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Not every question deserves an answer

Refusals motions have long been the scourge of the intellectual property bar. Prothonotary Aalto recently observed: "Refusals motions that last days on end because counsel move on every single refused question including the most trivial without considering whether the questions are truly essential or not consume a disproportionate amount of time of the Court in dealing with them to the detriment of other litigants…" *(Mediatube Corp. and Northvu Inc. v. Bell Canada and Bell Aliant Regional Communications, LP, 2015 FC 391 (Proth.))*

But times are changing. In its Notice to the Profession released last month, the Federal Court placed significant limits on the discovery process with the express goal of achieving greater proportionality in court proceedings "in terms of the costs and time required, to the nature and complexity of the dispute".

The new practice direction, entitled "Case Management: Increased Proportionality in Complex Litigation Before the Federal Court", expands the role of case management in interlocutory motions and appeals to keep parties on track for their scheduled trial date. The greatest area of change is in oral discoveries. Under the new practice, the following general guidelines apply:

- each party is limited to approximately one day of oral discovery per week of trial scheduled, up to a maximum of four days of discoveries;
- no questions can be taken under advisement. All questions must be answered unless clearly improper, prejudicial or privileged;
- refusals motions are limited to one hour per day of discovery of each party's representative; and
- significant cost sanctions may be imposed against unsuccessful or unreasonable parties, again "to ensure effective, proportionate use of the court's scarce resources by parties."

Consideration is also being given to recommending a legislative amendment limiting appeals of interlocutory orders by judges and prothonotaries.

This new direction comes in the wake of the Federal Court's repeated cries of abuse of the discovery process by counsel and parties. The Report of the Subcommittee on Global Review of the *Federal Courts Rules* also highlighted the need to curb abuse and disproportionate conduct, noting that the current scale of costs is too low to deter the conduct of large, sophisticated litigants.

These limits on the discovery process also parallel recent developments in the Ontario courts. Some Superior Court judges have adopted an approach that awards costs on an "amount per refusal" basis, at $1,500.00 per refusal, to a maximum of 8 "key" refusals. (See the standard case management directions released as an appendix to Justice David M. Brown's decision in *Farrell v. Kavanagh,* 2014 ONSC 905 (Ont. S.C.J. [Commercial List]), released prior to his elevation to the Court of Appeal for Ontario, and since endorsed and adopted in *Merpaw v. Hyde,* 2015 ONSC 1795.)

The Federal Court has always given case management prothonotaries and judges considerable "elbow room" to resolve interlocutory matters and move cases expeditiously to trial. This direction reinforces the primacy of proportionality in the discovery process, and provides the court with additional tools to curb abuses. It is a welcome advancement for counsel and litigants frustrated with the morass of procedural hurdles all too frequently encountered in IP litigation.