



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



Friday, June 2, 2017

MINUTES

Attendance: Justice Mary Gleason, Justice Mactavish, Chantal Carbonneau, Andrew Baumberg, Barbara McIsaac Q.C., Steven Welchner, Nancy Belanger, Maryse Tremblay, Sandy Graham, Patricia Kosseim, Karen Jensen; **Phone:** Catherine Lawrence, Stephen Moreau; **Regrets:** Peter Englemann, Andrew Raven. Gaylene Schelenberg, Jack Graham Q.C., Carole Bidal.

1. Introductory Remarks

Justice Gleason welcomed members of the Bar, including new members Barbara McIsaac Q.C. and Steven Welchner.

2. Agenda and Minutes (January 13)

There were no comments on the minutes.

3. Follow-up Items from last meeting

a. 30-day window for filing an application for judicial review

Justice Gleason noted that this had been raised by Peter Engelmann at the last meeting, indicating that the 30-day window was, at least for some litigants, too short.

Steven Welchner has found that the 30-day window is problematic in more than half of the proceedings he files, requiring the filing of a 'placeholder' proceeding.

Nancy Belanger noted that for access proceedings, most delays are 45 days.

Maryse Tremblay responded, on the other hand, that for finality, 30 days is already a long time. For the CIRB, they changed their delay from 21 days to 30 days for reconsideration to line up with the delay for filing a judicial review application. She would favour keeping 30 days, though 45 days would not make much difference.

Barbara McIsaac Q.C. noted that judicial review is already a summary procedure. Generally speaking, 30 days is fine. All you need to do is file the bare notice.

Maryse Tremblay agreed, adding that in Quebec the notice is much more involved than in Federal Court.

Steven Welchner noted that there is not much cost to filing a placeholder pending a decision by the client (e.g., a union) whether to proceed.

Justice Gleason asked whether there is any fixed time-line for the Rules sub-Committee on legislative amendments to add this to its list.

Andrew Baumberg replied that the list is meant to be presented at the Fall meeting, but there is nothing to prevent follow-up suggestions either through the Rules Committee or other channels such as the Department of Justice representatives on this Liaison Committee.

Justice Mactavish noted that there are many requests for extension before the duty judge. A 45-day window might give sufficient time to complete the necessary steps and avoid the need for an extension.

Tabled to next meeting, as some of the Committee labour representatives are not here today.

b. Committee membership

Action : Maryse Tremblay will follow-up with Gaylene Schellenberg re CBA representatives.

c. Mediation for labour, human rights, pension benefits, privacy and access review cases

Justice Gleason noted that she has raised the proposal within the Federal Court of Appeal: it doesn't have the resources at the moment to provide court-assisted mediation on the scale suggested in the proposal. However, if the Committee were to develop a proposal for consideration, it might be possible to consider a framework to allow a proceeding to be put in abeyance pending settlement discussions between parties.

Justice Mactavish noted that the Federal Court is already conducting a lot of mediation. The Court also conducts an assessment of all proceedings at the pre-hearing stage to determine whether the hearing time is accurate, but also to assess opportunities for dispute resolution. However, this is done later in the proceeding. Ideally, triage to identify cases for mediation should occur early.

Andrew Baumberg gave a summary of the triage framework for Aboriginal law cases, launched in 2012. The Court reviews every new Aboriginal law proceeding, typically within a few days of it being filed. In appropriate cases, if it appears that some aspects of the dispute might be narrowed, or settled completely, the Court will invite the parties to a conference to discuss dispute resolution options.

Justice Mactavish noted, though, that in many areas of law, a bare Notice of Application for Judicial Review does not disclose what the opportunities are for mediation. Furthermore, it would be difficult to find the resources do a triage across all new cases.

Andrew Baumberg noted that the Aboriginal law framework also provides for parties to initiate the process via a simple cover letter.

Justice Mactavish agreed to take a proposal back to the Court.

Barbara McIsaac Q.C. suggested that any letter be sent jointly to the Court.

Maryse Tremblay suggested a practice note to formalize the process for the labour bar. It would serve to highlight to practitioners the options available from the Court. If it is left simply to the parties to make a proposal with reliance on the Rules, it is not clear how the Court will respond. Furthermore, some parties are reluctant to make the 'first move' to propose mediation, as it might be perceived as an acknowledgement that their position is weak.

Justice Mactavish added that this type of mediation process was common in human rights cases. Patricia Kosseim encouraged early intervention.

Action: Justice Mactavish to raise the proposal with the Chief Justice for the Federal Court to consider developing a draft Practice Direction.

d. Feedback on scheduling and other administrative issues

Andrew Baumberg noted that the draft Federal Court Notice in the annex to the agenda was meant to address, at least in part, the concerns raised by the Bar. It has been provided, for comment, to different sections of the bar at recent liaison meetings (general CBA liaison on May 5, Aboriginal law liaison on May 31, IMM Liaison at upcoming June 9 meeting).

Action: Comments from the Bar to Andrew Baumberg.

e. Common List of Authorities

Chantal Carbonneau circulated a summary of her consultation of courts across Canada.

Justice Gleason noted the rules amendment (currently in progress), which would eventually make the Common List redundant.

Justice Mactavish noted that the List has not been used by practitioners in her experience. Sandy Graham added that the other purpose of the list was as a resource for self-represented litigants (SRL's).

Chantal Carbonneau did not receive feedback from other courts as to usage by SRL's.

Justice Gleason expressed concern about the Courts advocating a common list as a 'suggested reading list' for SRL's.

Karen Jensen thought that a common list would be useful for SRL's and offered to work on this project.

Barbara McIsaac Q.C. noted that if the list is not too granular, and with an appropriate caveat, it might be workable. It is not meant to be a comprehensive list.

Patricia Kosseim noted that the access to justice dimension is important, but may be misleading.

Andrew Baumberg questioned whether the Court wants to endorse a list on its web site that might represent or misrepresent what cases are relevant. He also questioned how often the list is used.

Action: Andrew Baumberg to circulate current common list and statistics re web hits.

Patricia Kosseim used to publish list of seminal cases, but this was discontinued (resource issue).

Justice Mactavish agrees with a purpose that is to avoid copying, but less so with a purpose to indicate what cases are relevant.

Tabled to next meeting.

f. Publication of Court decisions

Andrew Baumberg gave an update based on the May 5 meeting with the CBA. There was discussion at that meeting as to where court decisions should be published. Preliminary feedback was that members of the bar conduct research via CANLII, not the Federal Courts web sites.

Tabled. For update at Fall CBA meeting and this committee meeting.

g. Informal requests for interlocutory relief

Andrew Baumberg noted that upon review of the minutes of recent Rules Committee meetings in recent years, no reference has been found to discussion of possible amendment to Rule 7. However, this can be added to the list of amendment suggestions for the next Rules Committee meeting.

Action: Andrew Baumberg to add this issue to the list of proposed amendments to the Rules.

In the interim, the draft Federal Court Notice in the annex is meant to address, at least in part, the concerns raised by the Bar regarding what is considered excessive burden for procedural matters that are on consent. It has been provided, for comment, to different sections of the bar at recent liaison meetings (general CBA liaison on May 5, Aboriginal law liaison on May 31, IMM Liaison at upcoming June 9 meeting).

Action: Comments from the Bar to Andrew Baumberg.

h. Long-term Committee Agenda

Justice Gleason invited suggestions for next meeting.

4. Federal Court of Appeal Update

Justice Gleason noted that the Court remains very busy. There have been no new appointments or Notices since the last meeting, apart from a new Notice re gowning to accommodate maternity. (Since the meeting Justice John B. Laskin has been appointed to the Federal Court of Appeal.)

5. Federal Court Update

Justice Mactavish noted that there has been a significant drop in IMM cases, but there is a backlog at the IRB, which will likely eventually result in an increase in the Federal Court caseload.

There is one vacant position related to the resignation of Justice Camp. There remain a number of judges who are soon taking supernumerary status in the next year. (Since the meeting Justice Roger R. Lafrenière and Justice William F. Pentney have been appointed to the Federal Court.)

Andrew Baumberg added that the Court is planning to launch a twitter account to expand the options for public information about the Court. Furthermore, the Court recently launched a pilot media lock-up framework, which provides for a simultaneous virtual lock-up for counsel.

For non-IMM proceedings, hearing dates are available even in the next couple months for short hearings; hearings from 4 – 10 days long are being scheduled later in the Fall; and hearings over 10 days are into 2018.

• Court File Retention schedule: practical requirements for practitioners

Andrew Baumberg noted the background from the May 5 meeting. In response to the Court's draft retention schedule for abandoned and discontinued files, some key sections of the bar have argued that even these files should be maintained. The Court has, in turn, requested more concrete time-periods that are necessary for maintenance of the files. Although some effort has been taken to address closed files, there is a view that the solution for long-term records management is to move to e-filing for new files.

Justice Gleason noted that in some appeals, the Court has allowed for parties to file an electronic record and paper copies of only those portions of the record that will be referred to in argument.

There was some discussion regarding how to work with an electronic record at a hearing.

Ideally, the documents would have hyperlinking, and possibly multiple monitors, to allow for easy transition from one document to another. Furthermore, an optical character recognition / search feature provide a significant advantage over paper documents, which often are very difficult to search for key words. Also, having an electronic record makes it easy for counsel or a judge to work from home

Nancy Belanger asked about access online.

Andrew Baumberg noted that there first needs to be consultation within the court, and with the bar.

6. Update – Federal Courts Rules

Andrew Baumberg provided an update. There are two amendment projects that are going to Part I in the near future:

a. Miscellaneous Amendments

- Numerous changes to the Rules to address minor drafting issues, coherence between the English and French versions, etc.
- Expected to be published in Part I on June 3

b. 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 complete – should go to Part I in June or early July

Other amendment projects, as listed at the last meeting, are progressing.

7. Next Meeting

Action: Andrew Baumberg to survey members of the Committee for a November meeting.