 30 days prior to the hearing
- Compendiums, electronic versions – at least 15 days prior to the hearing
- Draft bills of costs: 15 days following the hearing
- Fixed-end basis for hearings – no additional time to be granted absent exceptional circumstances

4. Compendia and outlines of written submissions for trial

The following are proposed guidelines for use of these materials:

A. The parties are encouraged to prepare and file compendia in complex cases, consisting of the relevant documents and excerpts from documents to be relied upon at trial. To the extent possible, only relevant excerpts to be referenced should be included in compendia.

B. Parties should prepare and exchange proposed compendia of such documents and excerpts no later than thirty (30) days prior to trial. To the extent possible, on agreement, joint compendia of the parties' documents and excerpts to be used at trial, should be filed with the Court at least ten (10) days prior to trial.

4. Compendia and outlines of written submissions for trial - continued

- C. Where no agreement is reached on specific documents or excerpts, each party may exchange and file a separate compendium, inclusive of any such documents and excerpts, again at least ten (10) days prior to trial.
- D. If a party is unreasonable in failing to cooperate in the exchange and filing of compendia outlined above, cost consequences may follow, at the trial judge's discretion.
- E. Any outline of a party's written representations for use at trial shall be limited to thirty (30) pages, unless the trial judge agrees otherwise, after hearing submissions of the parties.
- F. Parties should prepare and exchange compendia for final argument, and is to be limited to 30 pages, subject to discretion of the trial judge.

5. Claim construction charts

- Templates have been provided to the parties for content & form
- Agreement as to construction, essential features strongly encouraged

6. Pre-trial (Case Management) Conferences

Rules 258 to 267 of the Federal Courts Rules prescribe the pre-trial conference (PTC) process

6. Pre-trial (Case Management) Conferences - continued

The purposes of a pre-trial conference are: (a) to resolve or narrow the issues in the action; (b) to expedite the disposition of the action; (c) to facilitate settlement of the action; (d) to assist the parties in effective preparation for trial; and (e) to provide full disclosure between the parties of the relevant facts and evidence.

6. Pre-trial (Case Management) Conferences - continued

Parties should provide a case management agenda to the judge prior to each CMC.

6. Pre-trial (Case Management) Conferences - continued

As the Federal Court of Appeal has confirmed, representations made by counsel or parties at a PTC are to be taken seriously and parties can later be held to what they say or do not say - thereby avoiding future motions/disputes on interlocutory matters: *Apotex Inc v Bristol-Myers Squibb Company*, 2011 FCA 34 at para 28, citing *Wenzel Downhole Tools Ltd v National-Oilwell Canada Ltd*, 2010 FC 669 at para 19 (Proth).

6. Pre-trial (Case Management) Conferences - continued

The need for detailed minutes is even more important in light of the recent decision of the Federal Court of Appeal in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 at paras 68, 69, 72 and 79-83. The FCA concluded that, absent error on a question of law or an extricable legal principle, intervention in all discretionary orders of Prothonotaries is warranted only in cases of palpable and overriding error.

6. Pre-trial (Case Management) Conferences - continued

*Outline of key issues (continued):

1. Background

2. Any outstanding motions/directions:
parties' positions re: discovery, pleadings

3. Admissions – Service of Notices to Admit

*the case management judge will retain the discretion to decide what may be included or excluded from the minutes of any CMC

6. Pre-trial (Case Management) Conferences - continued

Outline of key issues (continued):

4. Simplification of the issues to be determined at trial

5. Identify Remaining issues of for trial

6. Estimated Duration, Language and Venue of Trial

6. Pre-trial (Case Management) Conferences - continued

Outline of key issues (continued):

7. Possibility of settlement – discuss possibility of ADR, settling at least some of the issues before trial

8. Contents of the Trial Record – settle

9. Recommendation re: length, language and venue of the trial: the Court will make any final decision on the length of and venue for the trial

6. Pre-trial (Case Management) Conferences - continued

In order to ensure accurate minutes are taken after each conference, it is recommended that counsel prepare a draft on consent, for the case manager to edit and finalize, if needed. When possible these conferences should be recorded, to provide the case manager with a recorded back-up for verification of agreement(s) reached during the conference.