SEMINAR ON THE FEDERAL COURTS
WITH THE MONTRÉAL BAR
TUESDAY, MAY 4, 2010, AT 4:30 P.M.
30 McGILL ST., MONTRÉAL

"PROMPT RESOLUTION OF EVERY CASE, ON REQUEST"

The role of the Federal Court of Appeal in the prompt resolution of cases

Hello and thank you for inviting me to talk to you today on an important subject: the prompt resolution of cases in the Federal Courts, and specifically in the Federal Court of Appeal. I will repeat to you what my friend, the Honourable Michel Robert, Chief Justice of the Court of Appeal of Québec, recently confided to me by telephone about his own court's success in case management and mediation. He explained to me that the Court of Appeal of Québec does very little mediation because of the success achieved by the lower courts in this area.

At the Federal Court of Appeal, we are also the beneficiaries of the effective work done by the Federal Court's judges and prothonotaries. In other words, we are the victims of our own success. In fact, we do not receive requests for mediation at the Federal Court of Appeal. It must be remembered that the Federal Court of Appeal is different from the Federal Court in many respects: for example, we have no witnesses, no evidence, few or no interlocutory motions, etc. Nor do we have prothonotaries, experts in case management and mediation, to help us. As you know, three Federal Court of Appeal judges sit together, and we often travel across the country to hear cases according to the needs of the parties.

That said, I remain open to the idea and I encourage you to submit your requests or motions for mediation to the Court of Appeal if you believe that this could be useful for your clients. I will consider your requests on a case-by-case basis and we may find a way to accommodate you. I am thinking especially of intellectual property cases where both parties are open to mediation. There will be an annual meeting of Federal Court of Appeal judges on June 10, 2010, and I will discuss the possibility of the judges themselves pointing out when a certain case could benefit from mediation.

I would now like to talk to you about the steps you need to take to make sure that each of your cases is resolved as promptly as possible in the Federal Court of Appeal. I think you'll see that we are often ready even before you are!

[I] Preparation for scheduling and argument

It may be a basic principle, but it remains crucial for the resolution of all cases– you must be ready to perfect your case for the benefit of your own client. This means that you must be ready with available, practical and reasonable dates to offer to our Judicial Administrator – in the same calendar year… In an aside, I would like to tell you that we have already had one case where counsel told us that he was not available to schedule a hearing for an entire year! Remember that waiting periods are measured in weeks, not years.

[II] Times and timetable according to the rules of practice

After that, there are timetables to be respected under the *Federal Courts Rules*. This may be a review for those of you who are experienced lawyers, but I would like to go through the most important steps in an appeal or application for judicial review in the Federal Court of Appeal.

APPEAL:

[1] The appellant must bring an application by means of a notice of appeal (Form 337) within 30 days after the pronouncement of a final judgment or within 10 days after the pronouncement of an interlocutory judgment (subsection 27(2)), unless otherwise provided for in the law.

[2] Within 10 days after the issuance of the notice of appeal, the appellant must serve the notice of appeal on the respondents and on any other person who is to receive service under the rules (Rule 339(1)).

[3] Within 10 days after service, the appellant must file proof of service (Rule 339(2)).

[4] Within 10 days after service of the notice of appeal, the respondent must serve and file a notice of appearance or of cross-appeal (Rule 341(1)).

[5] Within 30 days after the filing of the notice of appeal, the parties must agree in writing as to the content of the appeal book (Rule 343(1)).

[6] Within 30 days after filing the agreement on the content of the appeal book, the appellant must serve and file it (Rule 345).

[7] Within 30 days after filing the appeal book, the appellant must serve and file a memorandum of fact and law (Rule 346(1)).

[8] Within 30 days after the appellant's memorandum is served, the respondent must serve and file the respondent's memorandum (Rule 346(2)).

[9] If the respondent has served a cross-appeal, the appellant as respondent to cross-appeal must serve and file a memorandum of fact and law within 30 days after service (Rule 346(3)).

[10] Within 20 days after service of the respondent's memorandum or within 20 days after the expiration of the time for service of the memorandum, the appellant must serve and file a requisition requesting that a date be set for the hearing (Rule 347(1)).

[11] Within at least 30 days before the hearing date, the parties must file books of statutes and regulations (Rule 348(1)).

[III] Special remarks about a complete record filed on time

I would like to take a little time here to make a few special remarks about the importance of providing the Court with a complete record filed by the deadline set in the rules of practice. Under Rule 348 of the *Federal Courts Rules*, a book of authorities must be filed at least 30 days before the hearing date, and it must be accompanied by a memorandum of fact and law in all other cases. It is preferable if a joint book is filed by all parties. In this regard, I refer you to a recent Federal Court of Appeal decision, written by my colleague here, the Honourable Gilles Létourneau. In ***Borduas v. Her Majesty the Queen* 2010 FCA102**, the Federal Court of Appeal examined Rule 348 and the importance of the two parties in this case filing their books of authorities on time. Justice Létourneau stressed the following at paragraphs 32 and 33 of this decision:

> [32] While it is rare for both parties to be at fault this way, the same cannot be said, unfortunately, for single parties. All too often for the members of our Court, who diligently prepare for hearings to make them as productive as possible, one of the parties is late in filing its book of authorities. If we refuse to accept it, we are only punishing ourselves.
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> [33] I believe the time has come for the Rules Committee to review Rule 348 to increase its effectiveness and promote compliance. We could link the book of authorities to the memorandum of fact and law by requiring that both be filed simultaneously. Or, to promote the filing of a joint book of authorities, the rule could provide that no application for a hearing under Rule 347 may be submitted, or hearing date set, before the book of authorities has been filed. Any party that files late would penalize itself rather than the Court and would have to explain to the client why the hearing is delayed; in the case of undue delay, the party would potentially be subject to a notice of status review.

JUDICIAL REVIEW:

I would now like to turn my attention to the judicial review role of the Federal Court of Appeal. As you know, the Federal Court of Appeal has jurisdiction to hear applications for judicial review made in respect of decisions of the federal boards, commissions or other tribunals listed in paragraphs 28(1)(*a*) to (*p*) of the *Federal Courts Act*. Examples include the CRTC, the Canada Industrial Relations Board and the Canadian Transportation Agency.

With respect to judicial review, subsection 28(2) of the *Federal Courts Act* confers on the Federal Court of Appeal the powers set out in section 18.1, with the exception of subsection 18.4(2) and with any modifications that the circumstances require.

The rules governing the application for judicial review procedure are set out in sections 300 to 319 of the *Federal Courts Rules*, SOR/2004-283:

[1] The applicant commences an application by a notice of application (Form 301) within 30 days after the time the decision was first communicated to the applicant (subsection 18.1(2)), unless otherwise provided for in the law.

[2] Within 10 days after the issuance of the notice of application, the applicant must serve it on the respondents and on any other person required to be served under the Rules (Rule 304(1)).

[3] Within 10 days after service of the notice of application, proof of service must be filed by the applicant (Rule 304(3)).

[4] Within 10 days after being served with a notice of application, the respondent must serve and file a notice of appearance (Rule 305).

[5] Within 30 days after issuance of the notice of application, the applicant must serve and file the applicant's supporting affidavits (Rule 306).

[6] Within 30 days after service of the applicant's affidavits, the respondent must serve and file the respondent's affidavit(s) (Rule 307).

[7] Within 20 days after the filing of the respondent's affidavits, cross-examination on the affidavits must be completed by all parties (Rule 308).

[8] Within 20 days after completion of the cross-examination on the affidavits, the applicant must serve and file the applicant's record (Rule 309).

[9] Within 20 days after service of the applicant's record, the respondent must serve the respondent's record (Rule 310).

[10] Within 10 days after service of the respondent's record, the applicant must serve and file a requisition requesting that a date be set for the hearing of the application (Rule 314).

[11] A hearing date is set by order and the matter is heard and determined by the Court.

[IV] Federal Courts Rules Committee

I would like to consider for a moment the importance of our rules committee in light of all these rules I have just enumerated. Sections 45.1 to 46 of the *Federal Courts Act* provide that the rules regulating the practice and procedure in the Federal Court of Appeal and in the Federal Court are made by the rules committee of the Federal Court of Appeal and the Federal Court, subject to the approval of the Governor in Council. The Act specifies the composition of the rules committee, which consists of:

- the Chief Justice of the Federal Court of Appeal (myself);
- the Chief Justice of the Federal Court (my colleague here, Chief Justice Lutfy);
- thee judges designated by the Chief Justice of the Federal Court of Appeal (who are the Honourable Karen Sharlow, the Honourable Carolyn Layden-Stevenson and the Honourable David Stratas);
- five judges and one prothonotary designated by the Chief Justice of the Federal Court (who are the Honourable Johanne Gauthier, the Honourable Richard Mosley, the Honourable Anne Mactavish, the Honourable Roger Hughes, the Honourable Robert Barnes, and Ms. Mireille Tabib, Prothonotary);
- the Chief Administrator of the Courts Administration Service (Mr. Raymond Guenette);
- five members of the bar of any province designated by the Attorney General of Canada, after consultation with the Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court (who are Mr. Peter Hutchins, Ms. Wendy Danson, Ms. Cecily Strickland, Mr. John Morrissey, and Mr. Joe Fiorante); and
- the Attorney General of Canada or a representative thereof (who is Mr. Donald Rennie).

A few other persons who are vital to the creation of rules for the Federal Courts have been added to this committee. We also have two consultants who help us enormously: Professor Janet Walker from Osgoode Hall and Professor Denis Ferland from Laval University. These two professors are able to give us certain perspectives from different jurisdictions and help us from a bijuralism point of view. We also have legislative drafters, Graeme King and Nathalie L'Heureux, who help us develop rules within the Department of Justice. Finally, there are the legal officers to the Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court, Ms. Chantelle Bowers and Ms. Emily McCarthy, who ensure that the legislative development process is properly followed.

On this point, I would like to point out that there is an entire procedure that must be followed in order for our rules to receive final approval by the Governor in Council. First, we must deal with the Regulatory Affairs Division of Treasury Board through an initial Regulatory Impact Analysis Statement (RIAS), which is published first in Part I of the

Canada Gazette, along with the proposed rules, for a 60-day period. Then, the comments received during this consultation period are considered by the subcommittees in question, and another RIAS prepared, with the new amended rules. All of this is submitted for approval by the Plenary Rules Committee, which usually meets twice a year. Once the rules have been finalized, they are stamped and sent, with the revised RIAS, for the final approval of the Governor in Council. Finally, the rules are published in Part II of the *Canada Gazette*. For example, we have had new rules on summary judgments and trials since December 10, 2009, and our rules committee has just given the "green light" to proceed with the final approval for certain procedural rules and rules concerning expert witnesses. All that to say that the rules you see and work with in the Federal Courts have a context and came into effect only after an extensive procedure. Maybe now you will better understand why the judges insist on their being complied with!

[VI] Conclusion

In closing, if you really wish to have a "prompt resolution of every case, on request" in the Federal Court of Appeal, I encourage you to carefully follow the *Federal Courts Rules* and be innovative by, for example, asking for case management in the Federal Court of Appeal for your client if you think it appropriate.

You must also focus on your written and oral arguments.

Do not underestimate the importance of the written argument. It plays an essential role in all stages of the hearing of an application for judicial review or an appeal. The *factum*, or memorandum, is at least as important as the argument, because counsel usually has only a certain amount of time to make arguments.

It is your factum that allows the judge to get a first impression of the case before the Court. Make sure that you follow the rules as to the number of pages (not more than 30) and font (not smaller than 12 points and the text must be legible for the judge). You must remember that the judge reads your factum before the hearing, has it available during the hearing and keeps it afterwards.

When you present your oral argument, the judge sees and hears you, which is not the case when the judge reads your written submissions. The way you present your argument is important. Be accurate, fair and objective.

Begin your argument by telling the judge exactly what the case is about and why you should win it. Above all, arrive at court prepared, and together we will ensure that all of your cases are promptly resolved.

THANK YOU