Tax Court of Canada  Cour canadienne de l'impôt

PRACTICE NOTE NO. 17

The Practice Note issued on December 31, 2009 is withdrawn and is replaced by the following.

This Practice Note is issued for the assistance of litigants to which the *Tax Court of Canada Rules* (*General Procedure*) apply.

PROPOSED RULES AND AMENDMENTS WITH RESPECT TO SETTLEMENT OFFERS, LEAD CASES AND LITIGATION PROCESS CONFERENCES

The Rules Committee of the Tax Court of Canada has proposed amendments and new rules to the *Tax Court of Canada Rules (General Procedure)* substantially in the form annexed hereto.

Until such time as the proposed rules and amendments receive approval of the Governor in Council and become effective, the practice of the Court with respect to Status Hearings, Pre-Hearing Conferences, offers of settlement of an appeal and any other matter referred to in the proposed rules and amendments shall conform to the proposed rules and amendments annexed hereto;

The proposed amendments and new rules affect the following sections of the Rules:

a) Rule 6 (amendment);

b) Rule 125 (amendment);

c) Rule 126.1 (case management)

d) Rule 126.2 (trial management conference);

e) Rule 126.3 (settlement conference);

f) Rule 127 (amendment);

g) Rule 128 (amendment);

h) Rule 146.1 - lead cases; and

i) Rules 147(3.1), (3.2) and (3.3) - settlement offers.

A Notice to the Public and to the Profession will be published together with this Practice Note.

This practice note will be effective January 18, 2010.

Dated this 13th day of January 2010.

Gerald J. Rip
Chief Justice

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6. Hearings by Videoconference or Teleconference

Where the Court and all parties entitled to be heard on a motion or to attend a litigation process conference or upon taxation of costs consent, or where the Court so directs, the Court or the taxing officer may conduct the hearing by means of a videoconference or by teleconference or by a combination thereof.

Litigation Process Conferences

125. Status Hearings

Initial Status Hearings:

(1) Where an appeal has not been set down for hearing or terminated by any means within two months after filing the reply or after the last day for filing the reply, whichever is later, subject to any direction by the Chief Justice, the Registrar or a person designated by the Registrar or the Chief Justice may serve on the Deputy Attorney General of Canada and on the counsel of record for the appellant or, where the appellant acts in person, on the appellant, a notice of status hearing at least 30 days before the date fixed for that hearing, and the hearing shall be held before a judge.

(2) A counsel who receives a notice of status hearing shall forthwith give a copy of the notice to that counsel's client.

(3) Unless the appeal has been set down for hearing or terminated by any means before the date fixed for the status hearing, the counsel of record shall attend the status hearing and the parties may attend the hearing.

(4) Where a party represented by counsel does not attend the hearing, that counsel shall file proof that a copy of the notice was given to the party.

(5) At the status hearing,

(*a*) if a reply has been filed, the judge may

(i) set time periods for the completion of any remaining steps in the appeal,
(ii) dismiss the appeal for delay, or
(iii) make any order or give any other direction that is appropriate; and

(*b*) if a reply has not been filed, the judge may,

(i) direct that the appeal be allowed if the facts alleged in the notice of appeal entitle the appellant to the judgment sought,
(ii) direct that the appeal be heard on the basis that the facts alleged in the notice of appeal are presumed to be true and make a direction regarding the hearing fee, or
(iii) make any order or give any other direction that is appropriate.

(6) The presumption in subparagraph (5)(*b*)(ii) is a rebuttable presumption.

Further Status Hearings:

(7) The Court may, on its own initiative or at the request of a party, at any time after the expiry of the period described in Rule 125(1) whether or not a status hearing pursuant to Rule 125(1) has been held, direct counsel for the parties, either with or without the parties, and any party not represented by counsel, to appear before a judge for status hearings;

(*a*) to set time periods for the completion of any remaining steps in the appeal;

(*b*) to determine the advisability of amending the pleadings;

(*c*) to attempt to identify the issues and shorten the hearing;

(*d*) to attempt to obtain admissions of fact or documents;

(*e*) to consider directing a settlement conference of any or all of the issues in the appeal;

(*f*) to determine if the parties are ready to proceed with the hearing of the appeal by identifying the parties' potential witnesses and documents which may become exhibits, confirming that all necessary steps of litigation have been completed before scheduling the appeal for hearing, determining the approximate duration of the trial, and fixing a time and place for the hearing of the appeal; or

(*g*) to make any other order or give any direction that the judge may consider appropriate.

(8) Where a party fails to comply with an order or direction made under subsections (5) or (7), or if a party fails to appear at a status hearing at the time and place set for it, the Court may, on application or of its own motion, allow the appeal, dismiss the appeal or make such other order as is just.

126.1 Case Management

(1) The Chief Justice may, on his own initiative or at the request of the parties, at any time order that an appeal or a group of appeals be case managed, and may designate one or more judges to act as the case management judge.

(2) A case management judge shall convene a case management conference as soon as practical after the close of pleadings for the purpose of establishing, in conjunction with the parties, a timetable for the conduct of the appeal or appeals.

(3) A case management judge may deal with all matters that arise prior to the hearing of the appeal including:

(*a*) convening case management conferences from time to time, either of his or her initiative or at the request of one of the parties;

(*b*) giving any directions that are necessary for the just, most expeditious and least expensive determination of the appeal on its merits, including consolidating two or more appeals or parts of appeals raising common issues, or dealing with common facts;

(*c*) hearing and determining all motions arising prior to the appeal hearing date, or arranging for them to be heard by another judge;

(*d*) notwithstanding any period provided in these Rules, fixing the period for completion of any steps in the appeal;

(*e*) make any order or give any direction that he or she may feel appropriate.

(4) A case management conference may take place either by personal appearance, video conference, teleconference, or a combination thereof.

(5) If either party fails to comply with the time requirements set out in a timetable established under this rule or fails to comply with any requirement of these rules, except for an irregularity, or fails to attend any case management conference as and when required, the case management judge may:

(*a*) strike out any document or portion thereof filed by that party;

(*b*) dismiss the appeal of the appellant or give judgment in favour of an appellant;

(*c*) amend the timetable in order for the party to comply with it;

(*d*) order the party to pay costs, either in a fixed amount or to be taxed; or

(*e*) make any other order that is just in the circumstances.

(6) A case management judge hearing any motion may dispense in whole or in part with the requirement to file a notice of motion together with the affidavits or other documentary material.

(7) A case management judge shall not preside at the hearing of an appeal except with the consent of the parties.

126.2 Trial Management Conference (Conference after appeal hearing date is fixed)

(1) A trial management conference may be held on or following the setting of an appeal hearing date, at the request of one of the parties or on the initiative of the trial judge.

(2) At the trial management conference, the judge may:

(*a*) canvass with the parties the names of the witnesses intended to be called and the substance of the testimony;

(*b*) explore whether admissions can be made that would facilitate proof of the non-contentious issues including documents whose authenticity is not in dispute;

(*c*) explore the alternative methods of the presentation of the evidence, such as filing of affidavits or reports;

(*d*) explore expeditious means for the presentation of evidence; and

(*e*) give directions that would facilitate the orderly and expeditious conduct of the trial;

(*f*) identify and hear, if necessary, any pre-trial motions which the judge considers ought to be dealt with and disposed of before the appeal hearing commences;

(*g*) consider the number of experts and the manner of the presentation of their evidence; and

(*h*) give such direction for the conduct of the hearing of the appeal as the judge considers just in the circumstances.

126.3 Settlement Conference

(1) The Court may, at any time, on its own initiative or at the request of either party, direct that a conference be held for the purpose of exploring the possibility of settlement of some or all of the issues.

(2) The judge who presides at a settlement conference shall not preside at the hearing of the appeal, and shall not communicate with the hearing judge concerning anything that was said or done at the settlement conference.

(3) Unless otherwise directed by the settlement conference judge, the parties and their counsel, if any, shall attend a settlement conference.

(4) Each party shall serve on the other party and submit a settlement conference brief to the Court at least 14 days prior to the date of the settlement conference. The brief shall

(*a*) explain the party's theory of the case;

(*b*) state the material facts that the party expects to establish at the hearing of the appeal, and how those material facts will be established; and

(*c*) state the issues to be determined at the hearing;

(*d*) state the propositions of law that the party will rely on at the hearing of the appeal, and the authorities to be relied on in support thereof.

(5) A settlement conference brief should not exceed 10 pages except with leave of the settlement conference judge, which may be applied for by informal communication with the Registry.

(6) The settlement conference judge may adjourn a settlement conference and reconvene it at a later date.

127. **Memorandum or Direction**

(1) At the conclusion of a litigation process conference under Rules 125, 126.1 or 126.2:

(*a*) counsel may sign a memorandum setting out the results of the conference, and

(*b*) the judge conducting the conference may give such direction as the judge considers necessary or advisable with respect to the conduct of the appeal or the appeal hearing.

(2) Any memorandum executed by counsel or direction given by the judge binds the parties unless the judge presiding at the hearing of the appeal directs otherwise.

128. No Disclosure to the Court

No communication shall be made to the judge presiding at the hearing of the appeal or at a motion in the appeal with respect to matters related to settlement or settlement discussions at any of the litigation process conferences.

146.1 Lead Cases

(1) This Rule applies if:

(*a*) two or more appeals have been filed before the Court;

(*b*) in each such appeal, the Court has not made a decision disposing of the appeal(s); and

(*c*) the appeals give rise to one or more common or related issues of fact or law.

(2) The Chief Justice may give a direction:

(*a*) specifying one or more of the appeals found under subsection (1) as a lead case or lead cases; and

(*b*) staying the other cases following under subsection (1) (the related cases).

(3) When the Court makes a decision in respect of the common or related issues the Court shall send a copy of that decision to each party in each of the related cases.

(4) Within 90 days after the date that the Court sent a copy of the decision to a party under subsection (3), that party shall notify in writing the Court whether or not the party agrees to be bound by the decision in whole or in part.

(5) The Court shall, on its own initiative or upon representations of the parties, give directions in respect of the cases which are stayed under paragraph (2)(*b*) providing for the disposal of or further steps in these appeals.

(6) If the lead case or cases are withdrawn or disposed of before the Court makes a decision in relation to the common or related issues, the Chief Justice shall give directions as to:

(*a*) whether another case or cases are to be heard as the lead case or lead cases; and

(*b*) whether any direction affecting the related cases shall be set aside or amended.

147(3.1) Settlement offers

(*a*) Unless otherwise ordered by the Court and subject to paragraph (*c*), where an Appellant makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the Appellant is entitled to party-and-party costs to the date of service of the offer and an amount equal to solicitor-client costs after that date, plus reasonable disbursements and applicable taxes.

(*b*) Unless otherwise ordered by the Court and subject to paragraph (*c*), where a Respondent makes a written offer to settle and the Appellant obtains a judgment less favourable than the terms of the offer of settlement, or fails to obtain judgment, the Respondent is entitled to party-and-party costs to the date of service of the offer and an amount equal to solicitor-client costs after that date, plus reasonable disbursements and applicable taxes.

(*c*) Paragraphs (*a*) and (*b*) do not apply unless the offer to settle

(i) is a written offer of settlement submitted to the Court within two days of being served, in a sealed date serviced envelope;

(ii) is served at least 90 days before the commencement of the hearing; and

(iii) is not withdrawn; and

(iv) does not expire earlier than 30 days before the commencement of the hearing.

147(3.2)(*a*) In circumstances where a written offer to settle does not provide for the settlement of the issue of costs, if a party requests the Court to consider subsection 147(3.1), the Court, in ascertaining whether the judgment granted is more or less favourable than the offer to settle, shall not have regard to costs awarded in the judgment or that would otherwise be awarded.

(*b*) For greater certainty, if a written offer to settle that does not provide for the settlement of the issue of costs is accepted, a party to the offer may apply to the Court for an order determining costs.

147(3.3) No communication respecting an offer to settle shall be made to the Court, other than to a judge in a litigation process conference who is not the hearing judge, until all questions of liability and the relief to be granted, other than costs, have been determined.