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

June 11, 2019
Ottawa, Ontario

MINUTES

Attendance: Justice Gleason (for the FCA), Justice Mactavish (for the FC), Justice Walker (for the FC), Amélie Lavictoire, Carol McLean, Athanasios Hadjis, Valerie Phillips, Maryse Tremblay, Catherine Lawrence, Regan Morris, Andrew Raven, Peter Engelmann, Marie-Josée Montreuil, Andrew Baumberg, Patrick Baud.**Teleconference:** Stephen Moreau.

1. Introductory Remarks

2. Agenda & Minutes (October 26, 2018)

No comments.

3. Follow-up Items from last meeting

a. Mediation for labour, human rights, pension benefits, privacy and access review cases – Federal Court website

Justice Mactavish: the new website now includes a section regarding mediation.

b. Common List of Authorities

Peter Engelmann: the revised list includes submissions from counsel, though there is one further suggestion from the last meeting;
Justice Gleason suggested the Supreme Court decisions in *Doré* and *Toronto Port Authority* be added. She added that the Rules Committee will be meeting this Fall and may be in a position to move ahead with the Rules amendment that exempts parties from filing full paper copies of books of authorities. However, the list could still have utility as a list of recommended cases from this joint committee;
Valerie Phillips suggested that the *Gold* case be kept on the list.
Peter Engelmann agreed, though it had been removed because not cited for 3 years.
Catherine Lawrence: where will the list be posted? There is no obvious location. Perhaps it could be on the Court websites?
Justice Gleason: this might be acceptable, but would have to be reviewed with the Court as justice Gleason could not speak for the FCA. Is there also some similar initiative at the IMM Bar?
Andrew Baumberg: yes, but it has only just started.

> **Next steps:** Peter Engelmann to send a revised version of the Common List of Authorities to Andrew Baumberg, followed by review of the List within the Courts.

c. Modernization Working Group (Certified Tribunal Record)

Athanasios Hadjis presented the report of the sub-Committee related to Rules 317 and 318. There are no formal recommendations, given the nature of the discussions within the sub-Committee. Of note, there are two very different types of decision-makers – some which are formal tribunals and others which are not, and for which the CTR request is more like a disclosure process. There are

also privacy issues that arise in some instance. The CTR is not really a tribunal record in many cases, and parties don't always ask for the full record.
Sandy Graham suggested that the 20 day time-frame under the Rules is not sufficient.
Justice Gleason asked about the issue regarding the tribunal being left out of the R317 and 318 objection process.
Athanasios Hadjis explained a recent case in which the Court heard an objection related to solicitor client privilege in which the tribunal was not aware of the dispute until the Court had rendered a decision. The tribunal is not a party under Rule 318(2).
Justice Mactavish: this might warrant an amendment to the Rules.
Athanasios Hadjis: also, there is no standard process for filing an electronic CTR in the Court.
Justice Gleason: an ad hoc motion could be filed to be permitted to file an electronic CTR.
Regan Morris: it is not clear why the Court receives a copy, but not the other party. Under the Rules, only the requesting party receives a copy.
Valerie Phillips: given privacy legislation, there needs to be a rule to provide authority to release certain documents.
Justice Gleason asked for information about the IMM e-filing pilot.
Andrew Baumberg provided background regarding the immigration e-process pilot, which runs under the Citizenship, Immigration and Refugee Protection Rules, which are quite different from the main Federal Courts Rules. The full CTR is automatically sent to the Court and put on the record. Under the pilot, the IRB agreed to send an electronic version of the CTR. However, given that refugee proceedings are confidential by statute, they would need a Protected B network connection to send the CTR over the internet, so instead simply use a CD / DVD for now.
Athanasios Hadjis /Andrew Baumberg noted that the CTRs do not appear to be vetted for privacy.
Justice Mactavish: no, but there is vetting for national security issues.
Andrew Baumberg provided background regarding the Federal Court's settlement pilot, under which a production Order requires that the tribunal provide a CTR to be circulated even before leave is decided. Early results of the pilot have shown a marked shift in timing of settlements, which now occur early in the process, i.e., avoiding last minute settlements after the Court and parties have already prepared for the hearing.
Justice Gleason asked if there were any recommendations regarding the sub-Committee Report.
Marie-Josee Montreuil: it might be helpful to establish a procedure for objections, such as a 2-step process, with a motion only if necessary.
Justice Gleason: there may be a need for a more detailed process, with notice to the tribunal. This needs to address privacy concerns as well.
Athanasios Hadjis: time-lines are needed as well.
Justice Gleason asked for the sub-Committee to bring forward more formal recommendations.
Athanasios Hadjis invited Committee members to send recommendations for Rules amendments.
Maryse Tremblay: if there is a self-represented litigant (SRL), it is usually the represented party that must file the record for the court. Also, the Rule requires single-sided copies, which creates a huge paper burden for large files. She suggested that double sided copies be permitted.
Justice Gleason: pending amendments to the Rules, an *ad hoc* motion could be filed requesting permission to e-file or do double-sided copies.
Andrew Raven noted the two different types of administrative decision-makers. However, it is preferable not to have two completely separate sets of rules for these situations.
Athanasios Hadjis: the Social Security Tribunal provides a list of documents and asks the party to select what they need.
Carole McLean: this works quite well for SRL's.
Athanasios Hadjis: there is also an issue regarding relevance – the tribunal takes on the role deciding what parts of the record are relevant to the Court proceeding.
Justice Gleason: if there is a challenge, the court will decide relevance. There is no other way, other than providing the full CTR, which results in an administrative burden.

Action: Modernization Working Group (Certified Tribunal Record) to prepare recommendations for review by the Committee.

d. Committee membership

The current make-up of the Committee appears to provide for sufficient representation;

e. Confidentiality Orders

Justice Mactavish noted the divide within the Federal Court regarding certain types of confidentiality orders (e.g., protective Orders in the IP domain) and the role that the Court should play adjudicating such motions.

Andrew Baumberg: the only other focus was for the Rule 317-318 sub-committee regarding confidentiality issues in the CTR.

4. New Items for Discussion

No items raised.

5. Federal Court of Appeal Update

Justice Gleason provided an update:

- Justice Locke was appointed and Justice Gauthier became supernumerary;
- the Court is very busy – there has been an increase of approximately 100 pending cases;
- the Vancouver backlog has been resolved, with hearing dates available within 6 months;
- the Toronto backlog has increased, and another appointment is needed to address this;
- the Ottawa backlog is also resolved; if you want an early hearing date, it is recommended to request a hearing in Ottawa;
- there is no backlog to note in other regions;
- e-filing is expected by 2020;
- one electronic courtroom is available in Toronto.

6. Federal Court Update

Justice Mactavish provided an update:

- appointments: Associate Chief Justice Gagné, Justices Pamel and McHaffie, Prothonotaries Molgat and Furlanetto;
- vacancies for position of judge: 3 in Quebec and 2 in Ontario; also, new positions were created by recent legislation in anticipation of workload increases;
- for immigration: there were 1000 more cases in 2018 compared to 2017; citizenship cases are lower; in IP, many cases are settling under the new regime;
- strategic planning exercise – the initial focus is on modernization and strengthening the court as a national institution – a public consultation process is planned;
- webcast pilot – the first hearing under the pilot was held in Vancouver in January;
- electronic hearings – there are 6 electronic courtrooms available across the country
- online access – Andrew Baumberg noted the Chief Justice's proposal for discussion with other liaison committees: electronic posting on the Court web site of (i) parties' pleadings (Statement of claim / Notice of application, all *facta*), and (ii) Court documentation (correspondence, orders and decisions), with a view to making these materials more available and accessible.
- IMM pro bono initiative – Andrew Baumberg described an initiative with the Bar to recruit volunteers to assist as pro bono lawyers for self-represented litigants.

7. Next Meeting

October or November 2019.