



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



**Wednesday, June 22, 2016
Ottawa**

Attendance: Justice Mary Gleason, Gaylene Schellenberg, Catherine Lawrence, Maryse Tremblay, Stephen Moreau (by teleconference), Carole Bidal, Patricia Kosseim, Sandy Graham, Andrew Baumberg, Laurence Bélanger ; **Regrets:** Justice Anne Mactavish, Nancy Bélanger, Colleen Bauman; Peter Engelmann , Jack Graham Q.C., Andrew Raven, Chantal Carbonneau

1. Introductory Remarks

Welcome by Justice Gleason, who noted that the co-chair Justice Mactavish sent her regrets due to a hearing on relatively short notice. Justice Gleason then provided the background to the Committee, which met a few years ago as a Federal Court – Bar Liaison Committee to provide a forum for discussion with specialized practice areas. With new legislation conferring additional jurisdiction on the Federal Court of Appeal in public service labour matters, it was thought that a new joint FC-FCA committee would be warranted.

2. Committee mandate & membership

Justice Gleason noted the efforts to reach out to different practice areas in the CBA, CALL, CACE, and Access and Privacy Commissioners' offices, asking if there were any others that might be included.

Maryse Tremblay welcomed the opportunity for a more specialized liaison committee to address labour and human rights practice issues. That said, there have not been many practice 'issues' that have arisen of late. She would welcome clarification of the scope of discussion of this more specialized committee compared with that of the more general liaison committee.

Justice Gleason noted the background to the specialized liaison committees and the opportunity for full discussion of practice questions in the special fora.

Andrew Baumberg noted that the membership in the specialized committees, including representation from 'both sides' of the adversarial divide in special practice areas, allowed for fulsome discussion.

Justice Gleason added the value of the non-adversarial forum to resolve issues.

Justice Gleason then asked for feedback regarding the frequency of meetings.

Maryse Tremblay suggested twice a year, initially.

Sandy Graham agreed – this also will give time to consult with colleagues.

Justice Gleason suggested that the next meeting be held shortly after Christmas, with long advance notice regarding timing.

Justice Gleason then asked for feedback regarding the scope of the practice areas represented by the Committee.

Gaylene Schellenberg will try to get other representatives from the CBA.

Stephen Moreau suggested that class action lawyers be considered, though noting that there are a lot of 'one off' cases – usually against the federal government.

Andrew Baumberg questioned whether this may be more suited to the general liaison committee if the class proceedings occur across the range of practice areas including Immigration law, Aboriginal law, etc. The consensus was that the class action issues would be more appropriately addressed in the general liaison committee but that if specific class issues arose in the practice areas of labour law, human rights, pension, benefits, privacy and access review, they could be discussed at this Committee.

3. Federal Court Update

Andrew Baumberg provided a brief Federal Court update.

- There has been a large number of judicial appointments since the last meeting in 2013, including the appointment last week of Mandy Ayles as the new prothonotary;
- A few recent Practice Notices were highlighted:
 - o Publication of Decisions of Precedential Value
 - o Procedural Protocol (re Allegations against Counsel)
 - o Case management: Increased Proportionality in Complex Litigation before the Federal Court
 - o Aboriginal Litigation Practice Guidelines, including a process to triage all new Aboriginal law proceedings for possible immediate referral to special case management and possible mediation.

Maryse Tremblay noted that in the labour law bar, there would be interest in a similar triage process on a pilot basis to see whether the resources are well-spent.

Carole Bidal agreed, adding that this would be particularly useful for self-represented litigants where there has not already been a labour board process that itself provided an opportunity to have settlement discussions.

Maryse Tremblay noted that some cases don't have a full hearing – the first hearing may be on judicial review.

Catherine Lawrence noted that delays in procedure sometimes are hints that there are problems in the file that might warrant intervention

Stephen Moreau does not think that the triage would be useful in a judicial review from CHRC or the CIRB; mediation may give party a false hope, given that the tribunal would not be at the table.

Maryse Tremblay noted that the employer might be interested in seeing the JR removed in exchange for some concession, even if the Tribunal was not involved.

Justice Gleason asked members to consider this for feedback at the next meeting.

Stephen Moreau and Maryse Tremblay will work together with a summary of recommendations. Carole Bidal will assist for the Department

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.

4. Federal Court of Appeal Update

Justice Gleason noted the Practice Direction regarding e-filing, which is available only on an exceptional basis (e.g., via CD). She then named the recent appointments to the Court since the last Committee meeting: Chief Justice Noël and Justices Near, Scott, Boivin, Rennie, de Montigny, herself, and then most recently, Justice Woods. Justice Ryer retired as of April.

In terms of workload, the statistics are available on the FCA web site. Input and output are fairly constant, with no real backlog at the Court.

5. Long-term Committee Agenda

Justice Gleason extended an invitation for suggestions from members of the Bar – are there practice issues that need discussion?

The previous issue regarding triage / mediation is noted, but are there others? There were no additional suggestions.

Patricia Kosseim asked about the Federal Court's Strategic Plan.

Andrew Baumberg set out high-level picture of the two main themes: access to justice and modernization. Progress is being made on both fronts, with the Court now entering year 3 of the plan. One key challenge relates to modernization, with a key element of the plan being contingent on funding for a new case management system.

6. Feedback on scheduling and other administrative issues

Justice Gleason noted the past discussion of problems related to scheduling – parties gave their availability within 90 days, but this often needed to be done a few times.

Maryse Tremblay noted that in labour law they usually get a courtesy call from the Judicial Administrator.

Gaylene Schellenberg noted the discussion from the general liaison committee regarding scheduling of cases for larger firms, including the Department: often, the firm would be expected simply to find a replacement if the counsel on the file was not available. This is a matter for consideration by the Court.

Andrew Baumberg also noted the e-scheduling project at the Federal Court, which may provide more flexibility for scheduling court hearings. For follow-up at next meeting.

7. Update – Federal Courts Rules

Andrew Baumberg provided a brief report of the active sub-Committees:

- a. Limited Scope Representation – will allow counsel to appear on a limited basis, thus providing more flexibility to litigants;
- b. Implementation (Global Review) – amendments are now at the drafting stage related to proportionality and control of abuse;

- c. Substantive Amendments – will include an exemption from filing paper for authorities that are available in a free public database; close to publication in part I Canada Gazette;
- d. Amendments to the *Citizenship, Immigration and Refugee Protection Rules* (related to modernization / substantive / citizenship) – at the drafting stage, including a new simplified process to request an ‘anonymity Order’
- e. Miscellaneous Amendments – close to publication in part I Canada Gazette;
- f. Costs – there remain significant divisions within the bar, and the Committee, regarding the competing goals related to revision of the rules on costs;
- g. Legislative Amendments – a new sub-committee that is compiling a list of ‘practice issues’ that might warrant amendment via legislation change rather than via the Rules.
- h. Enforcement Amendments – close to publication in part I Canada Gazette;

8. Common List of Authorities

Justice Gleason noted that the Federal Court list is really out of date. It was last looked at about 5 years ago. The thinking back then was that it would be useful to have the List published in part to assist self-represented litigants.

Maryse Tremblay noted that it is useful to provide the exemption for filing a full copy of the authorities on the common list.

Andrew Baumberg suggested that the list will likely be over-taken by the substantive rules amendments (exemption for e-authorities, noted earlier), which go to Part I Gazette soon.

Tabled to next meeting.

9. Varia

Stephen Moreau asked about the precedential decisions. There appear to be many decisions that are available via QuickLaw but not on the Court web site. What is the underlying policy? Why are all decisions not available via the Court web site, or at least via CANLII?

Andrew Baumberg noted that the Federal Court does not publish any decision unless it will also be translated. QuickLaw and other commercial (or non-commercial) groups are not subject to the Official Languages Act.

Stephen Moreau suggested that the Federal Court transfer *all* decisions to CANLII, even interlocutory decisions that are not translated.

Justice Gleason will take this back to the FCA and Andrew Baumberg to the FC.

10. Next Meeting

Justice Gleason asked that Andrew Baumberg circulate Friday dates in January or early February 2017.