

BENCH AND CANADIAN BAR ASSOCIATION

LIAISON COMMITTEE

MINUTES OF MEETING

FRIDAY, DECEMBER 17, 2010

BOARDROOM

90 SPARKS STREET

12TH FLOOR

In attendance:

Chief Justice Blais, Federal Court of Appeal
Chief Justice Lutfy, Federal Court
Justice Sharlow, Federal Court of Appeal
Justice Pelletier, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Phelan, Federal Court
Justice Rennie, Federal Court
Prothonotary Tabib
Suzanne Labbé, Acting Chief Administrator
Alain Le Gal, Registrar, Federal Court of Appeal
Manon Pitre, Registrar, Federal Court
Elizabeth Wasiuk, Director, Federal Court Registry Services
Susan Beaubien, Macera & Jarzyna
Martin Masse, Lang Michener
Mario Bellissimo, Bellissimo Law Group
Christian Monnin, Heenan Blaikie
Max Weder, Borden Ladner Gervais
Paul Harquail, Stewart McKelvey
Diane Soroka, Diane Soroka Barrister & Solicitor Inc.
Alain Préfontaine (Department of Justice - Canada)
Gaylene Schellenberg (CBA)

Regrets:

Justice Heneghan, Federal Court
Justice Lemieux, Federal Court
Justice O'Reilly, Federal Court
Prothonotary Aronovitch, Federal Court

Recording Secretaries:

Mr. Andrew Baumberg, Executive Legal Officer, Federal Court
Ms. Chantelle Bowers, Executive Legal Officer, Federal Court of Appeal

1. Opening Remarks

Chief Justice Blais and Chief Justice Lutfy welcomed members of the Committee.

2. Welcome to New CBA Members

The following changes for the Bar were noted:

- Martin Masse (Lang Michener LLP, Ottawa) as new CBA Chair
- Paul Harquail (Stewart McKelvey, Saint John, NB)
- Diane Soroka (Diane Soroka Barrister & Solicitor Inc., Westmount, QC)

3. Adoption of Minutes (June 25, 2010)

There were minor corrections proposed by the Bar:

- correction re Mr. Bellissimo's name and law firm;
- correction re Mr. Barker's role: "Chair of the Federal Courts Bench and Bar Liaison Committee" rather than "President of CBA"
- revision to immigration update: "After reviewing approximately 2,500 leave applications, the CBA has put in a submission re: unauthorized filings."
- removal of text: "The Department of Justice is planning on hiring 13 new lawyers in anticipation of the higher caseload expected."

CBA ITEMS:

4. Opening Remarks (Martin Masse)

In taking on the position as CBA Chair, **Mr. Masse** noted his high regard for the Courts and their administration as well as this committee.

5. Specialized Liaison Group Updates

(a) Immigration and Refugee Law

Mr. Bellissimo provided a report of activities within the Immigration and Refugee Law Bar:

- a number of exchanges with the Federal Court this year;
- common list of authorities – 36 new cases proposed, for implementation in 2011;
- restriction of identification of vulnerable persons – this was considered not to be an issue, due to changes to court web site coding that prevented access via search engines;
- proposal by bar to allow paralegals to appear for some matters;
- thanks to the Federal Court for web site – outstanding resources for litigants;
- Refugee Protection Division / Refugee Appeal Division rules were tabled – they are quite good, but there are some concerns regarding the time allocation for perfection of appeal;
- new "Substantially the Same (STS)" compliance regime – if conditions of the work permit change, there will be monitoring (some applications may come to Court);
- Federal Court / Courts Administration Service registry – positive comments from Bar;
- Federal Court of Appeal/ Federal Court participation in national CLE in 2010;
- 2011 conference is planned for May 13 – 15 at Lac Leamy;
- numerous changes to immigration legislation, resulting in increased workload;
- May 2010 proposal to Court re "care-of addresses" – amend form 301 to prevent unauthorized practice of law (about 100 leave applications per year are via consultants);

- Bill C-35 includes protocol to address individuals who are not authorized to practice – inclusion of the applicant's address is important to keep the applicant informed – in many cases, the limited number of unauthorized practitioners use false information;
- Bill C-35 has gone to Senate – consultants' association proposal has gone to tender;

There was a query regarding the practice of using a numerical reference to the applicant (e.g., B-642) for recent Tamil applicants. In response, it was noted that there were serious questions of identity, so individuals were assigned (not by the Court) a number for purposes of interim identification. Bill C-49 establishes different categories – this is a contentious issue within the Bar.

(b) Intellectual Property

Ms. Beaubien provided a report of activities within the Intellectual Property Law Bar. The IP Users Committee has many initiatives:

- discussion regarding experimental testing in patent infringement cases – a sub-group was formed re particulars;
- discussion regarding bifurcation, model orders, feedback on rules, simplified procedure – should the minimum financial threshold be raised?
- length of time to hearing – the Bar appreciates the 2-year start to finish framework by the Court – the '20 day' limit for trial needs to be addressed on ad hoc basis;
- appreciation for opportunity to meet with Court at annual judges' dinner and town hall meeting (May 5, 2011) – these are organized by the Bar along with a CLE, similar to initiatives with immigration and maritime bar;
- if there is interest to include in the CLE program more topics that are of interest to the Court, please let us know.

c) Maritime Law

Mr. Harquail provided a report of activities within the Maritime Law Bar:

- the admiralty bar is putting on a seminar, with the Courts, on April 15, 2011;
- the CMLA 60th anniversary is in June 2011 – there are events planned in Quebec City, with communications to be circulated soon;
- upcoming CBA annual meeting – there will be a CLE on piracy, co-hosted with the Navy.

(d) Indigenous Bar ~ Aboriginal Law Bar

Ms. Soroka provided a report of activities within the Aboriginal Law Bar:

- the main work has been in establishing guidelines on Elders' oral history testimony – Mr. Grant continues to provide support for this project;
- there was a meeting in October – the Court is working on draft guidelines in time for the next meeting in April;
- after the meeting with the Court and Elders last Fall, there is an education initiative planned;
- a new Act has been passed to amend the registration provisions under the *Indian Act*;
- there is legislation regarding matrimonial real property working its way through the House of Commons – there may be litigation in this area;
- the new common list of authorities for aboriginal law was finalized – many thanks.

6. Tribunal Records and Appeals

Tabled to subsequent meeting.

7. Electronic discovery – Update

Mr. Harquail noted that there is mention of electronic records in the Rules, but no mention of the specific “Sedona” principles. It may be useful to strengthen the rules. It was proposed that we refer back to earlier minutes, where the maritime law section raised the issue of discovery of electronic records. There are numerous questions: *Can electronic records be produced? How are they stored? How might they be canvassed (scope)? Duties of parties? How to access – electronic form or paper? Proportionality – what is reasonable in context?* There is a need to develop guidelines from the beginning of the proceeding rather than having to backtrack once parties get to the discovery stage. There are also other issues, such as meta-data, deletion of files, timing of access, etc. There is a recommendation that the Courts look at this issue more closely and consider this for possible amendment to rules. **Mr. Masse** noted that there is no formal proposal yet – this is simply an initial consideration of the topic generally.

Justice Phelan noted that the Federal Court Technology Committee is looking at this issue – the general proportionality rule (of relevance) still applies. At this stage, we are monitoring what other jurisdictions are doing, especially Ontario. This is significant in commercial litigation, but this is not a large part of Federal Court work. Issues regarding electronic records are not even arising significantly in case management, but we see this coming. As more and more records are in electronic format, we shall need to develop guidelines.

7.1 CBA (Varia)

There was a question by **Mr. Masse** regarding communication of Practice Directions. The Courts need to provide notice to the Bar regarding the distribution process for these Directions, possibly including them with the decisions distribution process.

Regarding electronic service of documents, **Mr. Bellissimo** noted that the Immigration and Refugee Law Bar is still trying to establish a pilot system with the Department of Justice. The \$200 saved by the applicant for a process server is significant. **Mr. Prefontaine** noted on-going efforts to find a solution within the Department of Justice.

COURT ITEMS:

8. Federal Court of Appeal Update

Chief Justice Blais reiterated the importance of this semi-annual meeting. There is a need for on-going communication with the Bar to hear their opinions / goals. He noted various updates for the Court:

- there have been no appointments since last meeting, though Justice Sexton (a former member of this committee) is now a supernumerary judge, and he is being replaced by Justice Stratas, also a former Toronto practitioner;
- there are 12 judges on the Court, sitting in three cities this week along with motions in Ottawa;
- the Court regularly uses courtrooms both at the Supreme Court building as well as the Thomas d’Arcy McGee building (at 90 Sparks Street)
- there was a Fall seminar along with Federal Court regarding standard of review issues
- members of the Court also participates in external seminars, both as participant and speaker, in a broad range of subject areas
- there are numerous Court committees
- the 3 members of this Bar Liaison committee are also on the Rules Committee

- Justice Hughes was designated as the Chair of the Rules Committee
- Justice Mosley was designated as Chair of Rules Sub-committee for technology
- Ms. Bowers acts as Secretary of the Rules Committee

Chief Justice Blais reiterated the support of the Court and CAS – if there is a problem raised by the Bar, we shall respond as quickly as possible.

9. (a) Rules Committee Update

Ms. Bowers provided an update of the work of the Rules Committee. Following consultations with both Chief Justices and pursuant to the *Federal Courts Act*, Justice Hughes was designated as Chair of the Committee on September 17 2010.

Amendments, in force August 4, were made to the expert witnesses rules along with some procedural amendments:

Expert witness amendments

- these amendments were made after extensive consultation with the Bar / public, pre-publication in the *Canada Gazette* and circulation of discussion papers for comment, which were carefully examined by committee, and an open house on the proposed amendments held in Toronto (on March 11)
- Key changes re expert witnesses
 - streamlined qualification process for expert witnesses
 - code of conduct for experts
 - conferences for expert witnesses – on consent or by Court direction

Procedural amendments

- there is a new procedure for transmittal of orders by e-mail – if the Registry does not receive confirmation from the parties, it will then send the Order by registered mail
- **Ms. Wasiuk** provides examples of positive feedback from counsel on this initiative
- there are new rules regarding affidavits (Federal Court), so it is no longer necessary to file affidavits twice

The last meeting of the Committee was held November 26, with the plenary committee now considering technical amendments via an omni-bus process. A new sub-committee was also struck (Chaired by Justice Mosley) with a mandate to review technological aspects of the Rules. Finally, a ‘global rules revision’ sub-committee was struck. The next meeting is planned for May 2011.

(b) Certificate of Service (R146)

Chief Justice Lutfy noted that the issue was initially raised by Ms. Kathy Ring (Department of Justice, Vancouver) regarding the practice, with a direction being issued by Prothonotary Lafreniere in IMM-4606-10.

(c) Payment into Court (R149)

Ms. Labbé noted that CAS Finance is looking at different options. **Ms. Bowers** added that the Registries accept VISA / MC, and sometimes the amounts are quite significant and include transaction costs. The Courts are looking at this in the Rules Committee.

10. Federal Court Update

Justice Phelan provided an update for the Federal Court noting:

- 2 new appointments to the Court (Justice Scott and Justice Rennie)
- new Federal Court gowns – this was an initiative lead by Justice O’Reilly, who also initiated the project to develop a new coat-of-arms for the Court
- a new Chief Administrator was appointed for CAS, Mr. Daniel Gosselin

Justice Phelan acknowledged the work of Ms. Labbé, who demonstrated very strong leadership as Acting Chief Administrator.

Chief Justice Lutfy also noted that Justice Evans and Justice Harrington are leading a steering committee to hold a conference on the jurisdiction of the Federal Courts, adding that there were numerous cases pending in the Courts that affect this jurisdiction.

Furthermore, he made reference to the uncertainty regarding remuneration of prothonotaries. The issue went for independent review before Mr. George Adams, and the CBA made representations, lead by Mr. Simon Barker. **Chief Justice Lutfy** has requested senior officers of the Crown to fix this key issue, and may go to the Bar to seek their support.

11. Update from the Interim Chief Administrator of the Courts Administration Service, Ms. Suzanne Labbé

Ms. Labbé noted that the CAS Report on Plans and Priorities was sent to Parliament yesterday. The report identifies risks to the organization, especially funding and information technology systems. The CAS focus is on core operations of the Courts, including operation of these liaison committees. There are only very limited funds to advance special projects.

12. Update – Self-represented litigants

Justice Stratas spoke about an experimental project regarding self-represented litigants, looking for ways to be more helpful. The plan is to design an interactive website where self-represented litigants, with the benefit of screening questions, could receive advice on preparation of appeal application (e.g., applicant under section 28 FC Act? If yes, then very specific advice would be provided on the application process). PDF forms could be built in, properly formatted under the Rules, with practical advice on how to deal with lawyers, the registry, and the Court. This includes ‘soft’ advocacy advice. The project will be reviewed within the Court, and then there will be consultation with the Bar. However, it is also important to have *pro bono* counsel available. Junior members of the Bar are needed, and they could then get experience.

13. Next Meeting

To be discussed between representatives of the Courts and the Bar.

14. Other

15. Closing Remarks

Chief Justice Blais and Chief Justice Lutfy thanked the participants and invited them to continue informal discussions over lunch.