BENCH AND CANADIAN BAR ASSOCIATION

LIAISON COMMITTEE

MINUTES OF MEETING

FRIDAY, NOVEMBER 2nd, 2012

In attendance:

Chief Justice Blais, Federal Court of Appeal
Chief Justice Crampton, Federal Court
Justice Stratas, Federal Court of Appeal
Justice O'Reilly, Federal Court
Justice Phelan, Federal Court
Prothonotary Aronovitch, Federal Court
Daniel Gosselin, Chief Administrator
Chantelle Bowers, Counsel, Executive Legal Officer, Federal Court of Appeal
Andrew Baumberg, Counsel, Federal Court
Roula Eatrides, Director Judicial Service, Federal Court
Lucille Collard, Counsel, Federal Court of Appeal
Alain Le Gal, Registrar, Federal Court of Appeal
Manon Pitre, Registrar, Federal Court
Susan Beaubien, Macera & Jarzyna
Martin Masse, McMillan LLP
Mario Bellissimo, Bellissimo Law Group
Joel Nitikman
David Demirkan
Paul Harquail, Stewart McKelvey (via teleconference)
Diane Soroka, Diane Soroka Barrister & Solicitor Inc.
Alain Préfontaine, Department of Justice - Canada
Marilou Reeves, Canadian Bar Association (CBA)

Regrets:
Justice Sharlow, Federal Court of Appeal
Justice Pelletier, Federal Court of Appeal
Justice Heneghan, Federal Court

Recording Secretary: Andrew Baumberg

1. Opening Remarks by the Courts

Chief Justice Crampton provided opening comments.

2. Opening Remarks by the CBA

Martin Masse provided opening comments and welcomed new member Joel Nitikman. He later welcomed a second new member, David Demirkan, who arrived mid-meeting after an unexpected delay.

3. Adoption of Minutes

Martin Masse noted that there were no comments from the CBA.

Chief Justice Crampton noted that the minutes were incomplete re item 7 and the issue of section 17 of the *Federal Courts Act*. The CBA is to provide additional detail regarding the underlying problem and how often it arises.

Joel Nitikman noted that a similar provision exists in the Income Tax Act. He added that if a question could be put to the court by either party, the Court will need a screening mechanism or else will be inundated by questions of law, with many not providing sufficient facts for the Court to adjudicate.

Prothonotary Aronovitch noted that a screening mechanism does exist under the Rules.

Justice Stratas added that this issue will be addressed in part by the report of the Subcommittee on Global Review of the *Federal Courts Rules*.

The minutes were adopted with minor modifications.

6. CBA ITEMS

(a) The Indigenous Bar - Aboriginal Bar Update
Diane Soroka provided an update. The Committee met on October 16, and completed its guidelines on oral history evidence. The bar is appreciative of the Court's attention to this file. There is ongoing work on a compilation of best practices. The Committee continues to work on ADR guidelines. The CBA is strongly in support of having the guidelines cover both First Nations as well as the Crown, which so far has not been included. Krista Robertson is the new CBA representative on the Committee.
The *First Nations Elections Act* passed through Senate and is now at first readings in the House. It provides for concurrent jurisdiction between the Federal Court and the provincial superior courts. The aboriginal law section provided comments to the Subcommittee on Global Review of the *Federal Courts Rules.*
Chief Justice Crampton noted his attendance at the Committee meeting in Winnipeg and a new proposal to have a meeting similar to that held recently at Turtle Lodge. The Court will pursue this with a program with NJI.

(b) Immigration and Refugee Law Update
Mario Bellissimo provided an update. Amendments will be coming into force in December, effecting fundamental changes to the immigration and refugee law system (approximately 70% of the system will be changed). With all the changes, including many new legal terms being defined, there will be a considerable increase in litigation, possibly with almost 15,000 cases before the Federal Court each year.

(c) Intellectual Property Update
Susan Beaubien noted concern regarding what is perceived as an overburdened case-management system. It often takes weeks to get motion heard via case management conference. Litigants questioning why they can't simply go to motions day. Also, for a 10 day trial, one IP lawyer indicated that they are now looking at dates in 2015 – is this the norm?

Prothonotary Aronovitch noted that this is not accurate. She is currently setting trial dates in 2014 without any problem, including files that were initiated this year. She added that parties should write to the Court if they need dates. She did acknowledge that there are resource issues making it difficult to provide as timely access to the case management judge. There is no difficulty to get a short motion heard, such as for one or two hours, as this can be heard at general sittings, but the challenge is with motions for a half day to a day, which require a special sitting.

Chief Justice Crampton noted that the Court is currently scheduling matters in early 2013, with some later scheduling dates due to unavailability of counsel.

Chief Justice Blais expressed the opposite concern. For cases filed in November, the Court is able to schedule matters by January or February, but it has difficulty with the limited availability of counsel. This is particularly important when the FCA is conducting an appeal of a prothonotary's decision, which was already appealed to a judge. The appeal process often results in a significant delay in the underlying proceeding, which is why the FCA tries to resolve the appeal as soon as possible.

Chief Justice Crampton noted concern with requests for adjournment. Parties need to make more of an effort to keep dates once assigned, as it can be very difficult to find new dates within a reasonable time-frame.

Susan Beaubien noted that bifurcation orders and discovery process will be discussed at the next IP meeting.

Chief Justice Crampton asked for more detail regarding the Bar's request for more active case management.

(d) Maritime Law Update
Paul Harquil is now chair of the national alternate dispute section of the CBA. He noted that on November 29 in Montreal there will be a CLE featuring Prothonotary Morneau and 2 leading practitioners in maritime law, speaking on mediation in Federal Court.

The maritime bar executive is planning a CLE for the August 2013 annual meeting of the CBA in Saskatchewan on Federal Court practice, before a multidisciplinary audience.

The maritime bar issued its first newsletter (*Port of Call*). The newsletter will raise awareness of the resources of the Courts on their websites. If there is anything that the Courts wish to highlight, please provide these to Mr. Harquil.

Chief Justice Crampton offered the support of the Court regarding the newsletter and the 2013 CLE.

Joel Nitikman noted that there is an annual tax conference and asked whether members of the Courts might be available to speak.

Chief Justice Blais noted that early notice is helpful. The Courts can then try to schedule sittings to correspond with the conference so as to have judges sitting in the region at the appropriate time.

Justice Stratas recommended early notice, both for scheduling purposes, but also due to the number of requests.

Justice O'Reilly noted that he spoke at a recent tax foundation conference in Ontario regarding judicial review practice in tax matters.

COURT ITEMS:
Update from the Chief Administrator of the Courts Administration Service
Daniel Gosselin noted that CAS is moving ahead with a new data centre over the Christmas holidays to minimize disruption of Court business. This will provide the necessary infrastructure to provide additional applications that will be of assistance to litigants.
CAS is now in the implementation phase of a digital recording system, already being used by some judges.

An agreement has been reached with Lexis-Nexis to allow CAS to use their software to develop a Court-based e-filing system. Lexis-Nexis will continue to provide service until the CAS system is in place, by the end of January at the latest.
A threat and risk assessment of IT issues is being conducted and should be complete by mid-2013.
The SCC is to be relocated during its rehabilitation project. CAS has been involved in discussions. Option 1 – SCC to be relocated to West Memorial building, and then CAS to move in once they are finished. Option 2 – a new building to be constructed for the SCC to be used by CAS once they are finished. Possible moving date: 2020.
The CAS governance structure is being modified with a new structure adapted to each court.
The CAS is making a large submission for program integrity funding, approximately $11M per year for 5 years. The program deficiencies are well-understood by central agencies, which have indicated positive support so far.

Chief Justice Crampton noted that the funding restrictions significantly impact on our ability to make progress on various modernization initiatives that would enhance access to justice.

Mario Bellissimo asked re DARS. Is this publicly available? If so, there will be many requests. Also, if available to the general public and media, there may be concerns re confidentiality issues.

Daniel Gosselin says that CAS will be able to provide access to the recordings, subject to the Courts' policy decision re access.

Chief Justice Crampton noted that the Federal Court is favourably disposed to providing access to DARS recordings and is working to resolve various implementation issues.

Mario Bellissimo also noted concern re access to electronically filed documents. In some cases, documents are being taken by publishers and resold. There is litigation between lawyers and publishers.

Chief Justice Blais noted that Courts' commitment to ensuring the necessary court infrastructure, which will provide better service to litigants and reduce litigation costs.

6. Rules Committee Update

Chantelle Bowers provided a report. The next plenary meeting of the Rules Committee of the Federal Court of Appeal and the Federal Court will be November 9. The following judges of the Federal Court of Appeal sit on the rules plenary committee: Chief Justice Blais, Justice Pelletier, Justice Gauthier and Justice Stratas. The Federal Court is represented by Chief Justice Crampton, Justice Mosley, Justice Hughes (who has been appointed by the two Chief Justices to chair the plenary rules committee), Justice Zinn, Justice Bedard, Justice Rennie and Prothonotary Tabib.

There are **five (5)** main subcommittees:

1. The first committee involves a number of procedural amendments. They were pre-published in Part I of the *Canada Gazette* for a period of 60 days of consultation, which ended on September 21, 2012. The comments received have been collated for consideration by the plenary rules committee on November 9. The comments were not substantive in nature, and Ms. Bowers hopes to be able to prepare the final Regulatory Impact Analysis Statement (RIAS) shortly afterwards, and seek Governor in Council approval to be able to proceed with final publication in Part II of the *Canada Gazette*.

2. The second subcommittee involves amendments which require a greater consultation with the Bar and which are more substantive in nature. For example, an amendment is proposed to Rule 348 to provide for the filing of a joint book of authorities, together with the requisition for hearing (unless the parties cannot agree on a joint book of authorities). This subcommittee is ably led by Justice Rennie, one of the authors of the *Federal Courts Practice*. The subcommittee has

reviewed the various amendments and is preparing drafting instructions for the legislative drafters.

3. The third committee is one regarding technology, with a mandate to reviewing the *Federal Courts Rules* to ensure that there are no obstacles or impediments to the use of technology. Justice Mosley presides over this sub-committee, and he presented a draft Discussion Paper at the Rules committee plenary meeting in May. The paper was accepted by all, subject to a few minor changes. Because technology is such a vast and ever-changing target, it was agreed that the best approach at this time was to consult with Members of the Profession and the public, before even thinking about drafting changes. To that end, the Discussion Paper on Technology was posted on the Court websites and was also made available through the practice distribution list. Drafting instructions were prepared, and the legislative drafters have provided a draft set of rules for review for pre-publication in Part I of the *Canada Gazette*, following the plenary meeting next week.

4. The fourth subcommittee is focusing on a Global Review of the *Federal Courts Rules*. This sub-committee is chaired by Justice Stratas, and its mandate is to examine the Rules as a whole on a policy level. The subcommittee will determine whether the Rules need to be revised or changed in terms of their approach or architecture, given the fact that it has been over 13 years since they were first implemented. The sub-committee on global review had already prepared a Discussion Paper, which was posted on the Courts websites and circulated through distribution. The subcommittee recently finalized a comprehensive report for review and approval by the plenary rules committee on November 9, following which it will be widely distributed. Justice Stratas will speak to this in greater detail shortly.

5. A new, fifth subcommittee was struck at the last plenary rules committee meeting to look at the rules pertaining to execution as a package. That subcommittee is chaired by the Department of Justice representative on the Rules Committee, Rob MacKinnon, and includes other members of the plenary committee, including prothonotaries, legal counsel for both Courts and the expert consultants, and lawyers familiar with enforcement matters. A draft Discussion Paper has been prepared for consideration by the plenary rules committee on November 9, following which it may be finalized and circulated to the profession and the public for comment.

Mario Bellissimo asked how counsel might bring a trend of cases to the attention of the Court so as to allow for a lead case. He noted that the Court's approach to hearing cases with common issues appears sound, such as the skilled-workers constitutional challenge, which would have resulted in countless cases if heard individually.

Chief Justice Crampton noted that the Court has been wrestling with this issue – it is difficult for the Court to be aware of such trends. He asked the bar to bring such issues to the attention of the Court, including generic details of the cases in question and file numbers. Where appropriate, a few cases can be selected as test cases and set down in a timely manner for hearing with all counsel at the same time. Even if there are only a few cases, such that common case management is not required, it might nonetheless be useful to have a single hearing by the same judge.

Justice Phelan noted that the bar sees the leading edge of issues, often at the IRB, long before the Court does.

Mario Bellissimo added that there is some concern from counsel that they do not want their own case restricted by a lead case argued by different counsel.

Joel Nitikman noted that a similar issue came up in the tax domain, which provided for lead cases in tax matters. The tax bar is pushing back against the government proposal.

Chief Justice Crampton responded that when there are a large number of cases in a group, not all counsel can be included in a test case, but of course there might be room for individual counsel's cases to be heard separately.

Chief Justice Blais noted that suggestions for rule changes are regularly received by the Courts. For instance, there appear to be some conflicts between the Tax Court rules and the Federal Court of Appeal rules. Suggestions are always welcome, even if it is not feasible to implement it immediately.

Martin Masse noted that the Rules Committee work would be promoted on the various Bar web sites.

7. Report on Subcommittee on Global Review of the *Federal Courts Rules*

Justice Stratas provided a report of the subcommittee.

This was a "once a decade" review. The subcommittee, made up of 13 members, resolved to complete task within one year, in three stages

- public and private consultation, including written recommendations from bar
- months of deliberations
- drafting of report

The Rules Committee will consider final report at November 9 meeting. Special thanks were made towards the Bar for its recommendations and comments.

Overall the Rules meet the needs of litigants, though in some areas policy changes are needed:

- the 1998 rules allowed parties to use courts without restriction – "laisser faire" approach is still dominant in rules, but it needs to be "tweaked" to represent current problems and needs – it needs to be mitigated by a "community focus" philosophy
- There are 26 recommendations, with unanimous or near-unanimous resolution of committee
- Key recommendations:
    - The courts should be given new tools to allow the courts to prevent abuses, on their own motion
    - Practice directions should be gathered and formalized, allowing necessary specialization while maintain common rules
    - Steps are needed to improve access to justice, especially for self-represented litigants
- If Rules Committee accepts report, an implementation committee will be created
- if there are changes to rules, the normal process will be followed, allowing for public consultation
- for other initiatives, a short period (approximately 2 months) of consultation will be provided to get feedback after release of the report
- the report will be posted on the Courts' websites shortly after the November 9 rules committee
- input from the Bar has been particularly helpful and is always welcome

Chief Justice Blais noted the considerable work for those on the subcommittee. The last project to review and organize the Rules (pre-1998) was a massive project, necessary to put order to the rules. However, it was recognized that another review process was necessary. He thanked Justice Stratas for leading the subcommittee, which provides direction to the Rules so as to be able to respond to the current needs of litigants.

Justice Stratas noted there is a partial response to the issue raised by Mario Bellissimo re grouping of cases. The Immigration Bar should take careful notice of the contents of the report and could provide feedback on this issue. Similarly, there is treatment of an issue within the intellectual property bar re staggering of proceedings.

Joel Nitikman asked regarding the opportunities for input, given that the report is going directly to the Rules Committee for endorsement.

Justice Stratas noted that there was a massive consultation by the subcommittee, which substantially represents a consensus view of the feedback. There will also be a short consultation upon publication of the report, allowing for additional comments that will be considered by the implementation committee.

Chantelle Bowers added that there would be a subsequent consultation for any formal amendment to the rules.

Mario Bellissimo asked re problems with access to the court on exceptional jurisdiction issues.

Justice Stratas noted that the report proposes an expansion of Rule 74 that would deal with proceedings that are improperly brought to the Court (see *Roch St-Laurent* case).

Chief Justice Blais noted that where strictly an issue of law, the matter cannot be resolved by the Rules.

Martin Masse expressed appreciation for the subcommittee report that no major changes to the Rules were required. The sense from the bar, overall, is that the rules work.

Justice Stratas noted that 98% of litigants will not see considerable change in the Rules. However, the 2% who use a disproportionate proportion of the Court and Registry resources, they will likely see a difference.

8. Managing vexatious proceedings (section 40, *Federal Courts Act*)

Justice Stratas noted that the subcommittee identified this issue as one of particular concern regarding the resource implications for the Court and litigants. He added that there is a perception that some litigants remain within the court system for years and use enormous judicial resources, without any possible application under section 40. However, the subcommittee expressed concern about the Court or the Registry taking the lead in trying to have someone declared vexatious, given the right to an impartial court.

Alain Préfontaine noted that the success rate for motions to strike vexatious proceedings is very low. The Bar and the Court have a shared responsibility to address this responsibility.

The application must be brought on consent of the AG. At present, the responsibility is delegated to the Deputy Attorney General. All requests are channeled through the ADAG. Overall, there have been 16 requests from within the AG since 2004, 13 approved and 3 denied. Usually it takes about a month for a decision. From private bar, there have been very few requests. Most of the requests were from within the Attorney General's office.

Chief Justice Crampton noted the existence of a number of cases which are clearly vexatious.

Chief Justice Blais raised the example of an individual who had reached 132 cases.

Chief Justice Crampton suggested that it might be preferable to have the Chief Justice decide the cases to provide consistency as well as a "buffer" from the judge who is assigned to a particular case. For consideration by the Bar.

Justice Stratas suggested that the DOJ consider the report's position on the issue.

Susan Beaubien noted that there are litigants called patent trolls, who buy up and trade patents, then demanding licence fees from companies and starting lawsuits to extract money.

Andrew Baumberg noted that Rule 221 includes a vexatious proceeding element related to an *individual* proceeding. If the Court receives multiple motions to declare a proceeding vexatious, after a certain number of Orders that the *proceeding* by a litigant is vexatious, then this could perhaps eventually result in the *party* being deemed vexatious subject to the party's right to bring a motion to overturn the designation.

Chief Justice Blais noted that the problem is that often it is the court that sees the problem but is constrained from bringing them to the attention of the Bar. He asked that the issue be tabled and subject to reflection by the Bar.

9. Federal Court of Appeal Update

Chief Justice Blais provided a report for the Federal Court of Appeal.

1 – Update on appointments to the Federal Court of Appeal

- We currently have two openings at the FCA: the first is due to recent retirements and the second is due to the passing of Justice Layden-Stevenson on June 27.
- We have a new judge, the Honourable Wyman Webb, who was formerly a judge of the Tax Court of Canada and was appointed to the Federal Court of Appeal on October 4, 2002. I went to Halifax for his swearing-in in the presence of his family members on October 19. He has already begun to hear cases for the Federal Court of Appeal.
- We are planning a ceremony to introduce Justice Webb to his recently appointed colleagues, Justice Manson of the Federal Court and Justice Graham of the Tax Court of Canada, to take place in January 2013.
- We are therefore expecting another appointment and we hope it will take place in the near future.

2 – Memorial in honour of Justice Layden-Stevenson, on September 15, 2012, at the Notre Dame Cathedral Basilica

- This was a ceremony organized by the judiciary for the judiciary and, of course, for the family.
- An in memoriam announcement for Carolyn is posted on our Web site, and it will also be published in the *Federal Courts Reports* (from the Office of the Commissioner for Federal Judicial Affairs). I understand that they will also pay tribute to her in the next edition of the *Federal Courts Practice*.

3 – Meeting of the Federal Court of Appeal judges in Québec on September 26-28, 2012

- We have had a training day organized in collaboration with the National Judicial Institute in Québec at the end of September. There was also a business meeting for the FCA judges.

4 – Request for a real immigration hearing before the FCA

- At the business meeting of the FCA judges in Québec, we discussed Mario Bellissimo's request to assign a real immigration hearing during the Annual Conference of the Canadian Bar Association (Immigration Section), which will take place on May 9-11 at the Marriott Château Champlain in Montréal.
- The judges understand the educational and instructional aspects of such an opportunity, but we are still in the process of considering your suggestion.

Obviously, this will depend on whether we have an immigration case at that time; whether the panel judges agree and whether the parties also agree.

5 – *Workload* is on time and the Federal Court of Appeal continues to increase its flexibility in terms of sittings across the country. The Federal Court of Appeal does not have a backlog.

6 – *Pro Bono Conference* in Montreal this week
Unable to attend because of an unscheduled sitting in Vancouver. Importance of following up on *pro bono* initiatives to assist with self-represented litigants.

There were questions from the Bar concerning the proportion of litigants who are self-represented and possible solutions.

Chief Justice Crampton noted that the Court was pursuing options to help connect self represented litigants to the pro bono organizations in their city.

Justice Stratas noted that the Report of the Global Review subcommittee proposes possible solutions, including the idea of a duty counsel.

There was further discussion regarding the availability of national pro bono access. Assistance by junior counsel would provide them with valuable litigation experience.

David Demirkan will bring this to the attention of the CBA litigation section. There needs to be coordination between the community legal clinics and the wider pro bono programs with respect to Federal Court practice. There is missing an organization and budget to coordinate access to pro bono counsel.

Chief Justice Crampton indicated that there would be further consultation with law firms and other stakeholders. It seems that the 'pendulum' is starting to swing back from a unique focus on commercial clients to a recognition of the public interest benefits associated with being involved with pro bono work.

10. Federal Court Update

Chief Justice Crampton noted that there have been two recent appointments: Justice Michael Manson and Justice Catherine Kane. There are currently two vacancies from retirements, one in Quebec and one likely from Ontario. There are still two vacancies that have never been filled from the Anti-Terrorist legislative amendments. Furthermore, Bill C-11 amendments to *IRPA* provide for another 4 positions, though not yet in force.

He noted that there is a growing backlog in Immigration matters. For non-immigration cases, for hearings under 1 day, these are being scheduled in January 2013; for hearing of 1-5 days, in April 2013. The court is now scheduling matters in 2014.

The Court is in the middle of a strategic planning process, as would be expected for a new Chief Justice. There are three broad themes:

- access to justice
- modernization of the Court
- delivery of justice

Finally, he noted the Order in Council establishing an independent review of prothonotaries' salary and benefits.

Martin Masse noted that the Bar is following this last issue. The CBA has previously established its position regarding the prothonotaries. He asked the Court to send the Order in Council establishing the review process.

QUESTIONS OF GENERAL INTEREST:
12. Next Meeting
To be confirmed upon consultation between the CBA and the Courts.