

***THE FEDERAL COURT OF APPEAL AND THE FEDERAL COURT: 50 YEARS OF HISTORY*, MARTINE VALOIS, IAN GREENE, CRAIG FORCESE & PETER MCCORMICK, EDS. (TORONTO: IRWIN LAW, 2021)**

## I. INTRODUCTION

The release of this book in 2021 marked the 50th anniversary of the creation of the Federal Court of Canada.<sup>1</sup> The various chapters are written by a distinguished assembly of academics, lawyers, and members of the judiciary. The fundamental aim of the book is to analyze the past and the present and look to the future of the Federal Court and Federal Court of Appeal, while remaining accessible to the general public. It is a difficult goal to attempt, but one that is reflective of the history of the Federal Courts, which have had to overcome challenges from other courts and the legal profession to defend their jurisdiction and their very existence. In this review, I overview the contents of the book and identify several recurring themes. I share some of the highlights that caught my eye as a lawyer who practises in the Federal Courts, as well as some points that may be relevant to non-lawyers and the general public.

The book contains 18 individual chapters that may be loosely organized into three parts. The first part (chapters 1 to 7) focuses on the general history of the Federal Courts, their successes and trials, and the present status of the judiciary and the Courts Administration Service. The second part (chapters 8 to 16) contains individual chapters covering various areas of law that the Federal Courts have significantly developed given their exclusive or concurrent jurisdiction: administrative, immigration and refugee, intellectual property, national security and intelligence, Aboriginal and Indigenous, environmental, admiralty, labour and human rights, and taxation law.

The final part (chapters 17 and 18) discusses the present and future opportunities and challenges facing the Federal Courts with chapters written by the Chief Justices of each court. The preface to the book written by The Honorable Frank Iacobucci and the epilogue written by The Honorable Robert Décaré may thematically be viewed within this part, although they give valuable insights into the entire text with refreshing forthrightness. There is also a final piece written by the Executive Director and General Counsel for each court outlining the impact of the COVID-19 pandemic, which is also discussed in chapters 1, 17, and 18.

## II. HIGHLIGHTS AND TAKEAWAYS

Of great interest to both lawyers and the general public is chapter 5, which presents a profile of the judiciary of the Federal Courts based on interviews with and survey responses from a total of 78 current and retired judges and prothonotaries.<sup>2</sup> The chapter reviews the general work, education, and volunteer backgrounds of the judiciary, their initial and later experiences working as a judge, and their thoughts on the challenges faced by the Federal

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<sup>1</sup> The views expressed in this review are my own and do not reflect the views of the Department of Justice Canada or the Government of Canada. The Federal Court of Canada was established in 1971 as the successor to the Exchequer Court of Canada, which was established in 1875.

<sup>2</sup> Martine Valois et al, eds, *The Federal Court of Appeal and the Federal Court: 50 Years of History* (Toronto: Irwin Law, 2021) at 153.

Courts. It is not easy to see behind the judicial veil, nor should it be, and this chapter provides a rare opportunity to receive valuable insights about the judiciary of the Federal Courts.

The following are three of the many interesting results in chapter 5. First, the survey asked about the personal qualities most important to being a judge, with the top result being humility, followed by good judgment, openness to new ideas, and patience.<sup>3</sup> Second, all the survey respondents agreed of the need for diversity in the Federal Courts, with three-fifths saying it was very important.<sup>4</sup> Diversity was identified in various forms, from the nature of their previous law practice, regional diversity, linguistic diversity, gender, and racial diversity.<sup>5</sup> As noted in chapter 1, it took a long time for women to be appointed to the Federal Courts, as they were held to a higher standard than their male colleagues for appointment to the bench and faced other systemic barriers.<sup>6</sup> By 2020, the Federal Court of Appeal was at gender parity and the number of women was increasing in the Federal Court.<sup>7</sup> The survey results and the corresponding analysis in the chapter stress the importance of the Federal Courts, like all courts, to continue to represent the diversity of Canada.<sup>8</sup>

Finally, nearly a tenth of the respondents were concerned about the continuing existence of the Federal Courts.<sup>9</sup> This concern likely reflects the jurisdictional struggles and tensions with superior courts and the Supreme Court of Canada that the Federal Courts have had to face through the past 50 years. The issue of jurisdiction is one that “hangs over” the Federal Courts, a shadow that was thought to have been exorcised after the earlier challenges faced in the road to the Supreme Court of Canada’s decision in *Canada (Human Rights Commission) v. Canadian Liberty Net*,<sup>10</sup> but one that has resurfaced since the *Windsor (City) v. Canadian Transit Co.*<sup>11</sup> decision.<sup>12</sup>

The lingering impact of the judgment in *Reference re Supreme Court Act, ss. 5 and 6* with regard to precluding the appointment of judges from the Federal Courts to one of the three seats reserved for Quebec jurists on the Supreme Court of Canada continues to impact the morale of the Federal Courts.<sup>13</sup> It may have an impact on the Supreme Court of Canada as well, as while there has not been a set tradition of keeping one seat for a former judge from the Federal Courts, when there has been one there, they have delivered a significantly greater amount of lead decisions for cases originating from the Federal Courts.<sup>14</sup>

The Federal Courts and the Supreme Court of Canada have been referred to as identical twins in regard to their original creation in 1875, the existence of their plenary powers, and their constitutional status as courts.<sup>15</sup> But even for twins there is an elder, and the sibling

<sup>3</sup> *Ibid* at 175.

<sup>4</sup> *Ibid* at 164.

<sup>5</sup> *Ibid* at 164–65.

<sup>6</sup> *Ibid* at 27.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* at 165.

<sup>9</sup> *Ibid* at 178–79.

<sup>10</sup> [1998] 1 SCR 626.

<sup>11</sup> 2016 SCC 54 [*Windsor*].

<sup>12</sup> Valois et al, *supra* note 2 at 73–74, 92–93, 96–101.

<sup>13</sup> *Ibid* at 58, 628–29; *Reference re Supreme Court Act, ss 5 and 6*, 2014 SCC 21.

<sup>14</sup> Valois et al, *ibid* at 149–51. As noted in the book, this is known as the “home judge” effect and was particularly pronounced for judges from the Federal Court.

<sup>15</sup> *John Mark Lee Jr v Correctional Service of Canada, Parole Board of Canada, Parole Appeal Division and the Attorney General of Canada*, 2017 FCA 228 at paras 12–13 [Lee]; Valois et al, *ibid* at 626.

analogy is useful when reading the book if the Supreme Court of Canada is viewed as an older sibling that routinely impacts the life of the younger, for better and for worse.<sup>16</sup>

The Federal Court of Appeal's close relationship with the Supreme Court of Canada is examined in the book. The appeal division of the Federal Court of Canada, the predecessor of the Federal Court of Appeal, was originally conceived of as a way to take pressure off the increasing demands of the Supreme Court of Canada.<sup>17</sup> This role became particularly important with the advent of the *Canadian Charter of Rights and Freedoms*, to the point that the Supreme Court of Canada would unlikely have had the time necessary to focus on early *Charter* cases without the existence of the appeal division.<sup>18</sup>

The Federal Court has more than doubled in size since the early 1990s, but the Federal Court of Appeal has remained roughly the same.<sup>19</sup> A recurring theme throughout the book is the need for an increased number of judges appointed to the Federal Court of Appeal to deal with the rising number and complexity of cases coming up from the Federal Court and the Tax Court of Canada and the increasing growth of the administrative state.<sup>20</sup> It is difficult to disagree with this idea after reading the book, including the data showing the growing workload of the Federal Court of Appeal. The statistical analysis covers the Federal Court of Appeal's caseload, decision-making, and impact on cases subsequently appealed to the Supreme Court of Canada.<sup>21</sup> The statistics are particularly useful for anyone who likes seeing the specific numbers, but they are partnered with corresponding explanations that make them accessible to the general reader. Overall, a slightly higher proportion of Federal Court of Appeal cases make it to the Supreme Court of Canada, as compared to provincial appeal courts, which may reflect the test for leave and the Federal Court of Appeal dealing with a high number of cases of national importance.<sup>22</sup>

Another takeaway from the book is that the Federal Courts would like their judges to be eligible to sit as ad hoc or deputy judges of the superior court in the provinces to which the judges were members of the bar prior to appointment.<sup>23</sup> This would be the reciprocal to the current situation, where the Chief Justices of the Federal Courts may appoint superior court judges to sit as deputy judges in the Federal Court or Federal Court of Appeal. The reasoning for the proposed reciprocity includes the ability to maximize the efficient use of judicial resources and to assist with pressure and delays in the criminal and civil justice system.<sup>24</sup>

There are other benefits that may flow from this proposed arrangement, including the fact that the Federal Court and Federal Court of Appeal travel to and hear cases throughout Canada, gaining a pan-Canadian perspective in challenging and developing areas of law.<sup>25</sup> The area of administrative law may particularly benefit given that the Federal Courts are experts in judicial review.<sup>26</sup> A reciprocal process may also lower residual tensions that may

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<sup>16</sup> Valois et al, *ibid* at 629.

<sup>17</sup> *Ibid* at 19.

<sup>18</sup> *Ibid* at 618; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

<sup>19</sup> Valois et al, *ibid* at 48.

<sup>20</sup> *Ibid* at 48, 623.

<sup>21</sup> *Ibid* at 103–51.

<sup>22</sup> *Ibid* at 135.

<sup>23</sup> *Ibid* at 49, 622.

<sup>24</sup> *Ibid* at 622.

<sup>25</sup> *Ibid* at 70.

<sup>26</sup> *Ibid* at 461.

still exist between the judiciary of different courts through the natural collegiality that comes with directly working with others, especially in appeal panels.

The adage that necessity leads to invention is reflected in the response of the Federal Courts to the COVID-19 pandemic. The Federal Court already had an e-filing system and the Federal Court of Appeal authorized filing by email and other electronic means during the pandemic. Both Courts were able to quickly switch to virtual hearings.<sup>27</sup> While virtual hearings have made attending court without travel possible for both judges and lawyers, there is now a question of how they will affect the collegiality of the Federal Courts, particularly the impact on Federal Court of Appeal panels.<sup>28</sup> This question fits into the overall disagreement within the judiciary of whether residency in Ottawa should be mandatory for the judges of the Federal Courts, with arguments on both sides, including increasing the potential number of candidates for the judiciary versus the risk of depriving local regions from a full rotation of judges.<sup>29</sup>

### III. PERSONAL IMPACT

There are several points in the book that improved my understanding of past cases I worked on or was familiar with due to my legal practice. I was excited to see one of the cases I was counsel for referred to in the book (*Lee*).<sup>30</sup> I understand better the context of the Federal Court of Appeal's reasons in that case as it was decided less than year after the *Windsor* decision and articulated the plenary powers available to the Federal Courts as fully fledged courts within the judicial branch. Subsequent cases and academic commentary strongly responded to the majority's *obiter* in *Windsor* with regard to the ability of the Federal Courts to make general declarations of constitutional invalidity.<sup>31</sup>

The book also increased my understanding of the Federal Court of Appeal's direction in *In re: Section 6 of the Time Limits and Other Periods Act (COVID-19), Enacted by An Act Respecting Further COVID-19 Measures, S.C. 2020, c. 11, s. 11*,<sup>32</sup> which was relevant to any participant in the Federal Courts by confirming the timelines under the *Federal Courts Rules*<sup>33</sup> and that Court orders and directions were not affected by the *Time Limits and Other Periods Act (COVID-19)*.<sup>34</sup> At the time of the direction, I focused on the practical impact on my legal practice. The book explains the background context of the decision and how it relates to the ongoing debate over the different models of court administration and the interplay with judicial independence that are covered in chapter 7.<sup>35</sup>

### IV. VEXATIOUS LITIGANTS AND THE FEDERAL COURTS

One subset of law that is not explicitly covered in the book but that the Federal Courts have significantly contributed to in recent years is the efficient management of vexatious

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<sup>27</sup> *Ibid* at 65, 633.

<sup>28</sup> *Ibid* at 629–30.

<sup>29</sup> *Ibid* at 163–64, 179–80, 630.

<sup>30</sup> *Ibid* at 96, 100, citing *Lee*, *supra* note 15.

<sup>31</sup> Valois et al, *ibid* at 98–101; Hon Justice David Stratat, “A Judiciary Cleaved: Superior Courts, Statutory Courts and the Illogic of Difference” (2017) 68 UNBLJ 54.

<sup>32</sup> 2020 FCA 137.

<sup>33</sup> SOR/98-106.

<sup>34</sup> SC 2020, c 11, s 11.

<sup>35</sup> Valois et al, *supra* note 2 at 261.

litigants. Vexatious litigation is a problem faced by all courts in Canada.<sup>36</sup> The Federal Courts, like all courts, are community property that exist to serve everyone and should not be subject to abuse by vexatious litigants.<sup>37</sup>

The Federal Courts have taken a clinical approach in dealing with vexatious behaviour and the issue of court access restrictions without overly focusing on or shaming the vexatious litigants.<sup>38</sup> Federal Court of Appeal decisions regarding vexatious litigant findings and orders have been regularly cited by other Canadian courts.<sup>39</sup>

## V. CONCLUSION

Some books need to be read in order from front to back cover. This is not one of them, with the chapters being sufficiently independent that readers may benefit from starting with the chapters that are of greatest interest. I recommend starting with the first chapter if one is not familiar with the Federal Courts before choosing to take this approach. The individual chapters in the middle of the book on specific legal areas are particularly suited to be used as excerpts for readings in law school or other university courses on the topics covered in each chapter. Whether read in or out of order, the entire book is well written, straightforward, and insightful.

The book succeeds in its goal as a spiritual and accessible successor to Ian Bushnell's respected history of the Federal Court of Canada.<sup>40</sup> It is a useful resource for academics, lawyers, and anyone interested in the Federal Courts. Readers of the book should also see the 50th anniversary celebration of the Federal Courts, which is available online, and contains speeches and webinars on specific legal topics marking the anniversary and launch of the book.<sup>41</sup>

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<sup>36</sup> The Alberta Court of Appeal recently released a trilogy of cases dealing with vexatious litigant orders, as discussed in Gerard J Kennedy, "The Alberta Court of Appeal's Vexatious Litigant Order Trilogy: Respecting Legislative Supremacy, Preserving Access to the Courts, and Hopefully Not to a Fault" (2021) 58:3 *Alta L Rev* 739.

<sup>37</sup> *Her Majesty the Queen in Right of Canada v Abe Olumide*, 2017 FCA 42 at para 17.

<sup>38</sup> *Ibid* at para 39.

<sup>39</sup> See e.g. *Sun v Allwest Insurance Services Ltd*, 2022 ABQB 18 at paras 29–31 (significant weight may be given to vexatious litigant findings by other courts); *Jonsson v Lymer*, 2020 ABCA 167 at para 47; *Green v University of Winnipeg*, 2018 MBCA 137 at para 58 (courts are community property with finite resources that should not be squandered); *Wood v Yukon (Public Service Commission)*, 2019 YKCA 4 at para 36 (proceedings to restrict vexatious litigants are often not commenced until after much damage has been done).

<sup>40</sup> Ian Bushnell, *The Federal Court of Canada: A History, 1875-1992* (Toronto: University of Toronto Press, 1997).

<sup>41</sup> "50th Anniversary: Commemoration of the 50th Anniversary of the Federal Court of Appeal and the Federal Court" (2021), online: *Federal Court* <[www.fct-cf.gc.ca/en/pages/about-the-court/fiftieth-anniversary](http://www.fct-cf.gc.ca/en/pages/about-the-court/fiftieth-anniversary)>.

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