

**Global Review sub-committee
August 24, 2012**

Present: Justice Stratas, Rob MacKinnon, Ben Grant (law clerk to Justice Stratas), Peter Hutchins, Andrew Baumberg (recording secretary)

Via Teleconference: Chantelle Bowers, Justice Gauthier, John Morissey, Justice Hughes, Janet Walker, Denis Ferland

Regrets: Justice Rennie, Prothonotary Tabib, Cecily Strickland, Lucille Collard

Topic for today – Bucket 2

- Architecture of rules – are they arranged in understandable way
- Access to justice
- Self-represented litigant & their ability to cope / navigate around the rules
- Uniform procedures versus specialized procedures
- Role of practice directions and issues related to their discoverability / development / review and how they relate to the Rules

Justice Gauthier

Re general vs. specialized procedure – agrees with Aug. 10 discussion

Re structure of rules – this is for the Committee, given that there is no agreement that there should be a restructuring at this stage; one possible change is to put case management at the beginning

Re index – the available indices are insufficient / incomplete (you may look for a word and not find it and need to understand the underlying framework to find things); web-based tools may be the solution; otherwise we need to be more involved

Peter Hutchins

Uniform procedures – does advocate for automatic case management in aboriginal litigation, as per minutes of last meeting; ‘aboriginal litigation’ includes cases where there is an aboriginal party, though there are some cases involving corporations / partnership with aboriginal members; another trigger might be the Crown being involved with or against an aboriginal group (this captures the majority of cases); however, there are more and more complex cases across the board, not limited to treaty and land rights, but also IP, judicial review, employment contracts, etc.

Re architecture – it would be well worth organizing the rules rationally; need to think about the new practitioners who are trying to figure out the rules; experienced practitioners will learn it soon enough

Justice Gauthier noted that with the change of civil procedure in Quebec, the older generation did not easily adopt the new structure

Re uniform procedure – there is really no standard case type for aboriginal cases; she expressed concern with having automatic case management for aboriginal cases, as there are similar underlying problems for self-representatives generally, and the Court does not have the resources for case management across the board; it seems more important to focus on complex cases

Peter Hutchins responded that it may be preferable to have cases involving collective interests as opposed to all aboriginal cases involving individuals

Justice Hughes

Focus: cases that need management or litigants who need assistance
Need to leave discretion in the Court

Andrew Baumberg noted that the Federal Court started a pilot triage process for aboriginal proceedings in 2012 to recommend case management where it appeared useful

Peter Hutchins

Access to justice is a key underlying issue.

Counsel for First Nations want to minimize the number of proceedings – counsel must do this pro bono, or else First Nations must pay, or else it won't happen. Agrees with need for discretion; perhaps there needs to be more direction in the Rules as to the use of discretion.

Justice Stratas

The issue of discretion leads back to the practice directions. These need to be reviewed.

For example, there could be a Rule saying that there shall be a practice direction for case management; or a practice direction for case management in aboriginal matters. This allows the use of discretion to be framed under the rules.

Justice Gauthier

Noted that practice directions are emanations of the Chief Justices, and not under the Rules Committee.

Justice Hughes

There was a time when the Rules Committee was not active in the development of rules, and it was at that time that there was an increase in the development of practice directions.

Justice Gauthier

It is important to make reference to the practice directions in the rules so as to ensure that litigators are aware of and follow them.

There was a discussion regarding the authority of the Rules Committee re practice directions. Justice Stratas was of the view that the Rules Committee did have authority to deal with practice directions.

Justice Hughes suggested the development of commentaries on the rules.

Chantelle Bowers

At the last meeting, the discussion was to the effect that the Committee was not looking to curtail the discretion of the Chief Justices, but simply to provide assistance / recommendations. It is important for parties to be aware of practice directions, though not to engage in challenging them.

Rob MacKinnon

Uniform vs. specialized – remains open to some specialized rules but only where needed

Structure – the Federal Courts Rules are harder to navigate than the Ontario rules; one small reason is that there are 60 Rules in Ontario whereas there are 400+ with the Federal Courts

Harmonization with other jurisdictions – this might be considered along with the structure to the Rules; the Ontario courts have a lot of self-represented litigants, so perhaps we could look to Ontario rules that offer an easier architecture; he noted that he has looked at New Brunswick and BC as well, and they are closer to Ontario rule structure than federal structure; perhaps we could look at common structural elements in the provincial courts that could be adopted

Re cost / benefit balance – the cost seems to outweigh the benefits in a narrow sense, but as you consider the wider access to justice goal, the benefits may outweigh the cost; there needs to be consolidation to allow understanding of the rules in *book* form rather than just on the *web site*

On case management – early screening of cases, such as in aboriginal cases, is one way to address the issue

Andrew Baumberg – perhaps we should focus on guides that are really helpful; however, even with a simplified guide, it is still a daunting task for a self-represented litigant to prepare and file an application or action

Justice Stratas – a restructuring of rules will never be enough for self-represented litigants; we could develop guides that are easy to understand; for example, the rules on motions are very difficult to follow; why not develop practical tools for the web that can be used

Justice Hughes – there are kiosks in New York state where a litigant can fill out a form and file an application; there is an issue re development costs for this, though

Justice Stratas – is developing an online tool for self-represented litigants; the Law Foundation recommended that we apply for funding to develop such tools to improve access to justice; there may be some value in doing a formal assessment of the usability of the rules; for example, Part VII re motions needs review and overhaul

Peter Hutchins – perhaps the rules re motions could be amended to allow for informal motions rather than always a formal motion record; he gave an example of a trial where there was too much spent for motions to try to get expert conferencing which is provided in the Rules

Justice Stratas – noted that only counsel experienced with Federal Court practice know that there is an informal practice to allow for a letter in some cases rather than a full formal motion record

Justice Hughes – generally speaking, the rules are not too bad; but need some simplification to make them more understandable; he notes that for even simple amendments, we get complex responses / questions from the legislative drafters; it seems we have agreed there is a need for a re-write; Need to send key issues to the rules committee and then delegate sections to 1-2 individuals each to fix core elements of the rules

Justice Stratas – after the recommendations are sent to the Rules Committee, there will need to be an implementation committee;

Justice Gauthier noted that rules are “regulation” and so are legal texts – this is unavoidable

Justice Stratas – there needs to be formal text complemented by a guide and practice directions

Peter Hutchins – what is the sanction for not following a practice direction?

Answer – the judge may get somewhat annoyed; the practice directions are informative and are more akin to policy statements

Janet Walker – practice directions are an application of the rules and provide guidance; they do not focus on consequences if not obeyed, but are of assistance and clarify practice; she referred to the English practice to provide commentaries on the Rules – a simple rule with more complex commentary / guide; the practice direction serves this role

Justice Gauthier – with reference to minutes of last meeting, disagrees with including a process in the Rules for a party to contest a practice direction

Janet Walker noted that practice directives and Court Directions serve similar purposes

Justice Stratas noted that judges and prothonotaries regularly issue Directions; the Rules Committee could look at the trends as to what is being done under a particular rule and then provide guidance to the Chief Justice as to the issuance of a practice direction; it is important for the Bar to know what the court is doing more generally

Denis Ferland

Practice directions – the Quebec Chief Justices have wide discretion – there is no obligation to consult with the Courts or Bar; in practice, he gave an example of a judge who refused to follow a practice direction on the basis that it did not follow the Code of Civil Procedure and has no more legal authority than a “lettre pastorale”; in each case the practice directions must be checked

against the code of civil procedure; in some cases, the Chief Justices will engage in a consultation process – this is prudent, but there is no legal obligation

Case management – in 2003, article 151.11 of the Code of procedure was developed: the nature of the case and its complexity are key factors to allow the Chief Justice to order special case management by a designated judge, who will have a conference with parties to develop a litigation plan

Peter Hutchins – up front, there should be the rules that assist the parties in avoiding ‘all-out’ litigation; such as dispute resolution options, which currently are sprinkled through the rules; the main objective should be to provide all the measures to assist litigants to resolve disputes early on rather than via a full hearing

Justice Stratas – can we get the benefit via a web-based tool rather than a re-organization of the rules?

Peter Hutchins – there needs to be clear rules that the judge can apply; the judges need to come onside as well with respect to application of the Rules (e.g., Rule 3); there is concern re how the rules and discretion are being applied

Andrew Baumberg – does it matter where the rule is within the structure of the rules – won’t the judge decide in the same way whether it is at the beginning or the end of the Rules; refers to practice guidelines in aboriginal proceedings which provide a consolidation of the options for dispute resolution / case management / etc.; it may be that this needs more *marketing* rather than *re-organization*

Justice Hughes – there needs to be an education of the parties as well as the court; if we start to proliferate outside mediation / settlement, these groups will want the court to refer litigants to them; this is not appropriate

Peter Hutchins agrees that the Court should take the lead.

Justice Stratas asked Peter Hutchins to circulate a short note setting out his suggestions for the committee; it might be useful to consider the role of practice directions re the use of discretion in this regard

John Morrissey suggested reference to the BC rules of procedure that provide for early meetings between parties even before filing the claim

Justice Stratas set out the next steps:

- Development by Justice Stratas / Janet Walker of a report version 1 with a draft summary of recommendations
- Review / revision in writing by the Committee of draft report version 1
- Preparation of Report version 2
- Face-to-face meeting (possibly more than one meeting) to develop a final report in time for November 9

Goal: unanimous agreement, majority views, and minority views could also be considered for inclusion in the report.

Justice Hughes asked that the report be prepared sufficiently in advance of the November 9 meeting to allow assessment by Committee members.