



## TAX COURT OF CANADA 2011 CANADIAN TAX FOUNDATION UPDATE

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On the final morning of the 2011 Canadian Tax Foundation (“CTF”) national conference, Chief Justice Rip of the Tax Court of Canada (“TCC”) provided an update on recent TCC activities, in what is becoming a regular part of the various updates and roundtable events on the CTF’s national conference schedule. This article summarizes the Chief Justice’s presentation for the benefit of those not fortunate enough to be present.

The Chief Justice began by noting that the TCC has co-operated with the CTF on a number of joint programs, including a recent reception for the Canadian Bar Association, members of the Quebec tax bar and the TCC Rules and Bench and Bar Committees. Future plans include joint seminars for junior members of the tax bar across Canada. In this regard, the Chief Justice noted that the TCC has in the past worked with Laval University to enable students to represent taxpayers in Informal Procedure appeals and that a similar project recently got underway in Ontario to enable University of Toronto students to do the same under the guidance of lawyers from Fraser Milner Casgrain LLP.

In terms of recent departures and appointments to the TCC, conference attendees learned that three well-established judges have been forced into mandatory retirement by virtue of reaching age 75,<sup>1</sup> namely Bowie J., Little J. and McArthur J. Further, Archambault J. has elected to become a supernumerary judge. The most recent appointment has been Boccock J., a former practitioner from Hamilton, Ontario, who was sworn in the week before the CTF national conference. The members of the TCC Rules Committee recently changed, with the departures of Bowie J., Lamarre J. and Ed Kroft. Recent additions to the TCC Rules Committee are Pizzitelli J. and D’Auray J. and a further appointment to that committee is anticipated. Finally, C. Miller J. has taken a sabbatical to work with the Organisation for Economic Co-operation and Development (“OECD”) in Paris, France and plans to follow that up with work with David Duff at the University of British Columbia in 2012.

The Chief Justice provided the following TCC statistics for 2011 as of October 1:<sup>2</sup>

<b>Procedural Stream</b>	<b>Appeals filed</b>	<b>Appeals disposed of</b>	<b>Appeals settled</b>	<b>Appeals withdrawn</b>	<b>Unrepresented taxpayers</b>
General Procedure	1,120	1,117	585	522	198 <sup>3</sup>
Informal Procedure	1,272	2,207	627	1,035	658

With respect to the recently proposed amendments to the *Tax Court of Canada Act*,<sup>4</sup> the attendees heard the Chief Justice’s comments on the proposed rules pertaining to *pro tanto* judgments and group tax appeals.

According to the Chief Justice, the proposed rules concerning *pro tanto* judgments will allow parties and the TCC to dispose of certain straightforward issues and allow the taxpayer to be reassessed in relation to those issues and receive a refund while the TCC process continues for other issues under appeal.

The Chief Justice noted that the proposed rules concerning “group” or “class” tax appeals would result in taxpayers with a common issue arising from the same or similar transactions being bound by the result in a test case. He observed that these proposed rules will improve upon the current regime, under which cases may be held in abeyance pending the outcome of “lead cases” without the results being binding on the group of appeals that are stayed. He further noted that the TCC has successfully encouraged the federal Department of Justice to apply subsection 174(1) of the *Income Tax Act (Canada)*<sup>5</sup> and refer to the TCC common questions of fact, law or mixed fact and law concerning the same transactions or legislative provisions that affect multiple taxpayers. However, the Chief Justice felt that the new rules would enhance and improve the TCC’s ability to deal with situations where multiple taxpayers are queued up for appeals concerning the same or substantially the same transactions. He then took note of comments from the tax community that the proposed “group” or “class” appeals rules may be prejudicial to taxpayers who wish to proceed individually. However, in this regard he noted that some appeals, such as the “Native Leasing” cases are largely redundant and consume very significant amounts of the TCC’s time. Thus, it is hoped by the TCC that the new proposed rules improve the efficiencies of tax appeals.

In his closing comments, the Chief Justice stated that the TCC has been scheduling hearings 12 months in advance and assigning judges 6 months in advance to enable litigants to have substantial notice of their trial dates and abundant time to try to settle and/or prepare for trial, and to allow the judges time to review their files and determine if settlement conferences would be helpful. Finally, the Chief Justice drew attention to the TCC’s website and its enhanced e-filing options for documents.

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<sup>1</sup> This retirement age for federally appointed judges is constitutionally mandated by subsection 99(2) of the *Constitution Act, 1982* (Enacted as Schedule B to the Canada Act 1982, (U.K.) 1982, c. 11). The Federal Court of Appeal confirmed in *Felipa v. Minister of Citizenship and Immigration*, [2011] FCA 272, that this rule cannot be circumvented by appointing deputy judges over age 75. Rossiter A.C.J., has confirmed that the TCC is bound by that ruling.

<sup>2</sup> The difference between total appeals filed and those disposed of, settled or withdrawn under both the General Procedure (GP) and the Informal Procedure (IP) arises because many of the appeals disposed of were carried over from earlier years.

<sup>3</sup> The Chief Justice stated that in his view the number of unrepresented litigants in the GP may be reduced once the *Tax Court of Canada Act* is amended to raise the IP ceiling to \$25,000 of tax in issue per taxation year under appeal (and \$50,000 per year for appeals of loss determinations).

<sup>4</sup> RSC 1985 c. T-2.

<sup>5</sup> RSC 1985 (5th Supp.) c.1, as amended.