



Federal Court of Appeal Cour d'appel fédérale

MEMORANDUM

Comments

TO: Stratas J.A.
FROM: Sharlow J.A.
DATE: June 13, 2012
RE: Global Review notes

Thank you for circulating the comments. You have undertaken a massive task. I have no doubt that the effort will prove worthwhile.

I will not kid you – I did not read all the comments. But I will make some of my own comments, for what they are worth. This is for the committee only. I have not put enough work into this to justify wider circulation.

General comments

I would counsel the committee to pay close attention to the view of registry officers and judicial administrators. They must work with the rules much more than judges.

Issue 1: Court led v. party led pre hearing procedures

The committee may wish to consider whether this issue ought to be viewed differently for the two courts. Broadly speaking, matters in the Federal Court are more procedurally complicated, in the sense that there is an enormous variation in subject matter and in the nature of cases. That suggests that significant flexibility would be warranted in the rules for the Federal Court, with provision for more detailed guidelines in practice directions relation to specific practice areas.

But in the Federal Court of Appeal the procedural aspects are more straightforward, not always but most of the time.

For cases in the Federal Court of Appeal, the committee might consider following the SCC model, in which the granting of leave results in the assignment of a tentative hearing date, which puts everyone on notice that they had better pay attention. It is possible to figure out, on the date on which a notice of appeal or notice of application for judicial review is filed, when a hearing could be held if everyone meets all deadlines. That date is usually within 6-8 months of the initial filing. Unless the initiating document indicates an intention to seek a stay or some other order that will affect the timing of the hearing, someone in the registry could figure out a hearing date right at the outset for every case. That may mean that the location of sittings might have to be determined a little earlier than is done now, but perhaps not.

Issue 2: Control of abuse

All courts already have the inherent power to control abuse once it comes to light, but that does not solve the day to day difficulties of registry staff who are the ones facing the worst of it. I think it would be a good idea to have some more specific rules, if only to give the Registry staff something they can rely on when dealing with someone who is unduly troublesome.

Issue 3: Trial v. disposition

I agree that the objective is a just resolution, with a fair process being the means to that end. We need both, but it makes sense for Rule 3 to emphasize the disposition aspect.

Issue 4: Proportionality

I have to say I do not understand why this is a separate issue. Anything that engages the court's discretion already requires consideration of

proportionality. I am not sure what else there is to it, but I would defer to those who have thought about this much more than I have.

(*Entre nous*, I may apply a kind of proportionality if I look at a file and conclude that the legal debate is trivial – I definitely pay less attention to that file than the others. Of course, I suppose the global rules review is not intended to address secret principles of proportionality.)

Having said that, it seems to me that if the rules were to provide for simpler or more expeditious procedures for relatively small or relatively routine cases, I think that would be a good thing. That is easier to say than to do, I think. It may be particular difficult to draw the lines.

Issue 5 – Practice directions

It would probably be best if the rules provided specifically for practice directions, so that they have some kind of formal status.

What is probably more important is to devise a means by which people can find out what practice directions have been made, what they say, and where they can be found. That is more a website problem than a rules problem, but perhaps the rules could mandate a publication protocol.

Issue 6 – Uniform procedures for specialized matters

This already exists for immigration law matters and to some extent maritime law. If there is some subject matter that warrants this treatment, then I see no objection in principle. It seems to be a bigger issue for the Federal Court than the Federal Court of Appeal, though.

Issue 7 – Architecture of the Rules

Generally speaking, the architecture of the rules makes some sense to those who are already familiar with them, but it makes life quite difficult for any one else to find what they need to know. Some of the deficiencies

stem from the lack of a decent index and detailed table of contents. Web-based solutions are an excellent idea, but would not help the least sophisticated users.

I would favour separate rules for the Federal Court and the Federal Court of Appeal. I say that despite the overlap on matters of judicial review. At this stage in the development of the two courts, they are quite different creatures. There are already instances of different treatment (for example, with regard to status reviews and service of originating documents).

Issue 8 – other matters

I do not have anything useful to say about the issues that relate mainly to trials. I will say this, however. Anyone who thinks all evidentiary matters can be settled before trial is in for a great disappointment.

Costs: I think it would be a good idea to require parties to be prepared to be specific on the matter of costs by the time of the hearing. That might save a lot of post-hearing work, and might also have the advantage of bringing home to self-represented litigants the financial risk they are taking on. Would it make sense to consider a rule that requires the courts to consider limiting costs when the Crown is appealing a decision (or seeking judicial review of a decision) for reasons that transcend the specific case – for example, when they challenge a \$300 employment insurance issue because they want a judicial interpretation of a particular provision of the statute or a regulation? (Hey, maybe I do understand proportionality after all!)

Consents to extensions of time

I would not be opposed to giving parties more autonomy on this, but with some limits.

Certified record

The purpose and permitted use of the certified record should be clarified, if only for international trade practitioners.

Early requisition for hearing

I think this is a good idea, at least for the Federal Court of Appeal.

Letters v. motions

I think the use of letters in pre-trial matters needs to be carefully controlled because there is a high risk of abuse (for example, asking for things without a proper factual foundation, especially where the other side is a self represented litigant). I would not favour any kind of blanket permission for this. Judges and prothonotaries can always make special directions for this in an appropriate case.

