



**FEDERAL COURT LABOUR LAW, HUMAN RIGHTS, PRIVACY AND
ACCESS REVIEW LIAISON GROUP**

MINUTES AND SUMMARY OF DECISIONS
Meeting of March 8, 2010

Present: Chief Justice Lutfy, Justice Zinn (Chair), Justice Mactavish, Thomas Brady, Mary J. Gleason, Sandy Graham, Harvey A. Newman, Barbara A. Mclsaac, Q.C., Andrew Raven, Emily McCarthy, Ben Perryman

Absent: Justice de Montigny, Dougald Brown, Philippe Dufresne, Chris Rupar

Subject	Discussion	Decisions/Action
1. Introduction of New Members	Justice Zinn welcomed everyone to the meeting including the newest members of the group: Sandy Graham, Mary J. Gleason, Harvey A. Newman, and Barbara A. Mclsaac, Q.C.	
2. Approval of Agenda	The agenda was approved without changes.	
3. Approval of Minutes from Last Meeting (September 25, 2009)	It was noted that Sandy Graham should have been listed as absent on the previous meeting minutes. The minutes were otherwise approved.	
4. Follow-up Items from Last Meeting	<p>Chief Justice Lutfy inquired as to whether any further members had been identified or were to be invited, particularly from Québec or Toronto.</p> <p>Justice Zinn advised that Dougald Brown was working on developing a common book of authorities.</p> <p>Justice Mactavish informed that she had spoken with Pro Bono Ontario, and that Prothonotary Aalto had engaged the Advocates Society regarding the issue of self-represented litigants. Justice Mactavish also informed the group that Justice Barnes, who chairs the self-represented litigants committee, had been working on this issue. Justice Mactavish advised of a Pilot Project that is being initiated between Pro Bono Ontario and the Advocates Society to link unrepresented litigants with Pro Bono counsel. The Pilot Project will be holding two education sessions in Toronto (April 20) and Ottawa (date TBA) on this</p>	<p>Members to forward any further suggestions of participants to Justice Zinn.</p> <p>Justice Mactavish to forward the formal callout regarding the Pilot Project to Justice Zinn. Justice Zinn to forward the callout to the individual members who can then disseminate the notice to their networks.</p>

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	<p>initiative. Barbara A. Mclsaac, Q.C. mentioned that the Law Society of Upper Canada is considering amending the Rules of Professional Conduct to make the rules regarding conflicts of interest less rigorous for counsel undertaking pro bono work.</p>	
<p>5. Expert Affidavits in Privacy Litigation</p>	<p>Sandy Graham raised issues on behalf of Chris Rupar regarding the appropriateness of expert affidavits in privacy litigation and whether such affidavits should be met with motions to strike. Sandy Graham offered that such affidavits usually cover the past practice of an agency or department and can also discuss the likelihood of harm arising if material is ordered released. Barbara A. Mclsaac, Q.C. suggested that in security matters, affidavits from former security officials are effectively expert affidavits. Thomas Brady suggested that affidavits of past practice are not offensive, but issues may arise where the affidavit infringes the very issue doctrine.</p> <p>Chief Justice Lutfy stated that the fact privacy litigation proceeds as an application does not render such affidavits inappropriate. Chief Justice Lutfy gave the example of Notice of Compliance applications where there are frequently numerous lengthy expert affidavits tendered. Chief Justice Lutfy questioned whether there was any legal basis in the Rules for refusing these affidavits, and suggested that the hearings judge can consider the appropriate weight to be given such affidavits.</p> <p>Barbara A. Mclsaac, Q.C. suggested that the appropriateness might depend on the specific section of the Act being relied upon and that different sections carry different standards of review. Chief Justice Lutfy reiterated his discouragement for interlocutory motions within applications. Andrew Raven commented that when lengthy inappropriate evidence is tendered counsel face a decision of whether to respond or ignore this evidence, but he suggested that a blanket rule against such affidavits was unnecessary.</p> <p>Justice Zinn questioned whether an objection could be made within a party's memorandum of argument and then addressed at the hearing on the merits, and stated that motions to strike should be the exception. Andrew Raven agreed that this approach was possible, but countered that it could breakdown if one party wants to cross-examine on an affidavit if the impugned evidence is to be before the Court. Barbara A. Mclsaac, Q.C. stated that the jurisprudence is clear on when a motion to strike is justified, but that difficulty arises when the inappropriateness of evidence is borderline.</p>	<p>.</p>

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<p>6. Filing Tribunal Records as Exhibits to Affidavits</p>	<p>A discussion was had on whether an affidavit is required to file material that was before the decision-maker with the Court pursuant to Rule 317, and specifically the divergent opinions expressed by the Court of Appeal in <i>Select Brand Distributors Inc. v. Canada (Attorney General)</i>, 2010 FCA 3, <i>Canada (Attorney General) v. Lacey</i>, 2008 FCA 242, and <i>Canada (Attorney General) v. Vold, Jones and Vold Auction Co.</i>, 2009 FCA 192.</p> <p>Barbara A. Mclsaac, Q.C. stated that there are two types of judicial review applications: 1) judicial review of a decision by Canada where Canada is also the respondent, and 2) judicial review of a decision by an independent tribunal where the tribunal is not a party to the application. Barbara A. Mclsaac, Q.C. argued that the requirement of an affidavit made sense in the context of the first scenario but not the second scenario. Justice Mactavish questioned what an affiant could actually say in the second scenario. Andrew Raven stated that in the second scenario their affidavits state something to the effect of “we sent a letter to the tribunal and attached is the record that they sent us”. Andrew Raven also stated that sometimes tribunals respond that the party already has the tribunal record since it was the party that submitted the documents to the tribunal in the first place. Mary J. Gleason stated that she just puts the tribunal record in her record. Chief Justice Lutfy asked that Don Rennie be briefed on this issue and that it be brought to the attention of the Rules Committee. Chief Justice Lutfy also highlighted the practice in immigration judicial reviews where the judge granting leave orders that the decision-maker send a certified tribunal record to the Court’s registry.</p>	<p>Sandy Graham to brief Don Rennie on this issue.</p> <p>Issue to be raised with the Rules Committee.</p>
<p>7. Scheduling of Hearing Dates</p>	<p>Thomas Brady suggested that counsel should send mutually agreed upon dates that they were available and not dates that they were unavailable. Chief Justice Lutfy suggested that counsel should provide both, and also expressed his desire to see earlier hearing dates provided. Andrew Raven stated that when they have asked for case management and an early hearing date that it has been forthcoming. Barbara A. Mclsaac, Q.C. stated that it is rare to get a hearing date within 90 days. Andrew Raven and Harvey A. Newman both stated that delay is not a major issue with their clients.</p> <p>Andrew Raven reiterated that the issue is with scheduling. Chief Justice Lutfy explained that an expedited hearing procedure is in the works. Mary J. Gleason stated that it would be helpful to know the hearing date early to allow the counsel that appeared at the tribunal to also appear on judicial review. Chief Justice Lutfy stated that the party would need to pay</p>	<p>Consideration is being given to the development of a practice direction about the scheduling of application hearing dates.</p>

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	<p>the hearing date fee and that the Rules would require an order. Mary J. Gleason suggested that counsel could send a letter with their requested dates and that the Chief Justice could render an order waiving Rule 314. Chief Justice Lutfy was very supportive of this suggestion.</p>	
<p>8. Submission of Electronic Documents</p>	<p>Thomas Brady expressed the desire to be able to attach lengthy exhibits to affidavits in the form of a CD-ROM. Barbara A. McIsaac, Q.C. questioned whether hard copies would still be required, and stated that digitizing materials can be cumbersome and expensive. Justice Mactavish stated that some judges of the Court are not technologically savvy and prefer hard copy materials. Thomas Brady expressed a desire for clarification on the meaning of electronic filing. Emily McCarthy stated that the rules permit electronic filing, without the need for additional hardcopies, when sufficient notice is given and the page length of documents is not <i>over</i> a certain limit. Emily McCarthy stated that this issue will also be addressed at the Rules Committee. Barbara A. McIsaac, Q.C. stated that the issue seems to be that the Registry is still stuck in the paper world.</p>	<p>Thomas Brady to liaise with Emily McCarthy on this issue.</p>
<p>9. Human Rights Topics for Judges' Conference</p>	<p>Justice Mactavish described the education program that takes place for Federal Court and Federal Court of Appeal judges. Justice Mactavish opened the floor for suggestions on novel administrative law issues that arise in the context of human rights, which might form the topic for a judges' seminar. Barbara A. McIsaac, Q.C. suggested issues that arise when the commission exercises its gate-keeping function, but the employer is not in a position to assist and the commission does not attend the hearing. Andrew Raven suggested issues surrounding determining the appropriate standards of procedural fairness in the human rights context, such as issues that arise with investigative reports that are given to the decision-maker but not referenced in his/her decision. Another issue that was suggested is what happens when the commission takes a position in a hearing, while holding the same issue that is before them in abeyance.</p>	
<p>10. Next Meeting</p>	<p>Tentatively scheduled for Friday, September 24, 2010. Justice Zinn informed that there is nothing special about this date, but that Fridays are generally better for the Court. Andrew Raven offered to host a future meeting. Chief Justice Lutfy thanked Mr. Raven for his kind offer but informed that it is preferable for the Court to meet within our offices.</p> <p>The meeting was adjourned.</p>	<p>Members to inform Justice Zinn if this date is not convenient.</p>