

Sub-Committee
on Global Review of Federal Courts Rules

Friday June 22, 2012, 10h00

Conference Call Participants:

Justice Stratas
Rob MacKinnon
Professor Ferland
Cecily Strickland

Present:

Justice Rennie
Prothonotary Tabib
John Morissey
Professor Walker
Peter Hutchins
Chantelle Bowers
Lucille Collard
Andrew Baumberg

Regrets:

Justice Gauthier

Prothonotary Tabib presiding and moderating the meeting.

* Problems with our communication system (polycom) delayed the start of the meeting until 10h30. It will be requested that from now on, a person from the telecommunications branch will be responsible for setting up the conference calls.

J. Stratas (from Vancouver):

The focus of today's discussions should focus on three items, flowing from the discussions at the last committee's meeting:

- 1- Proportionality – there was a consensus that this issue should be addressed in some way.
- 2- Abuse of process
 - some reform may be warranted
 - what type of pathologies exist and what tools may be available
- 3- Case management – P. Tabib to elaborate

Two new documents have been posted on the sub-committee website:

- Memorandum from Andrew Baumberg and Chief Justice Crampton
- Memorandum from Justice Sharlow

Moving on from the 1st four topics in the discussion paper, i.e. trial vs disposition also falls under case management as well.

Peter Hutchins

Peter Hutchins met with the Aboriginal Bar Liaison Committee and he was asked to report on the Rules Committee work to the Constituents. Chantelle Bowers will communicate with the Canadian Bar Association by the end of the day to advise that the official deadlines for comments have past but that comments will still be accepted until July 6th.

PROPORTIONALITY

J. Rennie

By experience, J. Rennie is of the view that there is a need to be express and direct in terms of proportionality. For example, the rule 249 test is what is “necessary and appropriate” – an argument was made that this excludes proportionality.

An amendment to rule 3 is desired.

Janet Walker

The Report of the committee could include an explanation and examples to provide more clarity on the intent of the rule referring to proportionality.

Rob MacKinnon

Areas where proportionality applies should be clearly identified, such all aspects of discovery, since rule 3 has been interpreted to apply only to procedures.

J. Rennie

In addition to amendments in the rules, the Report could provide illustration with examples of what constitutes proportionality so as to provide guidance.

Discussion raising these points:

- harmonization with other provincial jurisdictional rules
- is it sufficient to address proportionality in a general rule or should it be more specific
- rule 3 already speaks to “just, most expeditious and least expensive” – does this address proportionality

Peter Hutchins:

In the Aboriginal context, there is a special request for treatment of arrangements. For example, should court do viewing in the community? Despite the cost associated with this, the complexity and the length of a trial may justify it. Special considerations may be warranted for aboriginal given the distance usually involved and the particularities of the issues. The Aboriginal Bar has prepared a draft practice direction on this matter.

Peter Hutchins to prepare a note on the subject for distribution.

Chantelle Bowers to circulate the Draft Practice Direction in the Aboriginal Context that was formulated by the Aboriginal Bar.

Where can the concept of proportionality be included

- Things will be case managed and the concept of proportionality can also be included into R.385
- Practice direction vs rule amendment – practice direction may not be sufficiently consulted to be meaningful
- RIAS?
- Message need to be clear, front and centre
- Changing the structure or the rules should provide for an opportunity to incorporate the principle of proportionality.
- Where in the rules
- Already appear in rule 400 for costs
- Proportionality may be used as well not only to restrict but to expand on procedure for certain issues, i.e. where a case dictates that simplified procedure be applied
- There might be actions where the issue might have a low monetary value but of great importance in law – to bear in mind when applying concept of proportionality
- Motions – are motion records always necessary – allow more simplicity on the basis of proportionality – it could assist in controlling the filing of materials required and the inclination to file counter-motion automatically

Professor Ferland

Representative proceeding and class proceedings (rule 114(1)d) and rule 334.16 (1)d) – refer to proportionality.

John Morrissey:

- Oral Examination

- Use of experts and trial management and the ability to restrict the number of experts and timeline
- Rule 400

Background to Case Management Rules- 6-7 years ago

Case management used to be not very much utilized because it was not clear how it could be requested (by parties, judge, chief justice?)

- Unclear whether the Chief Justice had to approve case management within the context of status reviews first
- Status Review was triggered after 1 year when actions didn't have a requisition for trial
- After 6 months on application when a requisition for hearing was not filed
- Some cases were determined that they should go automatically to case management (PNMOC)
- Status Review still exists as a possible avenue i.e. where there have been no statements of defence
- Where there has been no movement on the file within 60 days

Justice Stratas:

- PNMOC proceedings are done by way of practice
- Get directions from the Chief Justice who designated the Case Manager
- Aboriginal litigation
 - there is some confusion as to whether case management is automatically required
- Is it appropriate to have Case Management automatically? He would say yes, especially being the matter is always against Crown
- How do you identify what is aboriginal litigation?
- See Rule 74
 - Why a particular matter (or ought not) should be case managed
- Get some experience from the other provinces as to their use of Case Management

Should this be re-assessed?

Peter Hutchins

Yes, more proceedings should be automatically case managed – such as actions against the Crown.

Other cases to be case managed

- aboriginal litigations
- IP
- Class proceedings
- PMOC
- Self represented litigants

Automatic case management unless parties agree to opt out with the consent of the judge.

What are other jurisdictions doing.

Justice Rennie:

A need to move Case Management from Part 9 right up to Part 3 as part of the streaming and should be front and center

John Morrissey:

As a member of the I.P. Bar, acknowledge that when case management is asked for it is generally granted. It is a valuable tool.

Prothonotary Tabib:

Most of the time, there are no opposition to case management whether is requested by the parties or imposed by the judge. Only a few cases raise issues where one party does not agree to case management (2%)

Next Steps re: Case Management - 3 proposals:

- Go back to the constituents to see if there are problems
- Survey of case management uses
- Invite Justice Beaubien and master MacLeod

ABUSE OF PROCESS

What are the various pathologies and examples of abuse of process?

John Morissey

Case Management has helped a lot with the abuses of process

Cecily Strickland

The Admiralty Bar has not come across problems related to delay tactics

Expert conferencing

The introduction of new rules in that area created a reluctance in the participation by parties. Because it happens during pre-trial to have costs reduced, it may also create an apprehension of lost of control over the experts' testimony.

Janet Walker:

Court's authority to control abuses

-More than the ability of one party

Discussion re: belligerent Counsel

- A rule that could address this type of comportment
- A rule similar to article 54.1 Code de Procedure Civile might help
- A rule that could give the Court the power to intervene on its own motion when parties are acting inappropriately.
- some of the stuff happens behind the scene without the judge having knowledge
- careful not to go to extreme where judge would be ultimately making every decision, encouraging parties to complain to the judge about the other lawyer
- how can judge complain to the Bar about the conduct of a lawyer – protocol? While saving appearance of bias
- counsel may think they are immune from such intervention by the judge because of the appearance of bias it may create
- what tools, like the ones in the Quebec Civil Code of Procedure, could be include in the Rules.
- lawyers are bound by a Code of ethics
- the issue is with the ones that are not meeting bar standards of ethics

Professor Ferland

There may be a rule vs practice issue – Le Code de procedure civile du Québec édicte une règle. The committee may propose rules regarding policies and procedures and process but may not be ultra vires to the *Federal Court Act*. L'article 40 de la Loi est limitatif. Il faut l'accord du procureur général pour interdire à une personne d'engager d'autres instances.

Comme il s'agit d'une question de compétence et que l'application d'une règle peut être contestée par les parties, il serait peut-être mieux d'inclure le pouvoir dans la compétence sous la loi.

Règle 221 – permet de sanctionner seulement la conduite des procédures « on motion » - devrait être modifié pour permettre « on its own motion ». Ne règle

pas le problème de l'avocat déplacé. À distinguer aussi des actes frivoles vs pas de chance raisonnable de succès. Speak to Justice Gauthier.

Le choix entre le representative proceedings et class proceedings est aussi un autre endroit où le concept de la proportionnalité existe et doit être maintenue dans les règles. R.114(1)(d), R.133.16(d)

Next meeting

The dates of July 13th or 20th are being considered. Chantelle Bowers will canvass the availability of the members and select the date for which the majority is available.