

November 13, 2020

MINUTES

Attendance

Court: Justice Favel (Chair), Justice McDonald, Justice Shore, Justice Grammond, Prothonotary Ring
Courts Administration Service: Andrew Baumberg (Legal Counsel / Secretary), Marie Desrosiers (Registrar), Catou MacKinnon (Sr. Communications Officer), Isabelle Simard, Geneviève Lévesque, Alaina Woolfrey, Bailey Fox (law clerks)

Indigenous Bar Association: Scott Robertson, Paul Seaman

Canadian Bar Association: Robert Janes, Julie Therrien

Department of Justice (Canada): Sheldon Massie, Paul Shenher, Eden Alexander

Other members of the Bar: Pamela Large-Moran

Advocates Society: Karey Brooks (regrets)

1. Review Agenda

Add item re assessor Rule after discussion of oral history evidence.

2. Adoption of Minutes (October 31, 2019)

No comments. Approved.

3. Framework for Receiving Oral History evidence

Justice Favel: a draft with DOJ annotations (from June 2019) was re-circulated for reference. Is there anything substantive that requires revision?

Scott Robertson: his comments can be built into purpose section:

- there is no way to capture the protocols of presenting oral history for 633 distinct nations
- adaptability is key – procedure should not trump substance

Also, the guide is somewhat Ontario-centric – we need to capture other provincial procedural perspectives. Although there is perhaps some repetition, he gave his congratulations to the sub-Committee for its considerable work.

Sheldon Massie – where is it Ontario-centric?

Scott Robertson – when Rules are cited, they are usually Ontario. Perhaps something to canvass.

Justice Favel – perhaps some wordsmithing can be done in the purpose section. There is already some broad language.

Paul Shenher – Agrees with Scott Robertson’s comments this morning, and volunteers to carry on with drafting work, and address Scott Robertson’s comments. At the October 2019 meeting, there were some comments as well from the Chief Justice. Perhaps we can circle back to him to review any further / final comments. Also, there was a follow-up he was to do with Robert Janes. These steps can be pursued. Also, he suggested that we review the latest case-law to keep it up to date.

Justice Favel – is there anything in the current document that is objectionable, or which raises concerns, or are we simply doing a final review?

Paul Shenher – it appears there is general agreement, but simply a need for final editing, but open to receiving further input.

Andrew Baumberg noted the inter-relationship between this project, revisions to the Practice Guidelines, and launch of the assessor rule pilot project. Timeline for completion?

Paul Shenher – middle of January to get a revised draft.

Andrew Baumberg proposed that the Committee target the end of January to publish the Guidelines with the revised oral history framework (as well as other additions).

Action: With consultation with Robert Janes, Paul Shenher will prepare a revised draft oral history framework, circulate it, get input (if any) from the Chief Justice per the October 2019 comments, and we can then proceed with this version.

4. Assessor Rule

Justice Favel – this item was ready to go as of the meeting last year.

Robert Janes (re advisory group volunteers) – will follow-up with the original group to determine their position regarding involvement in the launch of the pilot.

Project to be launched together with Practice Guidelines.

5. Indigenous Law Sub-Committee

Justice Favel - the sub-Committee met on September 17 and October 30.

Short Term Projects

- a. Sources / material re indigenous law and traditions – *Prof. Craft lead, with assistance by a university researcher and Federal Court law clerks.*
- b. Case list – *Karey Brooks lead*

Medium-Term Projects

- a. Checklist to assist parties – *law clerks doing some initial research / drafting work, and circulated a first working draft on November 13. Comments welcome.*

Next sub-Committee meeting: to be scheduled according to the availability of Prof. Craft's indigenous sources' report.

6. Communications sub-Committee

Andrew Baumberg - the sub-Committee met on January 20 and March 3, 2020. Key projects:

- development of a PPT slide deck for use by members of the Bar / Court to describe work of the Committee to broader legal community
- outreach to legal and other types of organizations – *requires further work*

Sub-Committee work was delayed in 2020 due to pandemic – it needs to regroup.

Justice Favel spoke recently about the work of the Court and this Committee. It went well, though some practitioners are not entirely familiar with the Practice Guidelines. Sometimes, we

get last-minute request for webcasting of a hearing, even though it is in the guidelines. Advance notice would be preferable.

Robert Janes – organizers are hungry for new content, including content from the Court. Some of these are commercial groups that would welcome liaison with the Court. Some of the audience is non-legal (e.g., political representatives), and it would be useful for them to know about options and then be in a position to speak with their legal counsel.

Andrew Baumberg – the draft deck is close to completion, and should be ready as a first edition by end of year.

Pamela Large Moran – the work of the sub-Committee is to educate the wider bar about the benefits and resources in the guidelines. She noted an access to justice initiative lead by Chief Justice Beverley McLachlin – reimagining justice with a focus on restorative justice (part of an [A2J action committee](#) initiative). There is an event at the end of the month. She would like to provide information about the Court / Guidelines. Is there an opportunity in this, and other events, for a member of the Court to participate?

Justice Favel – subject to timing, this appears feasible. The Court would support this.

Justice Shore – attended the virtual launch event of the 60's scoop board of directors. Perhaps they could be contacted by Ms. Large Moran to share information about these initiatives.

Pr. Ring would like to see a draft copy of PPT deck, as she is speaking at an event in January.

Action: Andrew Baumberg to circulate the draft PPT deck.

7. Sub-Committee on Scope and Cost of Aboriginal Litigation

Andrew Baumberg reported on the sub-Committee:

- background regarding development of a survey regarding scope and cost of litigation
- discussion at Oct 31, 2019 Committee meeting:
 - draft survey was too long
 - proposal: provide an option in online survey for respondents to complete only those sections for which they have time / relevant information
- since the last meeting:
 - identified an online survey tool (SimpleSurvey) with Canadian data residency
 - uploaded the survey online (English only)
 - added overview, skip logic, and 'save in progress' option
 - translation completed – currently being uploaded
 - review by DOJ Research and Statistics Branch – some further editing required to address comments
- [Draft online survey](#)

No comments were received from the Committee.

Andrew Baumberg: One issue for all institutional reps will be their own process to get endorsement – it is assumed that DOJ, CBA, Advocates Society, and IBA will all be open to having their institutional name/logo on the splash page, but will require formal approval.

Julie Therrien: estimated 1 month for CBA approval.

Scott Robertson: similar for IBA.

Andrew Baumberg – will follow-up with Karey Brooks re Advocates Society.

Sheldon Massie: will be meeting with Susan McDonald next week to work through DOJ issues.

Action: committee members to provide update as soon as possible re institutional review process for endorsement of launch of the online survey, and any final comments.

8. Virtual and in-person hearings

Justice Favel noted the Chief Justice's interest in receiving feedback from the Bar regarding:

- [General Policy Statement re: Virtual Hearings](#)
- [COVID-19 Guide: In-person Hearings at the Federal Court](#)

Robert Janes: has been involved in a couple virtual hearings, with positive experience. Grateful to avoid the health risk, as are clients and others on the litigation team. Clients appreciate not having pressure to attend in person. Significant cost savings through virtual hearings. A recent hearing in Ontario would have involved 2 days of travel for a 2-hour hearing; virtually, it was simply a 2-hour hearing.

Paul Shenher: the national litigation sector at DOJ has done work to compile / compare guidelines from all Courts. We can approach them to identify any issues / suggestions.

Prothonotary Ring – also of interest, a number of mediations have proceeded virtually. Zoom provides for virtual break-out rooms, but the dynamic is clearly different in a virtual process. There would be interest in getting feedback from virtual processes more generally.

Pamela Large-Moran: there is a lot happening in the mediation field. In some cases, counsel may be in the room but 'virtualling-in' parties from another location. This hybrid approach has been found to be a practical option.

9. Rules Committee update

Andrew Baumberg reported:

- The Rules Committee met November 6 and plans to launch a new sub-Committee to review a long list (close to 50) rule amendment suggestions, though is open to considering others, with the view to prioritizing / selecting suggestions to move forward with an amendment project.
- Krista Robertson (former CBA representative to the Aboriginal law bar liaison committee) is the Aboriginal law bar representative on the Rules Committee, and volunteered to assist the rules sub-committee.
- If there are any suggestions for rule amendment that we would like to see move forward in the next year, this is the time to submit them. Otherwise, they will need to wait until the next drafting project is launched.

Robert Janes – asked to get the listing of suggestions for review.

Andrew Baumberg – will follow-up with the Rules Committee, either to circulate the current running list 'as is' or else an updated consultation draft that has been organized by the new sub-

Committee.

Eden Alexander – is there a set time-line?

Andrew Baumberg – ideally by January – in time for a sub-Committee report to next Rules Committee.

Robert Janes suggested one possible amendment: how properly to name Indian Bands in a proceeding. Sometimes we use a representative plaintiff, but there is an election and the representatives role in the community changes as a result. Is there any thought to having more definition to how bands are named as parties?

Justice Grammond – this is an important issue, with both a substantive and a procedural component. Rules 301/302 indicate who to name as respondent, but there is nothing for the applicant.

Andrew Baumberg – this is not on Rules Committee list. Note, for now it is asked simply to identify issues (i.e., it is acceptable, but not required, to have a proposed solution).

Sheldon Massie noted that the Rules require Court approval of settlement of a representative action. In one case, the Band was not comfortable with this – has anyone seen this arise?

Robert Janes – using a representative action does sometimes create challenges.

Sheldon Massie – settlement cannot be effective without approval. This is an issue regarding validity.

Prothonotary Ring – R114(4) states that the settlement is not effective unless approved.

Justice Grammond – the theory may be similar to class actions. However, there is a question whether that same rationale is at play for both class actions and representative actions?

Justice Favel – please provide any comments or suggestions for Rule amendment to Andrew Baumberg.

Andrew Baumberg also noted upcoming Rules amendments:

- 3 packages of draft Rule amendments are to be published in Part I
 - Enforcement
 - Limited scope representation
 - Proportionality / abuse of procedure
- 3 packages of draft Rule amendments are to be published in Part II
 - Substantive amendments
 - IMM Rules amendments
 - Minor miscellaneous amendments (e.g., clean-up of typos, translation issues, forms, etc.)

10. Truth and Reconciliation Commission Follow-up: Calls to Action

Justice Favel – see compilation of discussion notes from previous meetings.

Suggests that the Indigenous Law sub-Committee add this to its mandate. We can then report back at the next Committee meeting.

Agreed.

11. Next Meeting

Justice Favel – there is a trend towards shorter, more frequent meetings in other contexts, which we may want to adopt here as well, assuming that there is sufficient material to discuss (warranting more frequent meetings).

Justice Grammond suggested 4 shorter meetings per year.

Robert Janes agrees. More frequent meetings help maintain momentum.

Eden Alexander – in any given meeting, it may take some time to fully engage participants in substantive discussion.

Andrew Baumberg – we may want to keep open the possibility of an invited speaker, and adjust the agenda / length of meeting accordingly.

Justice Favel – a meeting every 3 months.

Next meeting: January 29, 2021, date to be confirmed.

12. Varia

Justice Favel asked for feedback on the pilot project for indigenous language summaries of decisions. Should there be a time-line for raising this with the Court? Should the Court take the initiative to propose this? At case-management stage?

Robert Janes – the earlier the better, to get counsel thinking about this.

Andrew Baumberg – perhaps this can be included in the checklist for counsel.

End of meeting.