

Global Review Sub-Ctee. Mtg
Monday, April 23rd 2012 10 a.m.

Present:

**Justice Stratas
Justice Gauthier
Justice Rennie
Prothon. Tabib**

**Cecily Stickland
Rob MacKinnon
Janet Walker
John Morrissey (via teleconference)**

**Chantelle Bowers
Nathalie Daigle**

Overview of the Process :

- Justice Stratas provided an overview of the process and the work of the subcommittee on global review date and explained where we are at in terms of policy.
- Justice Stratas explained that he had created a separate web page within his own personal domain as a resource centre which can only be consulted by subcommittee members, wherein members can find relevant material to the work of the subcommittee and its initiatives (<http://davidstratas.com/global/global.htm>)
- For instance, one may find the discussion paper, formal submissions made during the consultation period, and other related materials, such as on the topic of proportionality

Comments yet to come:

1. Canadian Maritime Law Association – Cecily Strickland to follow up with the CMLA since the comments had been submitted quite some time ago through Chris Giaschi. Chantelle Bowers to ensure that their comments are incorporated into the collated table of comments received to date. (DONE on both accounts)
2. Chantelle Bowers to follow up with the Canadian Bar Association to inquire if they are still interested in submitting comments regarding the global review discussion paper, as they had indicated they were at the last Bench and Bar Liaison Committee meeting in December 2011. (DONE - C. Bowers followed up with G. Schelenberg of the CBA)

Justice Stratas then proceeded with a Summary of the issues identified in the discussion paper and in the submissions received during the consultation period (which ended on February 17, 2012, although comments are still welcome from members of the public and the bar).

Issue 1- Court led procedure vs. party led procedure:

- There was little consensus, although the bare majority would appreciate Court led procedures especially in intellectual property matters
- Comments seem to reflect about where we are now, which is party- led where they can meet the time lines.
- Otherwise, the court will have to interfere to ensure the process runs smoothly.
- Basically, it is a reflection of where we are at
- The Courts want to maintain relevancy, but the parties may want to have the fast-track option

Justice Rennie made reference to Ian Binnie's interview in the Globe and Mail which is to the effect that if the Courts want to remain relevant, we will need to have a fast-track option.

Janet Walker commented that in the end, we are an adversary system which must be born in mind when looking at various mechanisms for managing. Often, we have a combination of common law and civil law.

-For instance, when we refer to "Court led, what do you mean by that?" A judge/ a masters? Court led management generally is taken to mean case management?

Rob MacKinnon mentioned that minor tweaking is necessary regarding Rule 7.

Cecily Strickland commented that a litigation plan tends to be a waste of time.

Justice Stratas queried whether the introduction of a new mechanism is useful in terms of the benefits? Do the costs outweigh the benefits?

Rob MacKinnon agreed that it is important to try to convince counsel to come to terms early on.

Issue 2 – Court's authority to control abuse

-Justice Stratas referred to the fact that some provinces now explicitly provide for the authority of the courts to take steps to control abuse more generally.

Action: Chantelle to follow-up with Prof. Ferland to see if he might provide us with an overview of the jurisprudence regarding article 54.1 of the Code de procedure civile (DONE on both accounts)

Protonotary Tabib reminded us that the problems may not only be with self-represented litigants. For example, in cases of infringement of copyright and trademarks, some of the deficiencies come from the parties themselves, even

with sophisticated clients not showing up for examination or changing lawyers and time stalling tactics.

-For a remedy under 54(1):

- Must be able to identify the abuses and who is conducting them and identify the remedies, in order to give meaningful policy advice.
- What sort of abuses and remedies might be addressed in the rules of practice is a question for the bar to highlight to the Courts.

Issue 3 - Trial vs Dispositions

Justice Stratas reported that there was a lack of consensus on this issue

- Some people submitting comments had thought that the phrasing meant to limit summary dispositions
- The use of the word “determination” is the mischief, and perhaps a tweaking of the language would help.

Justice Gauthier does not agree with the registry’s interest in this issue and that it should be left up to the judges and prothonotaries to determine dispositions of matters before the Courts.

Issue 4 – Proportionality:

Justice Stratas reported that there was consensus overall on this topic.

- He suggested that the documentation re: proportionality should be distributed to members of the sub-ctee members and examples of the other countries would be useful.

Janet Walker referred the subcommittee to the terms “just, most expeditious and least expensive determination of every proceeding on its merits “. The word “just” is a fixed point, and “proportionality” is meant to give some texture to “just”.

Cecily Strickland indicated a concern, however, that proportionality should not be used to reduce any disclosure requirements.

Justice Rennie, however, takes the opposite view. Rather, it shifts the obligations to the parties to specify the requirements needed *i.e.* articulate what is cogent and probative as opposed to requiring the adverse party to disclose everything.

John Morrissey questioned whether we really need this and whether it is really relevant?

Rob MacKinnon added that the Ontario Courts may be giving us some guidance as well in short order with respect to expecting the provision of electronic

database information writ large is impossible. In other words, there must be a balance on both sides to provide disclosure in a timely way.

Protonotary Tabib raised the possibility of Litigation Plans providing a basis for parties to identify their theory and the main issues at play. It is not meant to be a fishing expedition outside of its parameters. In her view, there should be a detailed paragraph at Rule 3 setting out the context of “proportionality” and other components can be build in as we look at the rest of the rules.

Justice Stratas suggested that all of the topics are all inter-related. For instance, abuse relates to court management, which relates to proportionality. Everything is a whole and we should not be looking at only the parts of the machine. To make justice effective, we need to look at what is probative and relevant beforehand.

Justice Gauthier reminded the subcommittee that the Courts’ judicial resources also needs to be taken into account when discussing proportionality. It is not only about party-led concepts of proportionality, but whether or not the existing complement of judges can reasonably be expected to handle the workload.

Issue 5 - Making effective use of Practice Directions

Justice Gauthier indicated that despite some criticisms, she feels that practice directions from the Chief Justices are still useful to members of the profession, especially if they pertain to matters that have not yet been entrenched into the rules of procedure, and yet are very relevant to the members’ practice before the Court.

Justice Stratas made reference to the Registry’s suggestion that “the judiciary also routinely renders orders/directions which clarify the application of the rules. The registry will often use these previous decisions to support the information they give clients when the rules are unclear.” The Registry suggestion is that these orders/directions be reviewed on a yearly basis to determine whether they should result in changes to the rules. Justice Stratas simply raised this point with the subcommittee for further discussion. He added, however, that directions from some judges should not be interpreted from one matter to another. For example, one judge would not ordinarily make a direction that is applicable from one case to another.

Protonotary Tabib added that in her view, the Notices to the parties and profession is the way that the Chief Justice communicates information to the public and the bar. They are a vehicle that allows us to adapt our practices to the realities of the day, without having to go through the cumbersome steps of the rule changes. The Registry ought to be educated that it cannot “rule” on anything and shouldn’t be applying a direction from one case and imbuing it into another.

Justice Rennie suggested that the clarity of the rules is of the utmost importance. So the question becomes, where do we place the practice directions in the Rules? In an index? Next to the Rule that is most relevant? This is a discussion that the subcommittee will need to pursue in terms of where the notices of practice should be placed in the future to make sure that they are seen and used by the greatest number of people possible.

Issue 6 - Uniform Procedures vs Specialized Procedures

Justice Stratas provided an overview of the comments received to date and raised the question with the subcommittee of whether specialization is warranted?

Justice Gauthier referred to a policy that was adopted with the revision of the rules in 1998 that there would be as little specialization as possible. If the answer, in principle, is that where something needs to be tailored because the practice is different, it shall be done, but otherwise, the approach to the revised rules was to be general in nature at that time.

Cecily Strickland added that in her view, the specialized admiralty rules work well and should remain.

Justice Gauthier agreed and added that the Federal Court of Australia deals with specialized court procedures by way of Practice Notices ie. admiralty

Rob MacKinnon added that the Immigration Bar also likes the idea of keeping the specialized rules.

Issue 7 - Architecture

Justice Stratas mentioned that the comments indicated a general dissatisfaction as to where we are at in terms of basic architecture

- i.e indexing
- i.e experts discontinuance spread throughout the rules

Janet Walker suggested that a lot of these concerns could be addressed if an electronic tool were to be implemented since the practice notices could be hyperlinked to the rules and could provide various links throughout the rules to related rules.

John Morrissey added that the Ontario format is a good model, where the rules are grouped by area or subject matter. The Ontario Rules are numbered in such a way that people can find all the related rules, i.e. regarding discovery.

Janet Walker also suggested that the B.C. Rules have a similar model. They proceed chronologically from the litigants' perspective. It may simply be a matter of numbering.

Protonotary Tabib agreed that indexing can be very useful. However, she cautioned that changing the numbers can be very problematic because people become so accustomed to the numbers and where to find the rules.

Justice Stratas referred to the fact that Justice Hughes keeps hearing that the *Federal Courts Rules* are so difficult in largely because the clients are practicing before the provincial courts. He agreed that electronic rules may be the solution for everyone.

Issue 8 -Other Areas of Possible Reform with the jurisdiction of the *Federal Courts Rules*

Justice Stratas indicated that the subcommittee's final report will flag a number of issues that may be addressed in a laundry list for things to be changed along the way. Members of the profession were invited to provide their own list of issues that they felt needed to be changed in the Rules.

A summary of the items suggested can be found in the Table of collated comments, starting at page 30, which can be found on the subcommittee's website.

Some of the items raised by the submissions include the review of the following:

- (i) rules regarding pleadings
- (ii) rules regarding discovery
- (iii) rules regarding case management
- (iv) rules regarding evidence and trial management
- (v) rules regarding costs
- (vi) an increased role for the registry
- (vii) the incorporation of e-filing and e-service rules and technology overall
- (viii) the reference to "Christmas recess" be changed to "winter recess"
- (ix) a diminished need for motions, ie. removal of the requirement for a motion when requesting an extension of time, with parties' consent
- (x) rules regarding the certified record and class proceedings

Justice Gauthier also added that the subcommittee must not lose sight of the importance of addressing the language inconsistencies in the Rules. Justice Stratas agreed that we will need to develop a mechanism by which we review problems with the language inconsistencies.

To do for the next Plenary Rules on May 11, 2012

Justice Stratas queried whether we needed to solicit further comments from the bar at this stage regarding global review.

John Morrissey suggested that the heavy commentary regarding previous rules changes only came in once the bar actually got a chance to see the draft rules.

Janet Walker agreed that once the report is released, we may receive more feedback.

Justice Stratas wondered whether there might be an appetite to circulate the documents to the judges and prothonotaries. It was agreed that the Federal Court could be consulted by way of a lunch and learn series, which would allow them to hear about the approach of the subcommittee without having to read necessarily all of the documentation at this point. The Federal Court of Appeal judges can be similarly informed at the upcoming meeting on June 12th in Ottawa or by way of email.

Justice Stratas reminded the subcommittee of its mandate to provide a report on policy issues. The end product of our mandate will be a report which, as a policy review, will set out the majority and minority views, as well as the consensus, where there is one. The subcommittee will also make recommendations.

That final report should be ready for the plenary rules committee meeting next fall. If the plenary Rules Committee accepts our policy review, then it can provide us with further instructions as to how to proceed with the actual wording and drafting. Perhaps another sub-committee will be tasked with that stage.

Justice Stratas would like the subcommittee to focus now on the following items:

Bucket 1:

- proportionality
- reporting abuse of process
- case management
- court-led vs. party-led proceedings

Bucket 2:

- architecture
- practice notices
- specialized proceedings

TO DO:

Following the plenary rules committee meeting, we should have another meeting that afternoon at 2p.m. Chantelle to send email to everyone following this meeting (DONE). Discussion paper to be parceled out and Janet Walker to start with the first cut of the report.