

BENCH AND CANADIAN BAR ASSOCIATION

LIAISON COMMITTEE

MINUTES OF MEETING

FRIDAY, MAY 20, 2011

BOARDROOM

90 SPARKS STREET

10TH FLOOR

In attendance:

Chief Justice Blais, Federal Court of Appeal
A/Chief Justice Noël, Federal Court
Justice Sharlow, Federal Court of Appeal
Justice Pelletier, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Lemieux, Federal Court
Justice O'Reilly, Federal Court
Daniel Gosselin, Chief Administrator
Alain Le Gal, Registrar, Federal Court of Appeal
Manon Pitre, Registrar, Federal Court
Nathalie Daigle, Executive Officer, Federal Court
Susan Beaubien, Macera & Jarzyna (**by teleconference**)
Martin Masse, McMillan LLP
Mario Bellissimo, Bellissimo Law Group
Max Weder, Davis LLP (**by teleconference**)
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 Phelan, Federal Court
Justice de Montigny, Federal Court
Prothonotary Tabib, Federal Court
Prothonotary Aronovitch, Federal Court
Christian Monnin, Hill Sokalski Walsh Trippier LLP

Recording Secretaries:

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

1. Opening Remarks

Chief Justice Blais and **A/Chief Justice Noël** welcomed members of the Committee to this meeting and thanked everyone for their participation.

- **Chief Justice Blais** indicated how important these liaison committee meetings are for both the judiciary and the bar alike as they offer an opportunity to exchange ideas in an informal context, with the goal of ensuring the better administration of justice in Canada.
- Chief Justice Blais also welcomed the Honourable Simon Noël, who will be acting for a period of time for an esteemed colleague and friend, Chief Justice Lutfy. Chief Justice Blais also welcomed the new Chief Administrator to the Courts Administration Service, Mr. Daniel Gosselin, who joined us in January of this year. Chief Justice Blais mentioned that Mr. Gosselin is a chartered accountant who holds a Bachelor's degree in Business Administration from the Université du Québec. He is fluently bilingual and has almost 20 years of management experience within both the private and public sectors.
- **Acting Chief Justice Noël** indicated that, due to a serious, but manageable health condition, Chief Justice Lutfy has asked him to take on the role of Acting Chief Justice of the Federal Court. Acting Chief Justice Noël indicated that he was happy to fulfill that role and to lead in the name of his friend and colleague Chief Justice Lutfy. He also thanked Andrew Baumberg for his help during this period of transition.

2. Opening Remarks

Opening Remarks from CBA Chair **Martin Masse**:

- Mr. Masse mentioned, on behalf of the Members of the committee, that despite the fact that the Courts have come under some scrutiny in the media due to certain speeches etc. (e.g., Minister Kenney of Citizenship and Immigration), this committee remains committed to supporting the Courts in the context of judicial independence.

3. Adoption of Minutes (December 17, 2010)

There were minor corrections proposed by the Bar:

- CBA Committee Chair = President du Comité
- MacMillan – firm name change

CBA ITEMS:

4. Specialized Liaison Group Updates

(a) Indigenous Bar- Aboriginal Law Bar

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

- Ms. Soroka indicated that there was a meeting in Winnipeg that was attended by Justice Lemieux and Justice Mandamin.
- There were 2 papers presented at this meeting:
 - (i) The first paper was regarding the use of Alternate Dispute Resolution (ADR) (not a departure from the Rules, but more a practice notice), to make the courts aware of the use of ADR.

- The Court through its ADR mandate can help to find a solution that will be more fruitful for the aboriginal community.
- It underscores an effort to engage the community, and is seen as a very positive and progressive move to help.
- Where there are aboriginal rights claimed, but not yet proven, the Supreme Court of Canada has mandated that aboriginal peoples be consulted and appropriate accommodations are made.
- This issue often comes to the Court in the form of a judicial review of the consultation / accommodation decision.
- Another useful area for the Courts ability to assist is within the context of alternative dispute resolution.

(ii) The second paper was on the subject of Elders testimony and oral history.

- This has been generally very well received.
- The challenge is to keep it flexible because this is an area that continues to evolve.
- **Justice Lemieux** noted there has been active participation by the CBA, Department of Justice, Indigenous Bar Association, and others.
- The purpose of these consultations is to figure out how to be more efficient on both sides of the Committee and how to ensure better understanding of our Rules.
- The essence and driving force behind the first paper on ADR is having the community participate and having them help the Court find solutions.
- These cases start with judicial review, but it is better if we can reach a mediated resolution.
- The second paper prepared by Justice Mandamin, regarding Elders' testimony, is a very difficult and sensitive topic (cross-examination, discovery, will say statements).
- His paper put the Elders' testimony in perspective, providing background information and offering solutions (e.g., preparing Elders for the Court hearing and protocols for giving evidence).
- Comments are to be received by June 30th on both papers.
- Two other initiatives undertaken by the Aboriginal Bar Liaison Committee include: review of the appeal procedure related to the *First Nations Fiscal Management Act* (which gives the power of taxation on reserves) and discussion of the procedure to be followed in complex judicial review applications.
- **Martin Masse** added his support for ADR overall and gave a couple of his own examples where the enhanced use of ADR has been beneficial (election and membership disputes).
- **Justice Lemieux** indicated that it is best to approach ADR early in the process, well before affidavits are received.
- Suggested approach: for Band election disputes, parties should ask for case management right

away, and stay the proceedings while ADR is in progress.

(b) Intellectual Property

Ms. Beaubien provided a report of activities within the Intellectual Property Law Bar (via teleconference while in attendance at a conference in Washington)

- A Town Hall meeting was held at which a number of topics were canvassed:
- Use of confidential and protective orders
- I.P. Users Committee Meeting again chaired by Justice Hughes
- Annual I.P. Judges dinner on May 5th
- Things are progressing very well
- The I.P. Bar is very grateful to air their concerns, especially since I.P. Litigation does take up a significant amount of time and scarce court resources.
- Ms. Beaubien indicated that her 3-year term is up - this will be her last meeting. Although leaving the Liaison Committee, she will help with organization of the 2012 dinner.
- She thanked the Chief Justices and the judges of the Courts.
- **Martin Masse** thanked Ms. Beaubien on behalf of all the members of the Bar.
- **Chief Justice Blais** took this opportunity to thank her for all of her support and contributions over the years. He recognizes that Ms. Beaubien has been a pillar on I.P. matters and important events with the Federal Courts.
- **Acting Chief Justice Noël** spoke on behalf of the Federal Court and on behalf of Chief Justice Lutfy in thanking Ms. Beaubien as well.

(c) Immigration and Refugee Law

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

- Mr. Bellissimo added to the comments made by his colleagues regarding Chief Justice Lutfy.
- The Annual Immigration Conference was held at Lac Leamy and was very successful thanks to all the speakers, the judges and Andrew Baumberg and Chantelle Bowers for all of their help.
- Implementation of the *Balanced Refugee Reform Act* is planned for the end of this year.
- CBSA set 2013 as the year for clearing undocumented and unfounded refugee claimants. They received funding to this end so they will be moving ahead.

HRSDC Developments:

- Foreign Workers must have their work permit revised.
- Updated their websites
- Fruitful Bench & Bar meeting last week.

- Ex: vulnerable persons issues
- **Andrew Baumberg** mentioned the promotion at the meeting of resources for self-represented litigants (pro bono program)
- There was an issue raised by the Bar regarding Consultants acting on behalf of self-represented litigants
- One idea was to have a generic text, provided along with the final decision of an administrative tribunal, to inform potential litigants (before they apply for judicial review) of the possibility for pro bono assistance. Under review by the Immigration Liaison Committee.

(d) Maritime Law

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

- He repeated his wishes for a speedy recovery for Chief Justice Lutfy and brings greetings from the National Chair of the Maritime Bar Association (Peter Swanson)
- One item he wanted to raise was the *Nordems* cases issued by the Federal Court and Federal Court of Appeal. (2010 FC 332; affirmed at [2011 FCA 73](#))
- A clear delineation must be made between maritime liens and vessels. This will be discussed at their national meeting in Quebec City
- Bob Jette also provided him with an update regarding the Admiralty Law Conference in April at the Château Laurier: the formal evaluations were very positive.
- Reported on Buenos Ares CMI conference: the forced sale of vessels, as opposed to a judicial sale, was canvassed.
- Treaty on a forced sale of vessels exists, but no treaty on judicial sale of vessels
- Issues arise re comity of courts and conflicts of law
- On August 13th, the CMLA is putting on a seminar regarding piracy.

5. Procedure for conversion of judicial review application to action.

Martin Masse

- Raised the issue of timelines for conversion of a judicial review application to an action, in light of the recent decision of the Supreme Court of Canada in *Telezone*.
- There were different timelines for conversion. For instance, sub. 18.4(2) refers briefly to this issue, but it is unclear, since it speaks to a direction and not to an order. It may be a time limited problem.
- **Chief Justice Blais** mentioned that many people are still reflecting on the import and applicability of the *Telezone* matter (after 10 years of *Grenier*).
- Section 18.4(2) is a reference to the *Federal Courts Act* as opposed to the Rules, so it is not the purview of the Rules Committee per say.

- The *Crown Liability & Proceedings Act* may be a shortcut to resolve a part of the problem. Transforming all applications for judicial review into actions is not going to limit the numbers.
- He made reference to the 40th anniversary of the enactment of the *Federal Court Act* and a Jurisdiction Conference that is coming up on October 27-28th, 2011, and this topic may be canvassed at that time.
- **Justice Stratas** mentioned that when practical matters arise like this, one might write to the Secretary of the Rules Committee and ask the Rules Committee to consider a means of helping deal with some challenges with the *Federal Courts Act* and *Telezona*.
- **Justice Lemieux** added that the problem is whether or not s. 18.4 of the Act were to change, the jurisprudence remains.
- When you convert you're not dealing with an action, you're still dealing with a judicial review.

6. The proposed practice note on the use of ADR for Aboriginal Law matters.

This item was addressed under 4 (a).

7. The proposed practice guidelines on Elders' testimony and oral history.

This item was addressed under 4 (a).

COURT ITEMS:

8. Federal Court of Appeal Update

Chief Justice Blais provided the following update on matters within the Federal Court of Appeal:

“As many of you well know, our judges are not only sitting on the many cases that we have before us and busy ensuring that there are little or no delays before the Courts, we also keep extremely busy with speaking engagements across the country and internationally. My colleagues are often called upon to provide keynote addresses or speeches at a variety of functions within the legal community. I, myself, have been very engaged with various speeches with the Canadian Bar Association's annual Immigration Conference and with the Canadian Institute on advanced training on Charter and constitutional matters.

As Ms. Beaubien mentioned earlier, the Federal Court of Appeal's Justice Sexton was recently honoured by the Canadian Bar Association's Intellectual Property Section at a gala dinner at the Canadian Museum of Civilization for his years of contribution to intellectual property law. Justice Sexton will be retiring in October by reason of the mandatory age requirement. We will also have one of our more senior judges, the Honourable Marc Nadon, who has elected supernumerary status as of July 25th. So we will keep the Minister of Justice busy as well in the next little while – as you all may have seen this Wednesday during the cabinet appointment process, the Honourable Rob Nicholson retained his position as Minister of Justice.

On the topic of retirement, I would be remiss if I did not mention the retirement of Mme Suzanne Labbé from the Courts Administration Service, effective next Friday, May 27th. As we all know, Suzanne most recently guided the organization in her capacity as Acting Chief Administrator from June 2010 until January 31, 2011. Suzanne led CAS through a difficult transition period and ensured exceptional administration services to the Federal Court of Appeal, the Federal Court, the Court Martial Appeal Court of Canada and the Tax Court of Canada. With the arrival of our new Chief Administrator, Mr. Daniel Gosselin, here with us today, Suzanne then returned to her substantive position as Deputy Chief Administrator of Judicial Services for the CAS, a position she has held since 2005. In that capacity,

Suzanne has been responsible for overseeing the delivery of all judicial services to the four Courts. The Judicial Services includes the offices of the four Chief Justices, judicial assistants, law clerks, library services, translation and revision section.”

9. Electronic transmission of certain documents to the Federal Court of Appeal

Justice Pelletier provided an update on a new practice that requests the transmission of certain documents in electronic format.

Once a requisition for hearing has been filed, the Federal Court of Appeal Judicial Administrator, Ms. Bazinet, communicates with counsel for the applicant/appellant and with counsel for the respondent by letter, asking for counsel’s cooperation in providing the Court with a DVD or CD containing an electronic version (in .pdf format) of certain documents in order to assist the members of the panel hearing the matter.

In the case of the applicant/appellant, we request:

- all prior decisions and reasons that are relevant to the decision under appeal
- the notice of appeal or the notice of application
- the appellant’s or the applicant’s Memorandum of Fact and Law

In the case of the respondent, we request:

- the respondent’s Memorandum of Fact and Law
- and in appeals from the Tax Court of Canada, a copy of the Reply to Notice of Appeal

Counsel are asked to forward the DVD or CD within ten (10) working days of the date of Ms. Bazinet’s letter to the Registrar of the Federal Court of Appeal, Mr. Alain Le Gal.

Where there is both a public and a confidential version of a document, counsel is requested to include both versions, clearly indicating which one is the confidential version. The confidential material will be placed in a confidential directory on the shared drive, access to which will be limited to those judges, judicial assistants and law clerks who will be working on that file. Counsel are asked to ensure that the .pdf files be named in such a way that the origin and nature of the file can be determined without having to open the file.

Justice Pelletier made a few additional precisions, notably that this is **not** e-filing, because the documents in question have already been filed. There is nothing to preclude an evolution to e-filing in this practice if an appropriate case arises, and if the fundamental infrastructure is in place beforehand. As for the question posed “why CD ROM’s as opposed to email?”, Justice Pelletier indicates that the FCA has simply followed the SCC model at this point.

Finally, it is not mandatory and the letters have been carefully drafted to that extent. Justice Pelletier congratulates the Bar for their participation.

10. Rules Committee Update

Report of Chantelle Bowers, Secretary to the Federal Courts’ Rules Committee

The last plenary meeting of the Federal Courts Rules Committee was held on Friday, May 6th in Ottawa. It is a statutory committee whose members are all designated or appointed.

The Chief Justice of the Federal Court of Appeal and the Chief Justice of the Federal Court recently designated the Honourable Roger Hughes of the Federal Court as Chairperson of the plenary committee, pursuant to subsection 45.1 (3) of the *Federal Courts Act*. He ensures that we all keep very busy and

moves the files and amendments along swiftly!

There are 3 main committees at the present time, working on various projects and discussion papers, with the able assistance of two consultants, Professor Janet Walker from Osgoode and Professor Denis Ferland from Laval.

1. The first committee involves a number of procedural amendments derived largely from a laundry list that was compiled for a couple of years by members of the Bar, the Registry and the judiciary. That list was recently divided into two segments. The first segment includes non-controversial items (such as the hours of operation of the Registry to specify 8:30 a.m. to 4:30 p.m. in the Rules, to reflect the current practice following a direction from the Chief Administrator a few years ago), which have been collated and sent to the legislative drafters. In the meantime, the Secretary of the Rules Committee will be working on a Triage Statement for submission to the Regulatory Affairs Section, Treasury Board of Canada.

The next segment involves those procedural amendments which require a greater consultation with the Bar and which may be more controversial in nature. For example, there is a proposal to add a specific rule for the appointment of an *amicus curiae*. These proposed amendments have been described in greater detail in a Discussion Paper which is posted on the websites of the Federal Court of Appeal and the Federal Court. The Discussion Paper has also been circulated through our Distribution section to those lawyers who have subscribed, and we encourage your feedback and comments.

2. The second committee has a mandate to review 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 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 has also been posted on the Federal Courts websites, and it is also available through Distribution. Numerous comments have been received to date, and they have been collated into a chart for discussion within the subcommittee. Justice Mosley has called a meeting of the subcommittee for October 24, 2011, to discuss the comments and next steps.

3. Finally, the last committee is focusing on a Global Revision 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. For example, the sub-committee is considering whether the principle of “proportionality” should be specifically spelled out at the outset of the Rules. The sub-committee on global revision also prepared a draft Discussion Paper, which was approved by the plenary committee, subject to some minor revisions. This paper will also be posted on the Courts’ websites and circulated through Distribution as soon as possible.

The next plenary committee meeting will be in Ottawa on Friday, November 18, 2011.

11. Update regarding distribution of Notices to the Profession

Chantelle Bowers and Andrew Baumberg took note of the comments received from members of the bar that they have not necessarily been receiving the various notices to the profession or updates and

papers emanating from the Federal Courts. They have worked in close collaboration with the Distribution Section of CAS to update the various distribution lists. They have also communicated with the various law societies across the country, indicating that the Federal Court of Appeal and the Federal Court are currently revising its distribution list for practice notices and directions to the profession and documents regarding changes to the *Federal Courts Rules*. Members of the profession were asked to provide a general email address where we can send such information for distribution to their members. In addition, members of the profession were asked to subscribe to an automated subscription list by sending a request to distribution@cas-satj.gc.ca with the words “**practice subscription**” in the subject line. Finally, members of the bar and the public are invited to consult the Courts’ websites on a regular basis.

12. Federal Court Update

Acting Chief Justice Noël provided an update on matters within the Federal Court:

- There are judicial positions vacant: two remain from the last amendment to the Immigration and Refugee Protection Act, and 4 new positions are created by the new amendments.
- Some security certificate matters are moving up to the Federal Court of Appeal.
- By 2015, 11 judges will have become eligible for supernumerary status.
- Regarding the question of the jurisdiction of the Court, Acting Chief Justice Noël agreed that it is an ongoing issue following the *Telezona* decision.
- He also made reference to the challenges that the Courts are facing with respect to translation of decisions and the interpretation regarding the legal requirements for translation by the Commissioner of Official Languages.
- Acting Chief Justice Noël mentioned that the next Federal Court education seminar will be held this September.
- A 40th Anniversary Jurisdiction Conference is scheduled for October 27-28th.
- All courts served by CAS are planning a Judicial Security Conference on December 9, 2011.
- Acting Chief Justice Noël indicated that the Federal Court would appreciate the CBA’s help re: prothonotaries’ salaries & benefits issues. Andrew Baumberg will be in touch with Gaylene Schellenberg regarding the CBA’s plans to submit a draft resolution by June 1st. He noted that judicial independence must be reinforced.
- Finally, he recognized Daniel Gosselin’s involvement at CAS.

13. Update from the Chief Administrator of the Courts Administration Service, Mr. Daniel Gosselin

- **Mr. Gosselin** indicated that CAS has been active.
- During the last budget speech, the federal government publicly recognized that CAS has a program integrity funding issue.
- As a result, before the election, CAS was granted a \$3M budget increase on an ongoing basis, and he hopes that this commitment will be maintained.
- Mr. Gosselin spoke of two main areas where he would like to see that money be directed, namely towards information technology and security.
- He admits that the CAS Technology Infrastructure must be brought into the 21 century, and we are making progress in this regard.
- Security is another important matter, and he has had the opportunity to examine this file very carefully, since it is one that is very important.
- Some things can be done easily without a significant investment, and other security measures will require the program integrity funding in order to be realized.
- Mr. Gosselin also reported that CAS administrative groups are to move to the Thomas D’Arcy McGee Building by the Fall.
- Mr. Gosselin spoke about a renewed focus on the Governance Structure for CAS, to be presented to the Chief Justices for their approval in the upcoming months.

- Finally, Mr. Gosselin noted his commitment to improve communications and morale within CAS.

QUESTIONS OF GENERAL INTEREST:

14. Next meeting

Likely early December 2011

15. Other

- **Martin Masse** once again offered his best wishes to Chief Justice Lutfy and indicated that if he approaches his recovery in the same way that he has approached the running of the Federal Court, then he will be able to confront this challenge.

16. Closing Remarks

- **Chief Justice Blais and Acting Chief Justice Noël** also echoed this sentiment and closed the meeting. They invited the assembly to lunch.