

**BENCH AND CANADIAN BAR ASSOCIATION**

**LIAISON COMMITTEE**

**MINUTES OF MEETING**

**FRIDAY, June 1st, 2012**

**In attendance:**

Chief Justice Blais, Federal Court of Appeal  
Chief Justice Crampton, Federal Court  
Justice Sharlow, Federal Court of Appeal  
Justice Pelletier, Federal Court of Appeal  
Justice Stratas, Federal Court of Appeal  
Justice O'Reilly, Federal Court  
Prothonotary Tabib, Federal Court  
Daniel Gosselin, Chief Administrator  
Chantelle Bowers, Counsel, Executive Legal Officer, Federal Court of Appeal  
Andrew Baumberg, Executive Legal Officer, Federal Court  
Roula Eatrdes, Director Judicial Service, Federal Court  
Lucille Collard, Counsel, Federal Court of Appeal  
Alain Le Gal, Registrar, Federal Court of Appeal  
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  
Marilou Reeves, Canadian Bar Association (CBA)

**Regrets:**

Justice Lemieux, Federal Court  
Justice Heneghan, Federal Court  
Justice Phelan, Federal Court  
Prothonotary Aronovitch, Federal Court

**Recording Secretary:**

Chantelle Bowers, Federal Court of Appeal

**1. Opening Remarks by the Courts**

**Chief Justice Blais** and **Chief Justice Crampton** provided opening comments.

**2. Opening Remarks by the CBA**

**Martin Masse** provided opening comments.

**3. Adoption of Minutes**

Adopted with small changes.

**4. Adoption of Agenda**

Adopted

## 5. Rules Committee Update

**Stratas, J.A.** noted that the *Federal Courts Rules* are meant to be reviewed once a decade. Following the publication of a Discussion Paper a number of interventions were received. The Report of the sub-committee on Global review to the plenary Rules Committee is to be made in the Fall. The report will address issues such as: proportionality, abuse of process and case management. The deadline for formal consultation process was at the end of February but the Committee is still accepting comments until the end of June.

**CBA:** the CBA undertakes to communicate with its members concerning the Global Review and encourage members to provide input.

**Chantelle Bowers** reported that the last meeting of the Rules Committee was May 11. It is a statutory committee whose members are all designated or appointed. The following judges of the Federal Court of Appeal sit on the committee: Chief Justice Blais, Justice Pelletier, who recently joined the committee, Justice Gauthier and Justice Stratas. The Federal Court is represented by Chief Justice Crampton, Justice Mosley, Justice Hughes, Justice Zinn, Justice Bedard, Justice Rennie and Prothonotary Tabib.

The Chief Justice of the Federal Court of Appeal, in consultation with the Chief Justice of the Federal Court, designated the Honourable Roger Hughes of the Federal Court as Chairperson of the committee, pursuant to subsection 45.1 (3) of the *Federal Courts Act*. An expert in all that is related to the *Federal Courts Rules*, Justice Hughes keeps the committee busy and moves the files and amendments along swiftly.

There are now **five (5)** main subcommittees working on various projects and discussion papers. The subcommittees are comprised of members of the judiciary and the bar, legal counsel for both Courts and the two expert consultants, Professors Janet Walker from Osgoode and Professor Denis Ferland from Laval.

1. The first sub-committee involves a number of procedural amendments derived largely from a list compiled over 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 question of font and format of documents. Those fairly non-controversial items have been collated and sent to the Department of Justice legislative drafters for drafting. In the meantime, Ms. Bowers is finalizing the Regulatory Impact Analysis Statement for pre-publication in the *Canada Gazette - Part I* for a period of 60 days of consultation this Summer.

2. The second sub-committee involves those procedural amendments which require a greater consultation with the Bar and which may be 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 sub-committee is led by Justice Rennie, one of the authors of the *Federal Courts Practice*. The sub-committee has reviewed the various amendments and is preparing drafting instructions for the legislative drafters.

3. The third sub-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 he presented a draft Discussion Paper at the Rules committee plenary meeting in May. The paper was accepted subject to a few minor changes.

Because technology is such a vast and ever-changing target, it was agreed that the best approach was to consult with the profession and public before thinking about specific drafting changes. To that end, the Discussion Paper on Technology has been posted on the Federal Courts websites and is available through

CAS Distribution. The legislative drafters have received drafting instructions and are currently working on a draft set of amendments. No comments were received from the CBA.

4. The fourth sub-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 sub-committee 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. This sub-committee prepared a draft Discussion Paper, approved by the plenary committee subject to some minor revisions. This paper has been posted on the Courts websites and circulated through CAS Distribution, and the deadline for comments on that paper was February 17th, however, the sub-committee will still accept comments if submitted in due course.

5. A new, fifth sub-committee was struck at the last Plenary Rules Committee meeting on May 11 to look at the rules pertaining to execution as a whole. That subcommittee will be overseen by Justice Hughes for the moment and will include other members of the plenary committee, including the representative for the Department of Justice, legal counsel for both Courts and the expert consultants.

Finally, the next Plenary Committee meeting is planned for Friday, November 9<sup>th</sup>, 2012. The bulk of the work is done in between plenary meetings, with many meetings of the sub-committees.

## 6. CBA ITEMS

### *(a) The Indigenous Bar - Aboriginal Bar Update*

**Diane Soroka** reported that the aboriginal bar met on January 13<sup>th</sup>. Guidelines are being drafted for ADR in judicial review applications, largely aimed at band governance issues. There is a desire by the aboriginal bar to expand the ADR guidelines so that they apply both to First Nations as well as proceedings involving the Crown.

**Chief Justice Crampton** referred to a recent pilot project of the Court with respect to governance disputes, whereby the Court is conducting a triage of all new cases for possible referral directly to special case management and judicial dispute resolution. Justice Mandamin is taking the lead for the Court on this triage process.

### *(b) Immigration and Refugee Law Update*

**Mario Bellissimo** reported that the meeting in Kelowna (May 3-5, 2012) went very well, and the presence of the judiciary from both the Federal Court of Appeal and the Federal Court was appreciated. He also reported on the various bills underway involving immigration matters, namely C-11, C-31 and C-38, which have prompted a large number of mandamus applications so far, posing a challenge for the Federal Court.

Submissions were made to the Government regarding the possible detrimental effects of these amendments on the immigration system, and Mario Bellissimo will be speaking as a witness at a Parliamentary committee to discuss the possible impact on the Courts.

**Chief Justice Crampton** indicated that he is aware of the issues and mentioned that the Federal Court is looking into various ways of addressing the anticipated judicial review applications and the citizenship revocation proceedings, as well as possible amendments to the *Immigration and Refugee Protection Rules*.

**Martin Masse** queried whether the CBA could be useful in terms of making representations to the Minister of Justice regarding appointments. Ex. *Bill C-11* vacancies.

The Canadian Bar Association continues to have ongoing internal discussions regarding the issue of confidentiality in immigration and refugee protection cases. The CBA media and communications section favours the open court principle, whereas the immigration section is concerned with the increased risk that arises from public access to information about refugee claimants. A resolution is being developed by the CBA for the August annual meeting in Vancouver.

*(c) Intellectual Property Update*

**Susan Beaubien** reported, as mentioned at the annual IP Town Hall meeting, that there is concern with increased court workload that would make it longer to get hearing dates. More intervention is encouraged by the bar. She offered an overview of items discussed:

- record turn out from the Bench and Bar
- concern about case management: prothonotaries are at full workload capacity, if not beyond
- reduction in availability of judicial resources due to increased immigration / refugee workload may have a negative impact on IP cases
- fast-tracking of patent actions
- draft Practice Direction re experimental testing in preparation for trial
- discovery reform
- other reforms that would be desirable

*(d) Maritime Law Update*

**Paul Harquail** indicated that the annual meeting for the maritime law association will be in Beijing in October 2012. The **substantive programme will include panels on the Salvage Convention, 1989, the Recognition of Judicial Sales of Ships, as well as the Rotterdam Rules and other topical subjects.** He also reported on the draft Regulations to the Transportation Safety Board, the restriction on the number of individual witnesses by the Board, **and the** role of counsel in the context of witness interviews.

**7. Consideration of amendment to sub-section 17(3) of the *Federal Courts Act***

Sub-section 17(3) of the *Federal Court Act* allows questions of law, fact or mixed law and fact involving the Crown to be referred to the Court:

17(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

- (b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

This sub-section allows, for example, issues before administrative tribunals to be elevated to the Court even before the tribunal hears the case and renders a decision.

Although a party might eventually have a right of appeal or judicial review under the *Federal Courts Act* or an enabling statute, in many cases a hearing on the merits and a final decision will first be required. That hearing and decision often involve significant time, effort and cost for the Crown, for the tribunal and for the other party, all of which might be avoided if there is a crucial question that can be decided first by the Court.

However, 17(3) requires an agreement by both the Crown and the other party to get into Court. Either side can be arbitrary and withhold consent.

For example, in this age of fiscal restraint, the section of government that handles Federal Court cases may decline consent to avoid assuming the cost of the case, regardless of the impact of that decision on the cost to the parties (government and private) involved in the process.

Conversely, if the Crown wishes to refer a question to the Court, the other party may decline, despite the economies that could be achieved.

Therefore it makes sense to amend 17(3) to allow either party involved in an issue to bring a question to the Court.

Consideration should be given to whether this should be limited only to questions of law, and whether leave should first be sought.

Query whether a reference might be a possible avenue? Alain Préfontaine indicated that the Department of Justice will often play a role of mediator in reference questions, which typically operate on the assumption that there is an agreed statement of facts.

#### **8. Consideration of different time for future Bench/Bar Liaison Committee Meetings**

In consideration of costs, the CBA suggested a later start-time that would allow for same day travel. It was agreed, on a trial basis, that the next meeting will begin with lunch, followed by the meeting in the afternoon

#### **9. Minister of Justice response to Prothonotary compensation resolution**

**Martin Masse's** letter regarding prothonotary compensation was sent, as mentioned at the last meeting. The Minister of Justice responded on February 29, 2012. It is known that the 2008 process ended when the Supreme Court of Canada declined leave. However, the issue of periodic review remains outstanding, and the matter is still under consideration at the Minister's office. It is hoped that the file will be ready to move in the Fall.

#### **10. Letter from Mr. Fred Headon, CBA**

**Martin Masse** introduced the topic of the letter from Mr. Fred Headon, Second Vice-President, CBA, dated May 1, 2012, regarding proposals for reform to the jurisdiction of the Federal Court of Appeal, the Federal Court, and the Tax Court of Canada. Martin Masse indicated that the revised resolution contains "whereas" clauses that reflect concerns for the tax bar.

**Chief Justice Blais** and **Chief Justice Crampton** indicated that the Federal Court of Appeal and the Federal Court were, and remain, open to providing feedback on the underlying assumptions / facts in a CBA resolution regarding their Courts' jurisdiction.

However, given the timing of the May 1 letter from Mr. Headon proposing a new resolution, the June 1 meeting with the CBA at which the revised draft resolution was first shown to the Courts, and a pending deadline for CBA resolutions to be submitted for consideration at the CBA's Mid-Summer meeting, it appears best at this stage for the CBA simply to proceed with their own process. It is, after all, a CBA resolution, not a Court resolution.

The Federal Court of Appeal and Federal Court appreciate the considerable efforts made by members of this liaison committee to resolve this issue in the best interests of litigants, the Bar, and the Courts.

## 11. Federal Court of Appeal Update

Chief Justice Blais provided an overview of developments at the Federal Court of Appeal:

- The Court is currently working on modernizing and updating its web site in order to ensure an even easier access for parties. Lucille Collard, Quebec Bar member since 1999, recently joined the Office of the Chief Justice and has been tasked to review and recommend a new web site format and updates of the content to make it a valuable tool, not only for the bar but also the public, which may not be familiar with how the Court works. In addition to consultation within the judiciary, suggestions from the bar are invited regarding possible improvements.
- *Bill C-38, the Budget Implementation Act* has passed second reading, with modifications that will affect the Federal Courts, most notably with the creation of the Social Security Tribunal. If Bill C-38 becomes law, the four existing tribunals that hear appeals of Employment Insurance, Canada Pension Plan and Old Age Security decisions will be consolidated into this one Tribunal. While it is anticipated that for the Federal Court of Appeal the impact will be moderate, there will still be a need to make adjustments within the 1-year transition period in the Bill.
- Criteria for opening an appeal. The Registry sometimes asks the Court for Direction whether they should open a file when they receive an appeal of a Federal Court decision in immigration / refugee matters for which no question has been certified. In the context of judicial review of decisions under the *Immigration and Refugee Protection Act (IRPA)*, appeals to the Federal Court of Appeal are statute-barred unless the Federal Court judge certifies a serious question of general importance. Section 27 of the *Federal Courts Act* gives general appellate jurisdiction to the Federal Court of Appeal from any decision of the Federal Court. However, for any decision covered by the IRPA provisions on judicial review, subsection 75 (2) of IRPA removes this appellate jurisdiction if the Federal Court judge has not certified a question. The Federal Court of Appeal, being a statutory court, does not have residual inherent jurisdiction.
- Ex officio judges at the Federal Court of Appeal. The *Federal Courts Act* provides at subsections 5(4) and 5.1(4) that Federal Court judges are also *ex officio* judges of the Federal Court of Appeal and *vice versa*. From time to time, when necessary, these *ex officio* judges will sit on the Federal Court of Appeal. Members of the bar should not be surprised to see a different judge on the panel.
- Supernumerary status. Eligible judges may elect supernumerary status, under section 28 of the *Judges Act*, by notifying the Minister of Justice of the election to give up regular judicial duties and hold office only as a supernumerary judge. He or she shall hold that office until the age of retirement or resignation. Justice Evans has recently advised the Minister of Justice of his decision to elect supernumerary status and the Court wishes him all the best. He will join his other supernumerary colleagues at the Federal Court of Appeal, namely Justice Létourneau and Justice Nadon. The Court is hoping to have a new judge by the Fall.
  - Ongoing projects at the Federal Court of Appeal
    - (a) *self-represented litigants*- at the last meeting, a project was introduced to the bar that will provide easier access for self-represented litigants. Justice Stratas is continuing work on this initiative and has developed a user-friendly tool to navigate through the steps to get to the Federal Court of Appeal and the applicable rules.
    - (b) *Electronic submissions of certain documents to the Federal Court of Appeal.* An update from the last meeting was provided on this project for the electronic transmission of certain documents to the Federal Court of Appeal, headed by Justice Pelletier. This is not intended to be an e-filing system, nor is it intended to replace the requirements under the Rules to provide the Court and the Registry with the required documents in paper format. Rather, the project is a Court-led initiative, whereby the judges are merely requesting the cooperation of counsel to submit certain key documents in electronic format as well, in order to assist the judges who prefer to consult them electronically as opposed to having to cart around boxes of paper when traveling.
    - (c) *Ongoing Judicial Participation in Conferences.* In addition to their judicial work, Federal Court of Appeal judges attend numerous conferences and educational programs, most often for the benefit of the legal community at large, where they are called upon to deliver speeches and keynote addresses.

This takes a lot of time and preparation, but the judges are happy to do so and to be part of the development of the legal community.

## 12. Federal Court Update: Chief Justice Crampton

**Chief Justice Crampton** provided an overview of developments at the Federal Court:

- the Honourable Jocelyne Gagné was appointed yesterday
- Justice Rennie was just appointed Chair of the Competition Tribunal
- Justice Simpson will soon be taking on supernumerary status and will be stepping down from her role as Chair of the Competition Tribunal
- There remains a vacant position on the Court for a judge from Quebec (10 judges should be from the province of Quebec)
- There is a total of 4 vacancies at the Federal Court
- there have been some illnesses on the Court, and as a result, the Court the time-frames for scheduling cases is slightly longer
- the current backlog in matters under IRPA: 47 days in Toronto and 29 in Vancouver
- matters can be scheduled only within the 90 day statutory timeframe
- the number of applications under IRPA is much higher in Toronto (surge in removals in March); the numbers for Ottawa and Montreal are stable
- 50 files per month are put into case management
- Succession planning in specialized areas of the Court's work such as IP / admiralty / immigration
- lawyers at the top of their career were encouraged to submit their applications for judicial appointment to the Court
- one important item addressed recently at the annual Court meeting was the issue of "residency"
- although there is a residency requirement for the judge, there is no requirement that the judge move his or her *family* to Ottawa; however, the judge must integrate into the life of the Court
- the Federal Court is embarking on a strategic planning process, which hasn't been done in approximately 6 years, and it is timely with a new Chief Justice
- one key question to address is how to enhance access to justice

## 13. Update of the Chief Administrator Daniel Gosselin:

**Daniel Gosselin** mentioned that many of the issues have already been discussed, but he highlighted two files of particular importance for the Courts Administration Service (CAS).

- **Firstly, the 2012 Budget:** the good news is that CAS was cut by only 1.7% as part of the Deficit Reduction Action Program (DRAP), but the bad news is that still represents approximately \$1M.
- CAS is notifying affected employees
- in addition, CAS has a structural deficit and is taking a series of measures to remedy this
- for instance, CAS is pursuing discussions with central agencies to see how it might find a long-term solution for self-sustainability
- **Secondly, Technology.**
- CAS is implementing a new Data Centre this Fall.
- a new stand-alone digital recording system is being implemented in the Summer of 2012, followed by a 3-year implementation plan for a new case records management system (CRMS), depending on funding.
- Lexis-Nexis indicates that it will no longer provide e-filing service as of later this Fall, so a new solution must be found.
- CAS is moving on two fronts to address this issue.
  - discussions with Lexis-Nexis to see if they might be willing to assist us until CRMS is up and running.
  - exploration of in-house solutions within the context of the CRMS program

**14. Next meeting:**

To be determined (in the afternoon)

**15. Closing Remarks (Martin Masse):**

**Martin Masse** thanked members of the Committee for their dedication. He mentioned that Max Weber is considering whether he will return to the committee, but if not, the CBA will have another Tax Law representative. Christian Monin will not be running again.

**Chief Justice Blais** and **Chief Justice Crampton** also thanked members of the judiciary and the bar for their participation in this important committee.