Possible Procedural Changes

A Discussion Paper of the Federal Courts Rules Committee

Background

In addition to the larger reforms of the Federal Courts Rules, from time to time the need arises for discreet amendments. Reforms that are of a purely housekeeping nature may require no more than the ordinary process of notice and consultation through publication in the Canada Gazette. However other reforms could benefit from input in advance of drafting proposed amendments to the Rules. This discussion paper identifies the following possible issues that could form the basis for reform of the Rules and for which the Federal Courts' Rules Committee is seeking input:

1. Filing an appearance within the time limits for filing a Defence,

2. Timely filing of books of authorities,

3. Revising the content requirements for books of authorities,

4. Allowing non-lawyers to represent corporations without leave of the court,

5. Providing specifically for amici curiae,

6. Providing specifically for jurisdictional challenges,

7. Increasing the monetary limits for simplified proceedings and for prothonotaries, and

8. Garnishing joint bank accounts.

Issue 1: Filing an appearance within the time limits for filing a Defence

In cases where the time limits are too short for the preparation of a defence, one option could be to permit the filing of an Appearance followed by a Defence 20 days thereafter. This would preserve the integrity of the current time limits while addressing the concern that these time limits might be too short in some cases. It could also be appropriate to review more generally the time limits provided in the rules for Defences.

Discussion Point: Should rule 204 be amended to provide for the filing of an Appearance within the time limits and a Defence 20 days thereafter? Should the time limits provided in the rules for Defences be reviewed more generally?

Issue 2: Timely Filing of books of authorities

Rule 348 currently requires parties to file book of authorities at least 30 days before the hearing, but this requirement is often ignored causing inconvenience to the court: Borduas v Canada, 2010 FCA 102.

Various approaches could be taken to correct this. Sanctions could be provided for failure to comply, as is done in the rules of the Court of Appeal of Québec in Civil Matters, (2006) 138 G.O.Q. II, 5800 [c. C-25, r. 2.3], which provide

87. The Court, the Judge or the Clerk may penalize any party who files a book of authorities late by ordering that, in the event that the appeal or motion is decided in that party's favour, the cost of its preparation not be included in the bill of costs.

Alternatively, books of authorities could be required to be filed together with the memorandum of fact and law. However, this would increase the burden on counsel by requiring them to prepare books of authority properly highlighted at the same time that the memorandum of fact and law is being finalized.

A further alternative would be to provide for books of authorities to be submitted a specified number of days after the memorandum of fact and law is filed. Such a rule could read as follows:

Rule 346 (6) Books of Authorities- Within x days after service of a party's memorandum of fact and law, the party shall serve and file its Book of Authorities.

Still another alternative would be to require the filing of books of authorities to request a hearing date. This requirement would need to be limited to the appellant to prevent a respondent from delaying indefinitely the scheduling of a hearing date by failing to file its book of authorities.

Discussion Point: Should books of authorities in appeals be required to be filed either with the memoranda of fact and law, or a fixed time following it, or before a party is able to request a hearing date? Should a sanction be provided for late filing of the book of authorities?

Issue 3: Revising the content requirements for books of authorities

It may also be time to revisit the requirements for the contents of books of authorities. Supreme Court of Canada rule 44(2) requires the responding party to include only materials that are not already in the appellant's book. Clarifying that it is not helpful to include duplicate materials could streamline the process in the Federal Courts.

Furthermore, it might be appropriate to designate certain decisions, such as those frequently referred to in a particular areas, or classes of decisions, such as Supreme Court of Canada decisions, from which the parties need reproduce only the relevant excerpts.

Alternatively, given the easy access to cases on legal databases freely available to the public, it now may be appropriate to consider limiting books of authorities to necessary statutory references, material other than case law (excerpts from dictionaries, law text books and articles by learned authors) plus court cases that are not accessible on (a) the current website of a Canadian court, (b) some other reliable but free website such as www.canlii.org or (c) the website of a proven reputable legal publisher, such as Lexis/Nexis, together with the relevant excerpts from the cases relied upon and a published summary, if one is available as an appendix to the memorandum of fact and law.

Discussion Point: Should the content requirements for books of authorities in appeals be reconsidered? What should be included in those requirements?

Issue 4: Allowing non-lawyers to represent corporations without leave of the court

Federal Court rule 120 currently permits corporations, partnerships and unincorporated associations to be represented by officers, partners or members, as the case may be only in special circumstances and with leave. The need to seek leave could prove onerous for small businesses and other juridical persons. The question arises as to whether it might be appropriate to dispense with the need for leave and, if so, to consider what alternative mechanism might be introduced to safeguard the interests of such persons.

Discussion Point: Should rule 120 be amended to permit juridical persons to be represented by non-lawyers without leave, and if so, under what circumstances?

Issue 5: Amici curiae

Under the new article 211 C.C.P in Quebec, as in Ontario rules 13.02 and 13.03, a third party may be granted leave to intervene to make submissions during the trial in first instance or at the appeal hearing. To do so, the intervener must inform the parties in writing of the purpose of and the grounds for the intervention. The court may authorize the intervention if the presence of the third party could assist the court in resolving the issues by shedding a particular or additional light on the case, having regard to the questions at issue and after hearing the parties. On a request by a third party to intervene at the appeal hearing (arts . 509, 211 C.C.P.), a judge of the Court of Appeal must consider whether the parties to the appeal will present all points of view.

The authorized third party intervener does not become a party to the proceeding and therefore does not acquire the legal capacity to appeal the judgment to be rendered (art. 492 C.C.P.). The intervener may only exercise the limited right, where permitted, to make representations during the trial (proof and hearing) in accordance with the terms and conditions determined by the court.

Federal Court rule 109 currently permits interveners, but it does not distinguish between those who seek to intervene as parties based on their interest in the outcome of the case and those who seek to intervene as friends of the court, or amicus curiae, without being a full party to the proceeding. This type of intervention is intended to assist the court with questions of law and it enables, in particular, public interest groups, for example, in constitutional law matters, to argue views that are different from the views of the parties to the proceeding. Ontario rule 13.02 provides:

Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

While amici curiae ordinarily apply to intervene, they may also be asked to intervene by the court of its own motion. Ordinarily they are self-funding and the scope of their intervention in terms of volume of material and/or time permitted for oral submissions.

A rule permitting intervention of this sort would also be consistent with Supreme Court of Canada rule 92, SOR/2002-156 and with existing jurisprudence: Harkat (Re), 2004 FC 1717.

Discussion Point: Should a rule be introduced specifically to permit the appointment of an amicus curiae?

Issue 6: Providing specifically for jurisdictional challenges

Jurisdictional challenges are currently brought by way of rule 221(1)(a) which permits the court to strike out a pleading on the ground that it discloses no reasonable cause of action. Under paragraph (a), the moving party must show that this is €œplain and obvious and beyond doubt: Hodgson v Ermikneskin Band No. 942 [2000] FCJ No. 2042 (CA). While the €œplain and obvious test may be appropriate for pleadings that disclose no reasonable cause of action, it is less appropriate for the resolution of complex jurisdictional questions.

A distinct sub-rule for jurisdictional challenges could be created by adding €œ(e.1) is beyond the jurisdiction of the court to decide; or€¦. This would remove jurisdictional challenges from the ambit of challenges to pleadings that are subject to the €œplain and obvious test.

Currently, preliminary objections to the jurisdiction of the court are covered by rule 208(d): MIL Davie v. Hibernia Management & Development Co. (1998), 226 N.R. 369 (Fed. C.A.). The evidentiary requirements could be addressed as they are in article 151.5 C.C.P by providing that, on a party's preliminary objection as to jurisdiction, the Federal Court could allow the parties to present the necessary evidence.

Discussion Point: Should a rule be introduced specifically for jurisdictional challenges?

Issue 7: Increasing the monetary limits for Simplified Proceedings and for Prothonotaries

The Ontario Court Rules for Simplified Procedure, rule 76, was recently amended to increase the limit for such proceedings from $50,000 to $100,000. An increase in the monetary limit for simplified proceedings in the Federal Court to $500,000 could similarly assist in expediting matters. However, it would encompass many more actions, some of which, such as many aboriginal cases and complex litigation, might not be appropriate for such a procedure.

Some of the simplified action provisions may need to be tailored to the amount of the claim or some case management employed to €œproportionally allocated the procedure to the claim. On the basis of the guiding principle that proceedings must be proportionate to the nature, ultimate purpose and complexity of the proceeding as well as judicial economy€”and taking into account that the complexity of a case may not directly proportional to the value of the claim€”the limit for simplified proceedings might need adjustment, but a question remains as to the optimum monetary limit under rule 292.

Similar considerations could warrant an increase in the monetary jurisdiction of prothonotaries. Alternatively the jurisdiction of prothonotaries could require review more generally.

Discussion Point: Should the monetary limit in rule 292(a) be increased to $500,000, or to some other amount? Should the monetary jurisdiction of prothonotaries under rule 50 be similarly adjusted? Should the jurisdiction of prothonotaries be reviewed more generally?

Issue 8: Garnishing joint bank accounts

A bank account held jointly by two or more persons is not garnishable at common law for the debt of one of the account holders. To overcome this impediment, Ontario rule 60.08(1.1) was introduced to provide for the garnishment of joint bank accounts. The question arises as to whether the same should be done for garnishments issued out of the Federal Court.

Discussion Point: Should rule 449 provide for the garnishment of joint bank accounts?

To make written comments, please email or write by June 24, 2011 to:

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