



Mediations | Neutral Evaluations | Negotiation Facilitations

The Honourable Chief Justice Paul S. Crampton,  
Federal Court of Canada,  
Ottawa, Ontario,  
Canada K1A 0H9.

Ottawa

28 June 2012

Dear Chief Justice Crampton:

Re: Federal Court proposed Rule changes

I submit herewith some thoughts concerning mediation insofar as the Court may be looking at changes to its Rules governing intellectual property cases.

I shall be pleased to be of further assistance should there be any questions concerning these thoughts or the manner in which more encouragement to the parties to mediate, at early stages of intellectual property litigation, might be beneficial.

Yours very truly,

A handwritten signature in cursive script that reads 'Charles Kent'.

Charles Kent

✓ C.c. The Honourable Justice Roger Hughes

## **Rules Changes in the Federal Court of Canada**

This submission concerns the initiative by the Federal Court (hereinafter "FC") to review its Rules with a view to improving the way in which its cases are managed, insofar as intellectual property (hereinafter "IP") cases are concerned.

Although I have been retired from active IP practice for over three years now, during my many years of practice I have been involved as counsel in litigation (particularly in my early years), and as counsel and as mediator in numerous mediations of IP cases (particularly in recent years). I am presently doing mediation work in the IP field and, for the Public Service Staffing Tribunal (hereinafter "PSST"), in the labour field. (The PSST is quite innovative in its approaches to mediations of complaints received under the Public Service Employment Act.)

A couple of years ago, I reviewed, at the request of Chief Justice Lutfy, as he then was, the dockets of a significant number of trade-mark and copyright files in the FC to consider whether the Court might be doing more to move those cases forward in an expeditious way. My report was filed with him in early 2011, and concluded there was more the Court could be doing in this regard.

At the recent CBA "Town Hall" meeting between the FC Bench and the IP Bar, it seemed clear to me that the Court is anxious to do what it can to move IP cases along, but that there are still issues affecting the parties and their counsel (e.g. delays in scheduling cases for hearings) as well as issues affecting the Judges and staff of the Court (e.g. crowded dockets, multiple motions in many IP cases, etc.).

Based on my knowledge and experience with the effectiveness of the mediation process in resolving, or at least simplifying, disputes in litigation, I believe that earlier mediation of appropriate IP cases in the FC would not only be possible, but desirable. This would not only speed up the resolution of many of the cases that would not be going to a hearing, removing them sooner from the Court docket, but in many cases also would save the Court, the parties and their counsel the time and effort that would otherwise be expended in managing those cases.

Mediation in such cases could be required within a limited period of time after the conclusion of pleadings, unless one party or the other expressly declined mediation (this approach is followed for example by the PSST).

If a party declines mediation while another is in favour of it, cost sanctions against the declining party might be considered.

The Court might also consider in appropriate IP cases (for instance cases having complex facts or issues of law) encouraging the parties to use outside or private mediators having IP expertise. Along these lines, the United States Court of Appeals for the Federal Circuit has successfully used a roster of experienced mediators with IP subject matter expertise to mediate appeals of IP cases to that Court. That Court's website provides a succinct and simple summary of its mediation program insofar as it applies to IP cases: "[It]... offers parties a risk-free, non-binding opportunity to settle their disputes in a confidential, timely, creative way, by utilizing the services of an experienced mediator with intellectual property subject matter expertise."

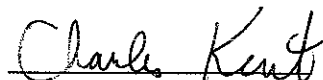
Prothonotaries doing "judicial mediations" and outside "private" mediators will say that the mediation process is usually "successful", in that it will either result in a settlement of the dispute or give the parties a better idea of what is behind the dispute, resulting in a narrowing of the issues being contested in Court or a reduction of motions such as those for particulars or for answers on discovery.

Early mediation of IP disputes in the FC would not be a panacea – many cases would likely continue beyond mediation and even go to hearings. However, the effectiveness of the mediation process in resolving or simplifying issues in dispute, particularly when carried out by skilled mediators, is indisputable. In the FC, a rule change encouraging early mediation in IP disputes would be beneficial to all concerned.

Ottawa, Ontario

26 June 2012

Charles Kent

A handwritten signature in cursive script that reads "Charles Kent". The signature is written in dark ink and is positioned below the printed name.