



**Federal Court of Appeal & Federal Court
Labour Law, Human Rights, Pension Benefits, Privacy and
Access Review Liaison Committee**



Friday, January 13, 2017

Attendance: Justice Mary Gleason, Justice Martine St-Louis, Chantal Carbonneau, Andrew Baumberg, Gaylene Schellenberg, Catherine Lawrence, Adam Zanna, Maryse Tremblay, Sandy Graham, Carole Bidal, Peter Engelmann, Patricia Kosseim, Julia Barss, Andrew Raven, Stephen Moreau, Karen Jensen; **Regrets:** Justice Anne Mactavish, Jack Graham Q.C., Nancy Belanger

MINUTES

1. Introductory Remarks

2. Agenda and Minutes (June 22)

Ms. Kosseim suggested a minor change at the bottom of page 2

“Patricia Kosseim noted that some access and privacy cases come as a de novo proceeding; an extra ‘try’ at settlement would be welcome; in privacy, we may reach a finding of fact but without an award of damages; here again, an offer to mediate to address damages could be welcome.”

3. Follow-up Items from last meeting

a. Committee membership

Justice Gleason raised a question regarding membership: *is the current membership sufficient, or are there other special practice areas that might be added?*

Ms. Kosseim suggested Barbara McIsaac from the practice side. Also, for privacy, access and labour, she suggested Steven Welchner. Their practice areas are different than other private practitioners.

Ms. Schellenberg noted that Mr. Moreau represents the pension section. She has a call out to other groups for expressions of interest.

Justice Gleason asked for a CBA update by end of February and, in the interim, proposes that we confirm Ms. MacIsaac and Mr. Welchner.

ACTION:

- Ms. Schellenberg to confirm CBA representatives by March 1, 2017.
- Mr. Baumberg to extend an invitation to Ms. McIsaac and Mr. Welchner.

b. Triage for Labour law cases

Ms. Tremblay presented a working draft proposal for mediation / triage, noting that it does not represent an official CBA position paper. There is an interest in mediation, though with concern that it not delay the proceeding.

Mr. Moreau suggested that the mediation be held well before the application record is filed, and even before affidavits are delivered. Even if the mediation does not settle the case, it usually will provide some clarity on procedural issues, scope of the record, and even on substantive issues in dispute.

Ms. Tremblay noted that the advantage sometimes of waiting before engaging in mediation is that one sees the more detailed arguments of the other party. It varies case by case as to whether mediation is feasible, and the best time.

Mr. Raven questioned whether there were judicial review cases that would be resolved via mediation. In his view, procedural steps can be resolved with existing case management. Justice Gleason noted that Mr. Raven's clients are generally more sophisticated parties; the situation is probably different for self-represented litigants.

Mr. Graham agreed with Mr. Raven – most cases he sees raise more substantive legal issues that are not readily amenable to settlement.

Ms. Bidal agrees that cases with self-represented litigants are more suitable for the triage project.

Mr. Moreau added that even the winner-take-all mentality for judicial review proceedings does not always lead to a significant benefit for the winner, who might simply return to the underlying decision-maker to start over. There may still be some benefit for sophisticated parties to enter some preliminary discussion to explore options.

Justice Gleason noted that she would take the recommendations of this Committee for consideration by the FCA.

Ms. Tremblay noted that the dispute resolution judge should not be the same as the hearings judge.

Mr. Graham suggested that a judge be involved in mediating a labour case, as they are more likely to be familiar with the labour issues.

Mr. Raven asked whether the pilot might be extended to other areas beyond labour.

Ms. Kosseim noted that privacy and access cases might also be useful to consider for the pilot.

Mr. Moreau agreed that other areas be considered.

Justice Gleason added that the FC already has a pilot for Aboriginal law triage. She will bring this to the FCA for review, and asked J. St-Louis to do likewise for the FC.

ACTION: Justice Gleason and Justice St-Louis to discuss the triage proposal with the FCA and FC respectively.

c. Feedback on scheduling and other administrative issues

Mr. Raven noted that feedback from the bar was that scheduling of hearings in the FC was the key area of concern. Oftentimes, counsel provide their availability for the next 3 months to the Court, but no date is available within the Court, and the Court requests a further window, but if no date works, a date is set unilaterally.

Ms. Barss gave a similar example.

Mr. Raven added that whether a small or a large office is involved, the issue is the same.

Mr. Engelmann questioned the 90-day window – in his experience, the court is rarely available.

Justice Gleason noted that the FC has a significant caseload.

Mr. Baumberg noted the Chief Justice's comments at the December 9 meeting with the Bar regarding the goal of scheduling the hearing on a timely basis, so that one party's unavailability does not result in significant delay for the applicant to have their day in court. There appears to be a need to balance efforts to accommodate parties availability versus the goal of having an earlier hearing.

Mr. Raven responded that it is usually not a matter of months, but simply an extra week that would provide a date suitable for both parties.

There was considerable concern from all members of the Bar regarding the Court's direction to a party to get a different lawyer. This places unreasonable cost / burden on the party, whether public or private.

ACTION: Mr. Baumberg to bring the concerns raised by the Bar to the Chief Justice and to the judicial administrator.

d. Common List of Authorities

Justice Gleason noted that the FCA does not have a Common List, the list has not been updated for years, and the Rules amendments will likely overtake the initiative.

Mr. Raven noted, though, that the list is already available, and simply needs an incremental revision.

Mr. Baumberg pointed out that the effect of the proposed Rules amendment (a print exemption for all decisions available via a public online database) seems to make the common list moot.

Mr. Moreau asked, though, whether there was any other purpose to the Common list.

Mr. Raven suggested another purpose – to assist self-represented litigants (SRL) to know what was relevant case law for a certain areas of the law.

There followed some discussion and recommendations that the list be converted into a resources for SRL's.

Mr. Baumberg questioned whether a long list of cases would really be helpful for a SRL. The Court is not able to provide legal advice to litigants or recommendations as to cases a party should use.

Justice Gleason noted the concern regarding the provision of legal advice for SRL's against the bar's effort to provide some resource.

ACTION: Ms. Carboneau to verify what other courts have done with similar lists and report to the Committee.

e. Publication of Court decisions

Justice Gleason noted the bar's recommendation at the previous meeting: for the Courts to publish their decisions via CANLII.

Mr. Moreau asked why the federal courts have a different approach than other courts. He noted that the bulk of decisions on scope of the record are prothonotary decisions, which often are not published.

Mr. Baumberg noted the *Official Language Act* requirements regarding translation of decisions, which places the federal courts in a different situation than courts at the provincial level. He added that the CANLII suggestion is being proposed on the agenda for discussion by the Federal Court at its upcoming plenary meeting.

Justice Gleason noted that even at the Ontario Superior Court, many endorsement decisions are not readily available. This would include most Masters' decisions.

Mr. Moreau responded that if the Masters' decisions are precedential, they are published. He thought that if prothonotaries' decisions on procedure were published, it would be very helpful to allow litigants to understand Court procedure much better. More access is generally better.

Justice Gleason added that for key procedural decisions at the FCA, they are decided by a single judge and usually published.

ACTION: for further review within the Courts and then discussion at next meeting.

f. Long-term Committee Agenda

Justice Gleason asked for further suggestions, if any. No comments were received.

She then asked whether it is still necessary to have two meetings per year?

Ms. Tremblay suggested that if there are on-going projects / issues, it is helpful to meet twice a year.

Mr. Raven agreed – it would be too long to wait a year to follow-up on today's issues.

4. Federal Court of Appeal Update

Justice Gleason mentioned a recent appointment – Justice Woods – and that Justice Dawson elected supernumerary status.

She also mentioned the recent Notice regarding digital recording of FCA hearings.

Mr. Moreau asked for the purpose of the recording. Justice Gleason indicated that the recording could be accessed by the Court to clarify matters and would be available to the parties or the public in accordance with the Notice to the Profession.

Ms. Carboneau advised that the recording system is very sensitive – counsel need to be careful regarding comments.

Mr. Graham asked if the Registry announces to counsel whether the system is on or not. There was concern that the system was still on during adjournments.

ACTION: Ms. Carbonneau and Mr. Baumberg to confirm with the Registry that it should announce to parties that DARS is on; and to advise the Registry of the bar's preference that the system be turned off during breaks.

5. Federal Court Update

Mr. Baumberg reported that since the last meeting, Justice Hughes retired from the Court (September 16, 2016) and that in 2017-18, a number of judges are eligible to elect supernumerary status or to retire. He reiterated remarks of the Chief Justice at a recent meeting with the Bar that leading members of the Bar were encouraged to consider applying for appointment to the Court. Regarding workload, although there has been a significant drop in IMM cases over the last few years, there may eventually be an increase as a result of the lifting of VISA requirements in some countries, and other factors; the changes to workload may in turn lead to additional appointments. Finally, he asked that counsel identify bilingual proceeding requests early in the process to ensure that a bilingual member of the court is assigned.

The Draft Notice (Retention Schedule) was then presented, with reference to Rule 23.1 of the Federal Courts Rules and the significant court archives. The Court has developed the draft retention schedule for consultation purposes, with the initial focus on files that were not adjudicated on the merits (e.g., abandoned proceedings).

Ms. Tremblay asked whether the project would include cases raised by vexatious litigants, noting that in some situations it may be useful to look back over many years to establish a pattern of vexatious behaviour.

Peter Engelmann noted that the tariff / costs regime is so undervalued, there is no disincentive to bring litigation. He suggested that parties may bring a place-holder proceeding, because the time-lines are much shorter than for provincial court. Do the Courts really need a 30-day rule for judicial review? Perhaps for the next agenda. The Federal Court is an anomaly in this respect.

AGENDA FOR NEXT MEETING: 30-day window for filing an application for judicial review.

Mr. Raven suggested an amendment to Rule 7 for an extension to allow for greater latitude on consent.

Justice Gleason asked this to be on the agenda for the next meeting.

AGENDA FOR NEXT MEETING: possible amendment to Rule 7 for extensions on consent.

ACTION: Mr. Baumberg to review consideration of the issue within the Rules Committee.

Mr. Graham then asked regarding the status of a transcript of a digital recording, and whether it is regularly found in an affidavit as part of the record. Justice Gleason noted that she has SRLs attempting to file such transcripts.

6. Update – Federal Courts Rules

Mr. Baumberg reported on the Rules Committee projects:

- a. Limited Scope Representation
 - The amendments will allow for limited scope appearances for a defined mandate
 - Drafting process mostly complete – should go to Part I Canada Gazette in 2017
- b. Implementation (Global Review)
 - Implementation of significant changes to the Rules to incorporate principles of proportionality and to provide tools to control abuse
 - Very early stage of drafting process

- c. Substantive Amendments
 - This project includes numerous changes to Rules that were published in Part I on November 5 for a 60-day comment period
- d. Amendments to the *Citizenship, Immigration and Refugee Protection Rules*
 - Modernization amendments (similar to those for the Federal Courts Rules) as well as some substantive amendments, including amendments related to ‘ghost representatives’ and simplified procedure for an anonymity Order
 - Drafting process mostly complete – should go to Part I in early 2017
- e. Miscellaneous Amendments
 - Numerous changes to the Rules to address minor drafting issues, coherence between the English and French versions, etc.
 - Drafting process complete – should go to Part I in early 2017
- f. Costs
 - a discussion paper was published in Fall 2015, resulting in extensive comments from many different sections and groups; divergent views were expressed throughout the comments
 - the comments were discussed at the June and October 2016 Committee meetings, with a Committee decision to increase indemnification (approximately 25%), simplify the tariff, and add new tariff items for practice tasks that are not currently reflected in the tariff
 - there may be further discussion at the next Rules Committee meeting regarding additional costs issues raised by the sub-Committee
- g. Legislative Amendments
 - This project involves compilation of practice ‘issues’ that can be addressed only via amendment to legislation (as opposed to Rules)
 - A working draft list has been prepared for comment / additional suggestions, with consultation by Sharlene Telles-Langdon (public bar representative) and Peter Hutchins (private bar representative)
- h. Enforcement Amendments
 - Extensive revision of the Rules on enforcement to ensure that Rules are consistent with current practice
 - Drafting process mostly complete – should go to Part I in early 2017

ACTION: Mr. Baumberg to circulate names of Rules committee members to the Committee for info.

7. Next Meeting

Proposed date is for a Friday in May / June.

ACTION: Mr. Baumberg to canvass members for availability.