Federal Court of Appeal & Federal Court
Cour d'appel fédérale & Cour fédérale
Labour Law, Human Rights, Pension Benefits, Privacy and Access Review Liaison Committee

November 3, 2017 (Ottawa, ON)

MINUTES

Attendance: Justice Mary Gleason, Justice Mactavish, Barbara McIsaac Q.C., Maryse Tremblay, Karen Jensen, Sandy Graham, Patricia Kosseim, Peter Engelmann, Amélie Lavictoire, Andrew Baumberg, Emily Hutchison; **Phone:** Stephen Moreau; **Regrets:** Gillian Carter, Steven Welchner, Nancy Belanger, Andrew Raven, Jack Graham Q.C., Catherine Lawrence.

1. Introductory Remarks

2. Agenda and Minutes (June 2)

Approved.

3. Follow-up Items from last meeting

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

Justice Mactavish summarized discussion from the previous meetings.

Peter Engelmann clarified his concerns. In Ontario / Alberta, there is no time-limit for filing an application for judicial review. A boilerplate filing is not difficult, but there are obstacles. The union gets a decision, which goes to a labour relations office, then over to a lawyer to provide an opinion, often around day 28 or 30. You then begin to prepare a legal opinion, but a 'place-holder' Notice must be filed to meet the 30-day deadline. Often, a request for extension is filed to allow time for counsel to establish a joint retainer. Also, if the ultimate legal opinion recommends against the judicial review, it is difficult to get off the record – a motion is required. He noted that other practice areas might have different considerations regarding the 30-day limit (which is set in the *Federal Courts Act*).

Barbara McIsaac Q.C. questioned whether an extra 15 days would make any difference. Counsel may still receive the request from their client 2 days before the deadline.

Karen Jensen suggested that the extension of time is the main issue. Also, in other jurisdictions, the lack of a clear deadline is sometimes confusing for clients. In Federal Court, the 30-day deadline is not difficult to meet.

Sandy Graham noted the importance of finality.

Maryse Tremblay noted that the Federal Court process for judicial review is easier than in Quebec, which has a 10-page limit on the factum, so much more is included in the Notice of Application.

Justice Mactavish suggested that the issue may be particular to union side litigants.

Justice Gleason added the limited scope appearance Rule that is being developed. Also, the proposal by Peter Engelmann could be forwarded to the Rules Committee for consideration by the Legislative Amendments sub-Committee.

Justice Mactavish suggested that the limited scope appearance amendment and the flexibility for extensions on consent may be sufficient to address practical issues.

Action: item closed.

b. Committee membership

Maryse Tremblay indicated that for now, there are no other volunteers to sit on the committee.

Justice Gleason noted that the committee has good representation already.

Action: item closed.

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

Justice Mactavish indicated that the Court has looked at the issue and considered a Practice Direction, but there is a view that there may be too many PD's already. The Court does not have the resources to do a full triage of all cases. It is proposed to have a page on the Court web site setting out options / resources under the Rules etc.

Karen Jensen agreed with the proposal, including notice to members of the Bar regarding the web site.

Andrew Baumberg indicated that an email could be sent out on the Court's practice distribution list and twitter account.

Action: Federal Court to develop a page on its web site regarding dispute resolution and then circulate notice to the Bar.

d. Scheduling

Justice Mactavish referred to the Notice issued by the Chief Justice regarding scheduling of Court hearings, noting that the Federal Court operates on a fixed date system. This is very attractive for those used to trial 'lists' in other Courts, for which trial lawyers are given no fixed trial date. But the *quid pro quo* is that because adjournments leave a scheduling gap, they are not granted without proper justification.

Justice Gleason added that at the Federal Court of Appeal, requests for adjournment work the same way. Parties file submissions with Court for consideration by the panel. The Court has no backlog, so it is able to schedule most matters for early 2018.

e. Common List of Authorities

Justice Mactavish and Justice Gleason both noted that they rarely saw any use of the common list.

Justice Gleason also noted the upcoming rules amendment, by which any authority available via a free online database would be exempted from the print requirement.

In response to a question from the Bar, Andrew Baumberg added that under the proposed rule, it would still be necessary to print the excerpt (e.g., one or two pages) on which counsel intended to rely at the hearing.

Justice Mactavish noted that there is a further concern as to the potential perception, at least on the part of some self-represented litigants, that the common list of authorities constitutes an exhaustive list of all of the decisions that may be relevant to a particular case.

Karen Jensen noted that the list is out of date. If used, it needs to be updated, along with an annotation regarding the limits on use of the list.

Maryse Tremblay suggested that as a resource guide, there would need to be many headings, and there are many cases. It may require a lot of work.

Patricia Kosseim noted that the Commissioner tried to create such a list for privacy cases. It was very resource intensive, and the project has been abandoned. It was too difficult to maintain a balanced, up to date list.

Action: Peter Engelmann and Karen Jensen volunteered to update the labour and human rights list for review by the Committee. Barbara McIssac Q.C. and Patricia Kosseim offered to update the access and privacy list.

Barbara McIsaac Q.C. noted that the tendency may be to have too many cases on the list. It would be useful to have a review of what is *cited* most often.

Justice Gleason added that there is no simple tool to show what cases are cited by counsel, though it is possible, of course, to see what cases are cited by judges in their decisions.

Andrew Baumberg noted that other Liaison Committees may reach different decision regarding the next step for the Common List. Perhaps there will be volunteers to develop a similar resource list.
There were further comments from members of the Committee regarding visibility of the list. It should be made more prominent if it is to be used as a resource guide rather than simply an exemption from filing paper.
Andrew Baumberg replied that the Common List is currently on the Notices page, which is accessible from a page for self-represented litigants, which has a link directly from the home page. However, the web site structure can be revised to make this more accessible. There are plans to renovate the Court web site starting in 2018.

Action: The volunteers will update the list and the matter will be tabled for further discussion at the next committee meeting.

f. Publication of Court decisions

Andrew Baumberg summarized the requests from the citizenship, immigration and refugee law bar, the maritime bar, and from this Liaison Committee for access to interlocutory decisions. Upon review, the Federal Court has decided to provide bulk access to CANLII and other publishers. Likely implementation is by early to mid-2018.
Justice Mactavish noted the concerns regarding equal access for stay decisions, all of which are accessible for the Department of Justice but not for the private bar.
Justice Gleason noted that for the Federal Court of Appeal, there are relatively few interlocutory decisions, and the Court already selects those of significance for translation / publication.

g. Informal requests for interlocutory relief

Justice Mactavish referred to the new Notice issued recently by the Chief Justice.
Barbara McIsaac Q.C. asked whether formal written consent might be preferable.
Justice Mactavish noted the emphasis on an informal process.
Justice Gleason added that this informal practice is also sometimes adopted in the Federal Court of Appeal.

h. Long-term Committee Agenda

In response to an invitation from Justice Mactavish for the Bar to identify any practice issues that warrant discussion, Patricia Kosseim noted the increase in sensitive personal information being published on the internet. She then referred to a 2005 guide by the Canadian Judicial Council, asking whether there were any plans to review and update the guide. [See: Judges' Technology Advisory Committee - Use of Personal Information in Judgments and Recommended Protocol / Comité consultatif sur la technologie L'usage de renseignements personnels dans les jugements et protocole recommandé]
Andrew Baumberg responded that the Guide had been discussed at a recent Court meeting in the last couple years. The Guide recommends that the judge, in drafting reasons for decision, must be alive to privacy concerns, but regarding the Court record, it is primarily the parties who are responsible for bringing a confidentiality motion to restrict access. It is not feasible to expect the Court or Registry to screen documents filed by parties for any privacy concerns.
Justice Mactavish undertook to raise the matter again with Federal Court judges in light of the substantial number of new judges.
Andrew Baumberg added that there will necessarily be a substantial policy discussion before documents are available via Court web site. There is already pressure from some sections of the bar to make the Court record available online to facilitate access.
Patricia Kosseim encouraged further consideration of the CJC guide in the internet age.
Andrew Baumberg also referred to proposed amendments to the Citizenship, Immigration and Refugee Protection Rules that would simplify the process for requesting an "anonymity Order."

Sandy Graham noted that for Rule 317 requests, the documents are transmitted to the Court, and so are available for public access; he transmits such documents to the other party to consider any privacy implications.
Justice Gleason noted a case on point. [see: *Canada (Attorney General) v. Philps* 2017 FCA 178]
Justice Mactavish agreed to raise this issue with the Federal Court to underscore the existence of the CJC guide and its recommendations.
Justice Gleason agreed to do the same for the Court of Appeal.

> **Action:** the CJC Guide (Use of Personal Information in Judgments and Recommended Protocol) to be raised at upcoming meetings of the Courts.

Patricia Kosseim agreed with the need to focus lawyers' attention on the option of requesting an anonymity order.
If there are any specific proposals for an amendment to the Rules, Andrew Baumberg offered to transmit suggestions to the Rules Committee.

4. New Items for Discussion

a. Modernization

Justice Gleason noted that the Federal Court of Appeal has no infrastructure in place to allow for e-filing, but it is allowed on an ad hoc basis, with an order setting out terms and is common in complex appeals involving large records.
Andrew Baumberg added that the Courts still have not received funding to replace their core proceedings management system. For now, the Federal Court has an e-filing portal in place, but it is not integrated with the Court's proceedings management system. As a result, an increase in e-filing traffic simply adds to the burden on the Registry to process documents manually and, in most cases, print the documents. He described recent e-trial pilots in large Aboriginal law proceedings, though noting that there are likely few cases of interest to the current committee that warrant a large electronic evidence display and management system. Finally, he noted the creation of a working group by the Citizenship, Immigration and Refugee Law Bar Liaison Committee to explore ways to facilitate electronic proceedings. It is currently developing a pilot framework for electronic proceedings (from Notice of Application through to final judgment). If there is interest, this Liaison Committee could pursue a similar pilot in a few cases.
Justice Mactavish agreed that there are very few labour, human rights, access or privacy cases with a large record.
Maryse Tremblay noted that if parties can have electronic service of documents on consent, this already helps.
Justice Mactavish then added the possibility of web / video streaming for cases with large numbers of parties.

5. Federal Court of Appeal Update

Justice Gleason provided an update for the Federal Court of Appeal, noting the appointment of Justice Laskin. The Court remains busy, but with only a small backlog. Amélie Lavictoire, the new General Counsel / Executive Director for the Court, is here at her first Liaison Committee meeting, replacing Chantal Carbonneau.

6. Federal Court Update

Justice Mactavish provided an update for the Federal Court, noting the appointments of Justice Lafrenière, Justice Pentney, and Justice Ahmed. Fifteen years ago, there were a large number of new appointments; many are now coming up for possible supernumerary election. Leading members of the bar are encouraged to apply. She added that regarding workload, the Court is in the "eye of the storm": there

is a significant backlog at the IRB; a hiatus for IP cases, with increased workload expected for patent challenges; and other caseload increases on the horizon in other areas.
Andrew Baumberg added that for scheduling of non-immigration proceedings, hearings of 1-5 days can still be scheduled before year-end, and for hearings of 6 days or more, they can be scheduled for Spring 2018.

7. Update – *Federal Courts Rules*

Andrew Baumberg provided an update on the Rules Committee, noting that there are 3 vacant positions (out of 5) from the private bar for a year – these are ministerial designations. As a result, the Committee has not had a formal meeting since October 2016. There are two amendment projects that went to Part I Canada Gazette in the last half year:

a. Miscellaneous Amendments
- numerous changes to the Rules to address minor drafting issues, coherence between the English and French versions, etc.
- no comments from Part I

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
- comments from Part I publication to be presented at next Rules Committee meeting

Other Rules amendment projects include:

c. Limited Scope Representation
- the amendments will allow for limited scope appearances for a defined mandate
- the drafting process is mostly complete, after which this will go to Part I

d. Implementation (Global Review)
- implementation of amendments to the Rules to incorporate principles of proportionality and to provide tools to control abuse
- drafting has been started

e. Substantive Amendments
- this project includes changes to Rules that were published in Part I on November 5, 2016
- comments are to be presented at next Rules Committee meeting re Part II process

f. Costs
- 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
- in drafting process

g. Legislative Amendments
- this project involves compilation of practice 'issues' that can be addressed only via amendment to legislation (as opposed to Rules) – the list would likely be provided to the Minister for action, if any, considered appropriate

h. Enforcement Amendments
- extensive revision of the Rules on enforcement to ensure that Rules are consistent with current practice
- very technical drafting process essentially complete, after which this will go to Part I

8. Next Meeting

Target time-frame: May / June 2018

Action: Andrew Baumberg to canvass availability of Committee members for the next meeting.