

BENCH AND CANADIAN BAR ASSOCIATION

LIAISON COMMITTEE

MINUTES OF MEETING

FRIDAY, DECEMBER 2, 2011

BOARDROOM

90 SPARKS STREET

12TH FLOOR

In attendance:

Chief Justice Blais, Federal Court of Appeal
A/Chief Justice Noël, Federal Court
Justice Pelletier, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Lemieux, Federal Court
Justice O'Reilly, Federal Court
Justice Phelan, Federal Court
Prothonotary Aronovitch, Federal Court
Daniel Gosselin, Chief Administrator
Alain Le Gal, Registrar, Federal Court of Appeal
Marie Desrosiers, Federal Court Registry
Nathalie Daigle, Legal Counsel, Federal Court
Susan Beaubien, Macera & Jarzyna
Martin Masse, McMillan LLP
Mario Bellissimo, Bellissimo Law Group
Max Weder, Davis LLP
Paul Harquail, Stewart McKelvey
Diane Soroka, Diane Soroka Barrister & Solicitor Inc.
Alain Préfontaine (Department of Justice - Canada)
Gaylene Schellenberg (CBA)
Christian Monnin, Hill Sokalski Walsh Trippier LLP

Regrets:

Justice Sharlow, Federal Court of Appeal
Justice Heneghan, Federal Court
Justice de Montigny, 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

Welcome by **Acting Chief Justice Simon Noël** and **Chief Justice Pierre Blais**, who together recognized the importance of the liaison committee.

2. Opening Remarks

Martin Masse recognized the role of the committee and members of the Bar, who are all volunteers.

3. Adoption of Minutes (May 20, 2011)

Two minor changes proposed to the French version:

- Page 11: registraire changed to greffier
- Page 14, item 11: lesquelles changed to lesquels

New agenda items were proposed by **Mr. Masse**:

- **prothonotary compensation resolution**

This resolution passed. The next step is to draft a CBA letter, which will be done before the holidays.

Acting Chief Justice Noël thanked the CBA for their commitment. He noted that the prothonotary issue is important and should be fixed as soon as possible.

- **CBA resolution regarding tax jurisdiction**

Martin Masse reported that the discussion with John Hoyles was positive. The Committee members will follow this issue and work towards a solution.

Chief Justice Blais provided some background. The core issue was lack of notice, though acknowledging that this was not the fault of members of this liaison committee. He thanked, in particular, the work of Mr. Masse and Ms. Beaubien to help resolve the issue.

CBA ITEMS:

4. Specialized Liaison Group Updates

(a) Indigenous Bar- Aboriginal Law Bar

Diane Soroka noted that the CBA provided comments on draft oral history guidelines. An Elders' meeting was held to provide further feedback. The guidelines are on track to be finalized by June 2012.

The CBA also provided comments on draft alternate dispute resolution (ADR) guidelines. The goal is to have judges trained in aboriginal ADR. She noted the wide variety of traditions that need to be considered. The CBA recommends that this initiative extend to disputes between First Nations and Crown litigants, in addition to litigation involving only First Nations.

Justice Lemieux noted that there was a recent meeting with Elders to provide formal comments on the drafts. He thanked, in particular, Aimée Craft from the CBA for her assistance with the meeting. Further issues before the committee:

- complex judicial review proceedings;
- a proposal by Elders for judges to participate in an education program on aboriginal perspective, to be held with Elders, academics, and others; this is in development with the National Judicial Institute.

(b) Intellectual Property

Susan Beaubien noted that the IP bar is following the resolutions on tax jurisdiction and prothonotaries. The Federal Court rules are under examination, and the IP bar will be tracking the proposed amendments via the CBA Court Practice Committee. It is relatively quiet otherwise – the IP dinner will be May 17, 2012.

(c) Immigration and Refugee Law

Mr. Bellissimo provided a report of issues:

- the Bar is tracking Family Class Sponsorship;
- Bill C-10 – there is concern re long-term consequences on individuals who have committed offences – disputes will go to Court;
- Bill C-4 Human Smuggling Bill;

- cuts to Investor – Entrepreneur category;
- freeze on family sponsorship;
- collateral consequences of conviction project – education with Bar;
- national conference in Kelowna – May 4-6, 2012 – Bar hoping for Court participation;
- E-service with Justice – there is an e-discovery project under way after a meeting with the Bar;
- time-lines for leave granted orders are working;
- more settlements based on effort by public / private Bar to explore settlement opportunities.

(d) Maritime Law

Paul Harquil provided a report:

- the Bar will be creating a newsletter, with a case summaries section for developments in the law;
- the Bar will promote the web site resources / distribution lists from the Courts;
- there was a recent maritime law conference;
- a noxious substances regulatory regime is in development;
- the CBA is working with Justice to develop uniform letters of undertaking for release of ships under arrest by the Courts;
- the CBA will attend the 2012 Comité maritime international meeting – judicial sale of vessels is on the agenda to attempt uniformity;
- the next CBA conference is May '12 (Vancouver).

He asked if there is interest in the Federal Courts for a speaking engagement at the University of Moncton re maritime law jurisdiction and history of the Courts.

5. Discussion of Proposals to Improve Caseload Management of Tax Court

Alain Préfontaine noted that there is little in the legislative proposal that directly affects the Federal Court of Appeal. The proposal appears to allow for an appeal for a group of tax payers; however, for individuals, the appeal would require leave.

Max Weder noted that there are large numbers of such cases – the goal is to manage them efficiently given limited resources. The proposals shift a focus to a more class-based process rather than individualized appeals. They also increase the limits for use of the informal procedure.

Chief Justice Blais noted that in tax cases, about 30% are self-represented.

Alain Préfontaine noted this is part of a government review of fiscal measures, thus the Finance Minister's involvement in addition to the Justice Minister.

Chief Justice Blais noted that the Court wants to know what changes might increase its workload, such as hidden classes of issues / litigants that might result in an increased number of appeals. If there are additional developments on this, the Courts are interested to know so as to be able to plan accordingly.

Max Weder noted that apart from this issue, the only other concerns the tax resolution.

Administrative Law Bar

Martin Masse noted recent efforts to have common training programs in collaboration with the association of tribunal members and practitioners at the national level. Some tribunal members have little training.

Justice Stratas noted the few training opportunities for tribunal members. This is a great initiative.

6. Consideration of Alternative Models for Bench/Bar Liaison Committees

Martin Masse asked the Courts to provide feedback on the existing liaison structure.

Susan Beaubien provided background on the structure of the CBA. She noted that some national sections aren't represented at the committee. The CBA does not guarantee representation from any particular section – it is put to a vote at the annual meeting. If there are areas from which the Court wishes to hear, it should let the CBA know. For example, military law.

Chief Justice Blais noted that this is a general liaison committee, but there are many areas of jurisdiction relevant to the Federal Courts. It may be possible to have rotation of members, or a member to attend to address a particular issue that arises.

Acting Chief Justice Noël noted that we could invite Chief Justice Blanchard and include a representative from the military.

Martin Masse noted that if there are situational issues, attendance could be on a case by case basis by members of other sections.

Andrew Baumberg noted that there are now specialized committees to provide a forum for discussion of some of these narrow subject areas.

On behalf of the prothonotaries, **Prothonotary Aronovitch** thanked the CBA and the individual bar associations for their support.

COURT ITEMS:

7. Federal Court of Appeal Update

Chief Justice Blais provided an update:

- Justice Gauthier was appointed to the Federal Court of Appeal; she is an active member of the Rules Committee and Bar Liaison Committees, particularly in maritime law;
- Justice Sexton recently retired from the Court, a former member of the Liaison Committee;
- the Court is incorporating new technology in its practice, with Justice Pelletier taking the lead, including the electronic filing of documents; there is another project regarding efficiencies for the book of authorities;
- there was a recent seminar on the jurisdiction of the Federal Courts, marking their 40th anniversary; this was an opportunity to discuss important jurisdictional issues that are relevant to litigants;
- it is important for the Court, which hears some 600 cases per year but with only a few going to the Supreme Court, to have the best judgment possible, with the best legal research support possible; this is provided by a group of law clerks;
- there was an education conference last week held jointly with the Tax Court of Canada, including coverage of the international scope of tax law.

Justice Stratas is preparing an on-line resource for self-represented litigants, providing advice on steps to take in a particular proceeding. It is expected to be released for review in Spring 2012. Soft advocacy is included – this needs to be evaluated. Specific input will be requested from the Bar.

Gaylene Schellenberg is to review this for the CBA's *Access to Justice* initiative.

8. Rules Committee Update

Bowers, Secretary of the Rules Committee, provided an update. She noted that Justice Hughes had been designated by the two Chief Justices as new Chair of the Committee. Professor Janet Walker and Professor Denis Ferland also provide direct assistance. Key projects on rules committee agenda:

Procedural amendments

- Non-controversial items – already sent to legislative drafters along with a regulatory impact statement, to be published in the Canada Gazette.
- Other items – a new sub-committee chaired by Justice Rennie covers items such as Rules for books of authorities, amicus curiae, and others

Technology – chaired by Justice Mosley and moving quickly, with drafting instructions approved on November 18 – the committee mandate is to remove obstacles to the use of technology, which changes quickly, rather than set a specific direction.

Global review – a broader review to the approach in the rules, such as the principle of proportionality.

Discussion papers on these initiatives are on the Courts' web sites. The next meeting is May 11, 2012.

9. Federal Court Update

Acting Chief Justice Noël provided an update:

- there is a project to develop a French / civil version of the Federal Courts Rules;
- some 5-6 judicial appointments are needed, as numerous judges retired or were appointed to the Federal Court of Appeal without being replaced;
- the Court is at almost the highest level of immigration proceedings in the last decade;
- Justice Campbell is supernumerary since January 1, 2011; Justice Gauthier appointed to Federal Court of Appeal as of October 21, 2011; Justice Beaudry to become supernumerary in January 2012;
- the prothonotary issue must be addressed (re pensions and benefits);
- the jurisdiction conference was a success – the Court's jurisdiction; needs to be solidified; a meeting was held with Chief Justice Lutfy, Justice Strayer, and the Deputy Minister, though with no follow-up; there needs to be less energy spent by litigants on jurisdictional issues;
- there are close to 4000 appeals on employment insurance issues each year but insufficient judicial resources; therefore, the appeals are heard by Umpires 'on contract' rather than by the Court directly; we met with members of the Office of the Umpire and Employment Insurance Commission;
- statistics were published in the media with improper and inaccurate targeting of specific judges, alleging ideological bias; the Court will not respond to such stories but will respond in a judicial way; the Court is not close-minded to the issue and is looking at it seriously.

Acting Chief Justice Noël expressed strong support for the Chief Administrator Daniel Gosselin to address key issues that affect the Bar.

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

Daniel Gosselin provided an update on the government's Shared Services initiative, which would have put the Courts' IT infrastructure under government control. The government exempted the Courts Administration Service from the initiative.

In the last budget speech, CAS was tagged to receive \$3M in program integrity funding. However, with the deficit action plan, this amount and more would have to be returned. The Administration provided 5% and 10% budget reduction proposals to the government. External reviews are supportive of the CAS position not to implement the 10% budget reduction.

CAS moved its administration to 90 Sparks Street and is now building a new data centre. It will continue to develop infrastructure if funds are available. Security and information technology are Mr. Gosselin's

key priorities. The records management system is being developed, subject to approval in 2013-14, with delivery in 2015-16.

CAS is moving ahead with a survey of the Bar regarding CAS services to litigants, to be launched in early 2012, with responses expected by March.

He added that he is also making representations to the government to address the prothonotary issue.

Susan Beaubien raised the issue of commercial groups scanning court files and then re-selling them, and claiming copyright over their scanned copies.

Andrew Baumberg noted that new technology being developed for the Courts' records system will allow for on-line access, but there remains a policy question re personal information in the Court file.

Daniel Gosselin noted the same rules should apply whether the document is available in paper or online. If confidential, the document would not be available.

Chief Justice Blais confirmed that public access to the online version should be the same as for paper.

QUESTIONS OF GENERAL INTEREST:

Mario Bellissimo asked whether the Court appointments reflect the timing of C-11 implementation, since its effects will be immediate. For example, if the applicant feels that there is a breach of procedural fairness on the initial interview, there may be applications for judicial review.

Acting Chief Justice Noël noted the 4 C-11 positions are separate from the 5-6 positions mentioned earlier.

11. Next meeting

Spring 2012 – to be discussed with the CBA / Courts.