

Notes of meeting of the sub-committee on global review - Bucket 2 Issues

Friday, August 10th at 10 am

Present:

Justice Stratas, presiding
Chantelle Bowers
Andrew Baumberg
Professor Walker
Cecily Strickland
Denis Ferland
Prothonotary Tabib

Opening Comments:

- Apart from the making the architecture of the rules more friendly, are there other areas of reform that we wish to be part of our review?
- For example, other topics to consider include: access to justice and self-represented litigants; use of web technologies and other technologies

Uniform Procedures VS Specialized Procedures

Justice Stratas noted that there appears to be no need to redesign our approach from uniform procedures.

- It is noted that there is general consensus that specialized procedures should only exist where they are necessary. In other words, the Rules are open to tailored specifics, where necessary.
- An example of where they might be necessary is in the aboriginal law context, especially with testimony by elders, because they aren't considered in the category of expert witness.
- Andrew Baumberg added that the Guidelines for Aboriginal Law are being currently completed at the Federal Court.
- Prothonotary Tabib understands that there is a need for case management, but this is generic, and not only for aboriginal matters.
- However, Peter Hutchins may advocate for automatic case management in Aboriginal Litigation.
- Yet Prothonotary Tabib is somewhat leery as to what constitutes Aboriginal Litigation. Is it every time there is an Aboriginal client is involved, for instance.

Index and Architecture

Justice Stratas noted that the comments received reflected a general discomfort with the Index for the Rules, in that people had difficulty in finding provisions. The difficulty lies

in the indexing tool itself, although it transcends into the architecture of the Rules as well, which will also need to be considered.

- Cecily Strickland agreed that she has heard that complaint in the past with respect to the index and table of contents, although the problem is more apparent with those users who are unfamiliar with the Federal Courts.
- The indexes right now are prepared by the publisher (professional indexes) or in concert with the authors.
- One suggestion is that the Court might have more involvement in the indexing process in the future.
- For instance, the Department of Justice website already has its own index that it has classified topics in order.
- Professor Walker suggested that many of the difficulties can be addressed through electronic tools and links.
- Prothonotary Tabib added that there are generally two ways to find one's way around the Rules, namely:
 - Index prepared by publisher or commercial entity
 - Table of Contents found in the hard copy of the Rules

Justice Stratas suggested that we must ultimately decide whether we need to change the official set of Rules, or leave them as they are. Even if we were to restructure them/renumber them, there is nothing that stops us from putting together an unofficial version which can include checklists on specific rules that would help the user navigate more easily through the steps, i.e. Motion/Document Disclosure/Settling Appeal Book. The end result is that there could be a number of unofficial versions of the Rules which would be more user-friendly and which can co-exist with the official rules.

- Professor Walker identified a potential transitional challenge for those who have been so accustomed to the rules in their original state (the official version).
- She suggested that there are a number of models which exist to assist easier access to the Rules in regard to several major topics and jurisdictions (which then drill down from there) i.e. Documentary Discovery
- Justice Stratas agreed that a Web based approach to the Rules is the way of the future, which is why he is developing his self-represented litigants website based on this model. For instance, people will be able to fill in pre-typed PDF forms and follow simple steps, which would increase access to justice.
- There may be a concern for those who may not have access to technology i.e. detainees with restricted access to the web, self-represented litigants, etc.
- However, as Professor Walker pointed out, this would only be one of the essential resources that they ought to have access to, and it should probably not be an obstacle for the Federal Courts to moving towards web-based Rules.
- C. Bowers mentioned that the text *Canadian Federal Courts Practice* (Justice Hughes, Arthur Renaud and Trent Horne) already does a very good job of setting out clear mechanisms of finding the rules and even the practice directions with its General Table of Contents, and then a more detailed Table of Contents regarding the elements of practice and procedure before the Federal Courts, where the

- various steps are briefly described, ie. Defending an action, reply and further pleadings, etc.
- Similarly, the text entitled *Federal Courts Practice* (Justice Rennie, Brian Saunders, Meg Kinnear, Graham Garton) does a good job of dividing the rules into various Parts, Table of Contents, Index, Charts, etc.

Justice Stratas requested that pdf. Versions of these indexes, tables of contents and charts be copied and distributed to the Committee. (Those copies will be circulated by way of email).

He reiterated that we will need to weigh the negative with the positive benefits of changing the architecture of the rules, namely balancing the desire to have a more user-friendly architecture against the changes to a set of rules to which many members of the profession have become accustomed to. Prothonotary Tabib agreed that if the opportunity presents itself for restructuring the Rules, then we shouldn't rule it out. However if there are only small changes, then a restructuring may not be necessary.

Practice Directives:

Justice Stratas does not particularly find the practice directives overall since there are many are outdated and overlap. He suggests that the subcommittee consider making recommendations to the Chief Justices as to criteria which can be used for practice directives (such as content, timeframes, etc.)

- Prothonotary Tabib agrees overall but reminds us that Practice Directives are essential, especially for things that need to be changed more frequently than the Rules allow for.
- Professor Walker suggested creating a new Rule which would set out some of the criteria for practice directives, but would also serve to remind people of their existence and their relevance. The Rule should also have a provision for a regular review of the practice directives.
- The new Rule could also provide a mechanism as to how a practice directive or Direction from the Court would apply and how a party can make a motion to contest it, for instance.
- The annotations to the Rules should also refer to the practice directives.
- Ideally, every practice directive should reference a rule (for ex. E-filing).
- Cecily Strickland agrees that the problem is the languishing of practice directives for too long.
- Finding the practice directive is the other problem, and the web-based, hyperlink approach will be part of the solution.

C. Bowers adds that generally speaking, it is the Chief Justice who emits Chief Justices emit the practice directions, most often in consultation with members of the Court and with the Bar. A good example of such a practice directions is the notice regarding the common books of authorities, which exempt parties from the rule requiring the filing of authorities.

- It was agreed that it is desirable for the rules committee to make some recommendations to the Chief Justices regarding the existing practice directives as to whether they might take the form of regulatory reform and become part of the amendment process.
- To this end, Justice Stratas requested a list of all the practice directives and he will ask his law clerk to work on this, in consultation with C. Bowers and A. Baumberg.

Access to Justice and self-represented litigants:

Query whether any reforms are specifically required with respect to access to justice and self-represented litigants, apart from the architecture of the rules.

- Professor Ferland provided an example in Quebec, where the registrar of certain tribunals, such as the small claims court, plays an important role vis-à-vis the self-represented litigants, but does not represent them, nor does he/she provide legal advice. The Courts might consider adopting a similar approach with the prothonotaries, whereby they, through their assistants, might be able to help the self-represented litigants navigate through the procedures. This was not meant to confound the role of the prothonotary with that of a registrar, but rather to show different models of how to assist lay litigants in an acceptable format that has already been well established in caselaw and jurisprudence in Quebec. It is also manifested in numerous pro bono initiatives, where clear lines of distinction are drawn and individuals receive assistance without conflicts of interests.
- Prothonotary Tabib suggested that this approach would be problematic for the role of a prothonotary at the Federal Court, who requires a level of judicial independence that may not be necessary for a registrar of a provincial court or tribunal. It is very difficult to envisage how a prothonotary can provide assistance or intervene on behalf of one party (the self-rep) without compromising his or her judicial independence towards the other party. Similarly, it is difficult to assist parties without providing a legal opinion. That being said, prothonotaries will certainly help the self-represented litigant during the proceedings, in the same way as other judges do in similar circumstances. She also suggested that a subcommittee of the Federal Court on self-represented litigants might be able to assist us further in this regard. The up-shot of that particular subcommittee's work was a preference for web-based tools to assist the self-reps. Justice Stratas will be in touch with the chair of that other subcommittee, Justice Barnes, to share comments and observations.
- C. Bowers also added that the Registrars and registry staff of the FCA and the FC are already very much involved with assisting self-represented litigants with the various processes and procedures before the Courts (counter, phone or email).

Please note that the next meeting, for those who can participate, will be on August 24th at 10 a.m. The conference call – in number is 613-960-7518 (local) or long-distance is 1-866-805-7923. The participant code is 987459. C. Bowers.