NOTICE TO THE PARTIES AND THE PROFESSION
CASE MANAGEMENT: INCREASED PROPORTIONALITY IN COMPLEX LITIGATION BEFORE THE FEDERAL COURT

June 24, 2015

Rule 3 of the *Federal Courts Rules* sets out the underlying purpose of the Rules: a just, expeditious and least expensive determination of every proceeding.

The Federal Court Case Management Working Group, composed of judges and prothonotaries, was tasked by the Chief Justice to consult with the bar and make recommendations for improving case management of actions. Several initiatives were considered, including earlier involvement of trial judges; streamlining and limiting oral examinations for discovery; limits on interlocutory motions and appeals with respect to pleadings and discovery issues; earlier exploration of settlement and expanding the use of case management.

This Notice to the Profession sets out the Working Group's initial recommendations, which are designed to modernize and improve practice and procedure, with the overarching goal of achieving increased proportionality in proceedings before the Court. Additional matters will be the subject of future consultation and Notices to the Profession.

1. Earlier trial judge management

Once a trial date has been set, more effective scheduling of trials will be achieved through earlier involvement of the trial judge in the case management process. The trial judge, working together with the case management judge, will implement procedures such as discovery plans, timetables and joint case management/trial management conferences, with a view to ensuring timely resolution of interlocutory motions and appeals, and that parties and the Court will be ready to proceed on the fixed trial date. Time for pre-trial involvement will be built into judges' schedules.

2. Short notice wait list for earlier trial dates

The Federal Court utilizes a fixed hearing date system for all matters. Fixed trial dates allow the Court to set its schedule and to manage its case flow while maximizing use of the court's limited resources. Fixed trial dates are also widely preferred by lawyers and parties because they provide trial date certainty. It remains that most actions settle before trial often freeing their scheduled trial dates. Accordingly, the Judicial Administrator will keep a separate list of actions that have already been scheduled for trial and for which a short notice trial has been requested in writing. Earlier trial dates will be offered to parties on the short notice wait list, depending on counsel's availability and the projected length of trial.

3. No new demonstrative evidence at trial

To avoid surprise and contentious introduction of new facts or evidence through demonstrative aids to be used at trial, parties must exchange any demonstrative evidence proposed for use at trial to opposing parties at least 60 days before trial. Any objections to such evidence must be raised with the case management judge and/or trial judge, in the Court's discretion, at least 45 days before trial.

4. Limits on documentary discovery

The parties must ensure that the steps taken in proceedings are proportionate, in terms of the costs and time required, to the nature and complexity of the dispute. In addition, timely productions, confirmation of the scheduling of examinations for discovery and the exchange of discovery plans shall be among the topics for early discussion with the case management judge. Parties should be prepared to identify and discuss at an early stage the representative(s) to be examined, their knowledge and areas of expertise, the scope of inquiry and the documents anticipated to be reviewed.

5. Limits on oral discovery

The principle of proportionality applies to all stages of an action, including oral discoveries. Unless the parties agree or the Court orders otherwise, the following limits will be placed on oral discovery based on the number of days fixed for trial or the estimated duration of the trial.

- 1 week trial or less: 1 day of oral discovery per party
- 1-2 week trial: 2 days per party
- 3-4 week trial: 3 days per party
- 5+ weeks: 4 days per party
- Any follow-up discovery will be limited to 1 day per party

These guidelines will be enforced by the Court unless, in the discretion of the Court, an exemption should be made, based on special circumstances. The purpose of the guidelines is to ensure a focused, effective approach to oral discovery by the parties, an efficient use of Court resources and appropriate proportionality in proceedings before the Court.

6. Limits on refusal motions

- No refusals motions will be permitted until discoveries are complete
- Such motions will be limited to one hour per day of discovery of each party's representative
- Potentially significant cost sanctions may be imposed against unsuccessful/unreasonable parties
- No questions will be permitted to be taken under advisement

- Questions should be answered unless clearly improper or prejudicial, or would require the disclosure of a privileged communication

- Answers provided under objection will be considered by the trial judge, if the objection is not sustained

Again, the goal is to ensure effective, proportionate use of the court's scarce resources by parties. Mandating answers to contested questions should significantly reduce the number of refusals contested by the parties prior to trial or at trial.

7. Limits on appeals of interlocutory orders of prothonotaries

Interlocutory orders of prothonotaries may be appealed as of right to a judge of the Federal Court. A judge's order may then be appealed to the Federal Court of Appeal. In order to reduce costs and attendant delays, consideration is being given to recommending an amendment to the *Federal Courts Act* and *Federal Courts Rules* to limit appeals of interlocutory orders.

8. Stricter enforcement of the limit on number of experts

Concerns have been repeatedly raised regarding the inconsistent approach that has been taken with respect to the number of experts allowed to testify in complex litigation. This has resulted in redundancy, inefficiencies and unnecessary time allocation for expert testimony and cross-examination. Rule 52.4 provides that only five (5) expert witnesses may be called by each party in a proceeding, unless leave of the Court is otherwise granted. The Court will strictly enforce this limit, absent extraordinary reasons. It will also encourage parties, through Court consultation with experts early on in litigation, to seek agreement on issues of fact and law, including interpretation/construction of science, technology and other expert evidence.

9. Science and technology primers prior to trial

To enable the Court to better understand complex science and technology issues in complex litigation at an early stage, parties may be required to jointly or separately provide science and technology primers to the Court prior to trial, at a time to be determined by the Court after consultation with counsel for the parties.

10. Early consideration of mediation in all actions

Parties are encouraged to seek the Court's assistance at any time to pursue alternative dispute resolution, including mediation. The Court will also proactively raise these options throughout the proceeding, including at those junctures where it would lead to the most efficient and cost-effective disposition of the action, such as the close of pleadings, or immediately following documentary production or oral discoveries.

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Chief Justice