Labour Law, Human Rights, Pension Benefits, Privacy and Access Review Liaison Committee

September 21, 2023

MINUTES

Attendance:

Judicial members

Justice Mary J. Gleason (Chair), Justice Anne MacTavish, Justice Elizabeth Walker

Legal/tribunal community members

Maryse Tremblay (BLG – Labour Law), Louisa Garib (Privacy Commissioner), Stephen Moreau (Canadian Bar Association - Pension), Patricia Boyd (Information Commissioner), Colleen Bauman (Goldblatt Partners), Brian Smith (CHRC), Andrew Astritis (Raven Law - CALL), Asha Kurian (Federal Public Sector Labour Relations and Employment Board)

Secretariat: Courtney West, Amélie Lavigne, Sandra Calhoun (minutes)

1. Attendance / Introductory remarks and welcome

Chair J. Gleason welcomed and thanked the committee members for attending.

2. Federal Court General Update

Speaker - Justice Walker

Changes to the composition of the Federal Court

- New appointments:

  Judges

  - Guy Régimbald
  - Ekaterina Tsimberis
  - Anne Turley
  - Negar Azmudeh

  Associate Judges

  - Michael Crinson
  - John Cotter

- Changes to Associate Judge roster:
  - Kevin Aalto – Retired
  - Martha Milczynski – Supernumerary
  - Mireille Tabib – Retired

- There are currently three vacancies in the Federal Court (two in Quebec). Bilingual candidates are especially encouraged to apply.

Statistics

- The Federal Court has had a spike of new files.
    - Almost 13,000 immigration files in 2022 and expect to receive the same if not more in 2023.
    - There has also been a steady increase in class actions.

Wait time for hearing dates

- Currently scheduling T- files and Immigration files within 3 to 6 months, including the regions.

    Patent files are being scheduled a bit further out.

3. Federal Court of Appeal General Update

Speaker - Justice MacTavish

Changes to the composition of the Federal Court of Appeal

- Retirements:
    - Chief Justice Marc Noel
    - Marc Nadon
    - Denis Pellethier
    - Johanne Gauthier
    - David Near
- Departure:
    - Marianne Rivoalen – appointed Chief Justice of Manitoba
- New appointments:

    <u>From Tax Court</u>

    - Siobhan Monaghan
    - Nathalie Goyette
    - Monica Biringer

    <u>From Federal Court</u>

    - Sylvie Roussel

    <u>From Academia</u>

    - Gerald Heckman
- There are currently two vacancies at the Federal Court of Appeal. There may be an additional vacancy if a judge from this Court is appointed as the next Chief Justice.

Speaker - Justice Gleason

Statistics

- The number of new files has decreased; however, this coincides with the drop in volume for lower Courts during the pandemic. Numbers have increased in comparison to pre-pandemic years.

Wait time for hearing dates

- There is a small backlog in Toronto showing a 6-9-month wait for hearing dates. Smaller backlog in Montreal.
- No backlog in Ottawa. There are dates available for those who submit their requests within the appropriate timeframes.

Proposed amendments to Rules 317-319: Status and next steps

A sub-committee of this Committee proposed that there be an amendment to the *Rules* to provide greater flexibility regarding the tribunal record – that it is no longer required to be deposited in the Registry prior to being introduced by party.

The proposed draft amendment, once endorsed, will be placed before the Rules Committee during their October meeting.

Speaker - Asha Kurian

- Concerns regarding the ambiguity of the wording of rule 318(1)(b)

  Proposed: *a list of all material that the tribunal is able to transmit upon request.*

  There may be a need to expand on the word "able".

  Suggestion: *a list of all material that the tribunal is able to transmit upon request <u>and a list of documents that cannot be transmitted</u>.*

  Generally, they concede that these amendments reflect was presented and they would endorse the proposal.

Speaker - Justice Gleason

- The initial notion was presented to provide more flexibility.
- Upon further reflection proposes:

  a list of all material that the tribunal is able <u>and prepared</u> to transmit upon request.

  This would provide more definition to the notion of "able". Mindful that the proposed changes would be re-written by the drafters.

  There was a consensus to make this change.

Speaker - Andrew Astritis

- Notes that the term "certified copy" was removed. The certification adds formality and ensures a complete record.

- The proposal reference that the document would be added to the record but not via an affidavit. How would it be added?
- Logistically parties should have more time, beyond the initial period, to ensure that they have the appropriate version of the record.
- If the back and forth is extended at the initial stages, it would be worth thinking about whether the affidavit deadline should be triggered by the completion of the 317-318 process.

Speaker - Justice Gleason

- The intent was to put certification in 1.2 – *the tribunal files a notice that it has complied with the Rule*.
- In terms of putting materials in front of the Court, the Certified Tribunal Record is not placed before the Court. Documents can be put in the record without being in an affidavit (although some do have a practice of putting all documents inside an affidavit).
- As for the longer time frames, the language allows the Court to extend deadlines if needed. The flexibility is there to accommodate these requests.

Speaker - Asha Kurian

- The reasoning for the move from "certified" to a copy is in part of it is that provision is not just for tribunals, but also other types of decision-makers.
- Parties can often address missing documents among themselves, include them as part of an affidavit if they need to.

  It is less burdensome to transmit electronic documents as a copy with the notice coming from the tribunal.

Speaker - Brian Smith

- The CHRC supports the direction of the amendments in principle.
- Concerns regarding the objections process (Rule 318 (2)):
    - It was understood that the amendment would indicate that the "onus of bringing a motion rests with the party that is seeking disclosure". However, the current amendment indicates that the tribunal might be responsible to request that the Court settle the issue of objection.
    - Based on the amended rule 318(2), when would it be the CHRC's responsibility to raise the issue of objection to the Court as opposed to the requesting party?

Speaker - Asha Kurian

- Agrees with Mr. Smith.
    - Clarity would be useful. Requesting Party should have the responsibility to come forward and raise the issue of objection.

Speaker - Justice Gleason

- This is reflected in the drafted change, however, if we proceed as suggested, only the requesting Party would make the motion.

Speaker - Louisa Garib

- OPC had similar concerns. Requesting clarity on when the burden would shift to the tribunal.

Speaker Justice Gleason

- New proposed change to Rule 318 (2)
    - Current proposed changes:

      Where a tribunal or party objects to a request under rule 317 or a response under rule 318(1) or (1.1), the tribunal or the party shall inform all parties and the tribunal, ~~and the Administrator~~, in writing, of the reasons for the objection. If the parties or the tribunal require the Court to settle the objection, the party or tribunal objecting shall make a motion under either rule 369 or rule 369.2 within 10 days of notice or of the making of the objection, as the case may be.

    - Additional proposed change:

      Where a tribunal or party objects to a request under rule 317 or a response under rule 318(1) or (1.1), the tribunal or the party shall inform all parties and the tribunal, ~~and the Administrator~~, in writing, of the reasons for the objection. If the parties or the tribunal require the Court to settle the objection, the parties seeking disclosure shall make a motion under either rule 369 or rule 369.2 within 10 days of notice or of the making of the objection, as the case may be.

Speaker - Brian Smith

- CHRC agrees with change, but inquires as to the need of "If the parties or the tribunal require the Court to settle the objection". The reference to the tribunal could be removed.

Speaker - Justice Gleason

- Modified additional proposed change:
    - Where a tribunal or party objects to a request under rule 317 or a response under rule 318(1) or (1.1), the tribunal or the party shall inform all parties and the tribunal, ~~and the Administrator~~, in writing, of the reasons for the objection. If the parties ~~or the tribunal~~ require the Court to settle the objection, the parties seeking disclosure shall make a motion under either rule 369 or rule 369.2 within 10 days of notice or of the making of the objection, as the case may be.

Speaker - Stephen Moreau

- The term "disclosure" is not used in the rest of the rules. Suggests "transmission".

Speaker - Justice Gleason

- Agrees that the term "transmission" could be used instead of "disclosure".

  Or "the party seeking material"

4. **Committee vote – yes/no**

Speaker - Justice Gleason

Call for a vote: With these last changes, do you support the amendments contained in the discussion draft regarding amendments to rules 309, 310, and 317-319?

Committee endorses the proposal unanimously. It will be brought forward as amended to the Rules Committee.

5. **Pro bono representation for unrepresented litigants in the Federal Court of Appeal**

Speaker - Justice Gleason

- Seeing a noticeable rise in matters that involve self-represented litigants. Would it be worth looking into a pro bono program? Seeking discussion and recommendations, perhaps more from the practising lawyers than tribunal members.
- There is an existing process at the Ontario Court of Appeal, when pre-hearing motions are heard in person, a number of young lawyers in Toronto sign up to offer pro bono services.

Speaker - Maryse Tremblay

- This service would not be offered by their firm but more likely from firms that represent unionized complainants.
- However, it would be a great idea as it can be difficult for opposing parties to deal with self-represented litigants. They do not have the distance from their case to see a more beneficial course of action.
- Their firm would have too many conflicts to participate, but would gladly participate in a subcommittee for discussion.

Speaker - Justice Gleason

- Some matters may not be a conflict. Example: ex-public servant pursuing the government may fall in the purview of employer counsel.

Speaker - Coleen Bauman

- On behalf of employee/union counsel, the idea is worth exploring since the service provides exposure for younger lawyers and there is a need.
- Many firms have internal pro bono services and people may have already sought it but not been qualified.
- We would have to look at the services offered and the restrictions.

Speaker - Stephen Moreau

- Agrees with the general sentiment. It would benefit both sides.
- However, focusing on subject matter or the firm's specialization would yield better results in attracting lawyers who would be willing to participate.

Speaker - Justice Gleason

- Notes the lack of a representative from CACE on the committee.
- As discussions proceed, it would be good to have representatives from CBA, CACE, CALL and the Department of Justice.

- Possibly create a sub-committee comprised of practising lawyers from this committee for initial discussions.

Speaker - Maryse Tremblay

- Agreed to follow up and determine CACE representative

Speaker - Courtney West

Agreed to contact Department of Justice counsel, determine who might participate as AGC representative.

6. Common books of authorities

Speaker - Justice Walker

- The Federal Court has discontinued the practice of updating common books of authorities on the Court website.

7. Modes of hearing in the Federal Court of Appeal

Speaker - Justice Mactavish

- The Federal Court of Appeal has primarily held in-person hearings for the past year, however, continues to offer Zoom and hybrid options when the parties request them.
- Over the last year, the breakdown was approximately
    - 70% in person
    - 25% through Zoom
    - 5% hybrid
- Virtual option is convenient for litigants who do not live in one of the major cities.

Also offers technical convenience; the public can access and observe hearings online.

8. The Federal Court of Appeal's new website

Speaker - Justice Gleason

- All are invited to visit the new user-friendly Federal Court of Appeal website. https://www.fca-caf.ca

Speaker - Stephen Moreau

- Virtual hearings:
    - The members of the public who are only observing an online hearing should be moved to a different room so that there is no interruption.

Justice Gleason confirmed that the Federal Court of Appeal hearings are designed in a way where the members of the public are in a separate virtual room where they cannot participate in the active hearing. Justice Walker confirmed that the same is applicable to Federal Court hearings.

9. The Federal Court of Appeal's Consolidated Practice Direction

Speaker - Justice MacTavish

- The Federal Court of Appeal now has a Consolidated Practice Direction. It is available on the Court's website; it is indexed and easy to navigate.
- All are strongly encouraged to follow the suggestions in the Consolidated Practice direction regarding electronic documents and how they should be set up.

Speaker - Justice Gleason

- Agrees with Justice MacTavish and elaborates the value of bookmarking records provided to the Court.
- It is helpful to provide a physical copy of the documents referred to during a hearing – daybook. As well as providing PDF page numbers rather than record page number.
- It was also convenient when parties used the virtual platform and shared their screens during the hearing to display their materials. This can be done in-person with the help of the registry.

Speaker - Stephen Moreau

- How does one share their screen during an in-person hearing? Justice Gleason advised that a laptop could be used with the Registry's help, and can also use a daybook if the Court room is not equipped.
- The Superior Court uses Case Lines that facilitates the ability to directly share the referred material with the Judge during a hearing. Is this tool being contemplated by the Courts?
- Justice Gleason confirmed that courtroom technology updates are being contemplated, but not necessarily Case Lines. Bilingual functionality is a major consideration. An electronic document management system for the court may be in the works in the future.
- Justice Walker added that counsel can share documents through the Registry with their laptops, but not all courtrooms are set up that way. It is recommended to contact the court in advance so that the assigned registry officer can relay instructions on how to proceed. There may be some restrictions in some regions.

10. Date of next meeting

Speaker - Justice Gleason

- A meeting in early December would be beneficial to facilitate the discussion of a pro bono subcommittee.
- A virtual committee meeting is preferred.

11. Varia