

**Bench & Canadian Bar Association
Liaison Committee Meeting
Thursday, November 6, 2013**

MINUTES

In attendance:

Chief Justice Blais, Federal Court of Appeal
Chief Justice Crampton, Federal Court
Justice Pelletier, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Phelan, Federal Court
Chantelle Bowers, Acting Deputy Chief Administrator
Manon Pitre, Registrar, Federal Court
Roula Eatrides, General Counsel, Federal Court
Lucia Shatat, Counsel, Federal Court
Lucille Collard, Counsel, Federal Court of Appeal
Marie-Claire Perrault, Senior Counsel, Federal Court of Appeal
Paul Harquail, Chair – Maritime Law representative
Susan Beaubien, member, Intellectual Property Law representative
Mario Bellissimo, member – Immigration and Refugee Law representative
Joel Nitikman, member – Income Tax Law representative
Diane Soroka, member – Aboriginal Law representative
Maryse Tremblay, member – Labour, employment, human rights & privacy law representative
Alain Prefontaine, member – Department of Justice representative
Gaylene Schellenberg, staff lawyer Canadian Bar Association (CBA)

Via Teleconference

Prothonotary Lafrenière, Federal Court
David Demirkan, member – Civil litigation representative (Canada Industrial Relations Board)

Recording secretaries:

Andrew Baumberg, Senior Counsel, Federal Court

Regrets:

Justice Dawson, Federal Court of Appeal
Justice Sharlow, Federal Court of Appeal
Justice Heneghan, Federal Court
Justice O'Reilly, Federal Court

1) Opening Remarks (CBA)

Mr. Harquail acknowledged the support of the Bar in designating him as Chair. He also acknowledged the work of the Committee members in preparation for the meeting.

2) Opening Remarks (Federal Court of Appeal / Federal Court)

Chief Justice Blais and **Chief Justice Crampton** welcomed members of the Bar, reiterating the importance of these meetings to address practice issues in the Courts.

3) Adoption of Agenda

The CBA proposes to withdraw item 6 and move item 7 to Updates or Varia.

(6) Rules on judgment translations

(7) Draft Practice Directions at Federal Court of Appeal

4) Adoption of Minutes (May 2, 2013)

The minutes were adopted subject to 2 changes:

Item 12 – update by Daniel Gosselin, Chief Administrator. The program integrity submission was tabled asking for 67M\$ over 5 years rather than 10.

Page 2 – Update by Diane Soroka: “ADR is encouraged with First Nations, and it is hoped that they will be used in proceedings involving the Crown.”

CBA ITEMS

5) Update – Specialized Liaison Groups

a) Aboriginal Law Bar

Ms. Soroka noted that at the last meeting of the Aboriginal Law Bar Liaison Committee, a sub-committee was struck to develop a practice manual to supplement the Guidelines issued last year to help practitioners work their way through the system. There was considerable discussion regarding greater recognition of Indigenous law. The Bar appreciated the Court’s openness to discuss the issue, though noting the need for more discussion. The *First Nations Elections Act* was re-introduced in the House of Commons (Bill C-9). The bill was deemed approved at all stages completed in the previous session (previously Bill S-6 in the 1st Session of the 41st Parliament). It provides for concurrent jurisdiction with provincial Superior Courts and the Federal Court and encourages further use of ADR in election disputes.

Justice Phelan noted that it is unclear how well concurrent jurisdiction will work in practice.

Chief Justice Crampton referred to the Court’s recent seminar on Aboriginal law at Kitigan Zibi (Maniwaki, Qc), and noted Chief Justice Finch’s paper on the need to find ways to provide greater recognition of indigenous law. He added that it would be helpful to arrange a further meeting with Aboriginal Elders to clarify the Court’s mandate. He also noted the intention of the Court to support development of a practice manual, as well as to explore the Court’s support for ADR in collaboration with Aboriginal communities and Elders, even without having to have a formal application / statement of claim.

Ms. Soroka noted that each First Nation has its own unique legal tradition.

Chief Justice Blais noted the existing complexity within the *Indian Act* and customary election codes, which would be made even more complex with the proposed concurrent jurisdiction – having provincial Superior Courts involved from across the country, possibly with different approaches in each province. The creation of the Federal Courts was to provide more consistency in such areas.

Ms. Soroka noted that the new election code would apply only to First Nations that “opted in.” If the Federal Court is able to play the role described by Chief Justice Crampton, there would likely be considerable interest from litigants to approach the Federal Court.

Chief Justice Crampton confirmed the Court’s willingness to actively explore such a potential role.

b) Immigration and Refugee Law

Mr. Bellissimo reported that the Bar has created an annual award in honour of the initial founders of the Section (the « Founders Award »), covering costs for one student to attend the CBA annual meeting. **Justice Stratias** agreed to assist on the board.

Mr. Bellissimo recognized Justice Snider, who recently retired. She was very well respected for her work in this field.

It was noted that the refugee caseload is down, for various reasons: litigants are still learning how best to navigate the system; there is now an appeal process; there are test cases.

The CBA's Annual meeting will be May 8-10, 2014, in Calgary.

The Bill C-4 omnibus bill has new changes, including "e-harmony" (not the actual title of the program) to match applicants with employers. Maybe the *Citizenship Act* will be next.

Chief Justice Crampton noted that the Court launched its pilot fast-track immigration project in the Summer. So far, ten cases have been screened into the process, with 5 not pursued by the parties (it is an optional process). One was recently heard, with a 20 minute hearing. However, there are fewer VISA officer cases arriving than anticipated (based on historic case levels), in part because of the extended labour dispute between visa officers and the government last year. If there are any adjustments that could assist to make the pilot project more successful, the Bar should provide feedback to the Court. The Chief Justice added that although there has been a significant drop in new immigration cases, there remains a very large backlog given the record intake the last year.

c) Intellectual Property

Ms. Beaubien noted that the Section has numerous sub-sections responsible for policy papers, commentary on legislation, etc. There is an essay competition (for law students) that needs reviewers. The Users Committee is developing best practices for Notice of Compliance cases. She asked whether the immigration fast-track process could be used for non-immigration matters, such as review of trade-mark opposition decisions. At present, it could take many years to complete. A fast-track process would be welcomed by the Bar. Next year's IP day is June 12 (to be confirmed), scheduled around the International Trademark Association (INTA) conference. It provides a large networking opportunity – to be held in Hong Kong this year. The judges' dinner in 2014 is celebrating its 25th anniversary.

Ms. Beaubien mentioned an Intellectual Property Institute of Canada 2-day primer on patent law, including a distance learning option, in case this is of interest to law clerks.

Chief Justice Crampton noted that one of the Court's initial fast-track initiatives was for pharmaceutical IP actions, which now proceed on a 2-year time-line. As a result of this initiative, the backlog in this area has now been cleaned up. There is also a new pilot project regarding electronic courtrooms, and the IP bar is being encouraged to participate.

The Court is also trying to find ways to use case-management to advance the files more quickly and reduce the time spent by parties. The Prothonotaries currently have a very heavy caseload – the Court needs to find ways to address this while making greater use of case management, which has proven to be a very successful tool. Additional initiatives under review include a chess clock and hot tubbing experts. The overall objective is to have matters heard and decided more quickly. If the parties could narrow the issues, it would reduce the time needed for the hearing and writing the decision.

Justice Stratas noted, as a judge sitting on the Fox IP moot committee, that the moot could use the assistance of the CBA IP section. The moot has only 7 law schools participating. Some schools have no full-time IP professors, but only sessional lecturers from private practice. It would be useful to have IP lawyers who would be willing to coach a team in their area.

d) Maritime Law

Mr. Harquail attended the *Comité maritime international* (CMI) meeting in Dublin, along with Justice Gauthier. The agenda included a report of the International working group on the recognition of foreign judicial sales of ships, based on the Beijing draft, which is progressing well. The revised document is now ready for circulation. Some of the language seemed to

interfere with the procedural rules of the local jurisdiction. This requires some amendment to include accommodation language for the local procedure. The next CMI meeting is in Hamburg.

Chief Justice Crampton noted the *Irving vs. Siemens* case, currently before the Court.

Other Sections

Ms. Tremblay provided an update on labour, employment, privacy and human rights law issues. There is an annual conference, along with the administrative law section, on November 29-30, 2013, in Ottawa. Justice Martineau will moderate a panel on privacy issues. Justice Gleason will also attend on a panel. The section is formalizing a law reform committee. Bill C-4 contains changes to the *Public Service Labour Relations Act* and *Labour Code*. The section would like more scope for counsel to devote time to commentary regarding legislative amendments.

Mr. Demirkan spoke regarding the civil litigation section. He noted that the CBA annual conference is mid-August 2014, in St. John's, Newfoundland. Although at the planning stage, one proposed subject relates to social media in litigation. If there is a judge interested and able to speak on a panel, please advise the section.

Chief Justice Crampton invited the section to contact the court with further details.

Mr. Demirkan noted that Canadian Judges Forum has put forward a funding request to develop a checklist for judges to deal with self-represented litigants.

Chief Justice Blais noted that the Forum involves a limited group of judges authorized by the Canadian Judicial Council to attend the annual CBA conference. It meets only once per year.

Ms. Schellenberg added that the Forum has institutional support within the CBA administration.

Mr. Demirkan noted that the section reviewed its policy and procedure for review of proposals for intervention at the Supreme Court of Canada. There were two proposals for intervention on the current reference on the appointment of a judge to the Supreme Court from the Federal Court or Federal Court of Appeal. This is currently under review, with 4 options currently under review:

- no intervention
- intervention in line with Quebec's position
- intervention in line with federal position
- 'amicus curiae' position with hybrid point / counter-point model

The CBA is looking at what it can add to the process and how best to advance its position, including whether the intervention would be restricted to legal submissions or include evidence.

Mr. Harquail noted that this Liaison Committee is not consulted in this process, but will try to ensure that the Courts are consulted.

Chief Justice Blais noted that Courts are concerned with the recent developments. The information circulated in the public domain is often inaccurate. It is important to have the record straight. He added that this is not the first time that the Bar has had to respond to proposals regarding jurisdictional issues.

Justice Stratas noted that he follows some twitter exchanges and finds that there is considerable misinformation regarding the work of the Court. This should be countered, but the Courts' hands are tied in their ability to respond.

Prothonotary Lafreniere noted that prothonotaries are often described as Chief Clerks, which affects the way that parties, especially self-represented litigants, deal with the Court.

Mr. Bellissimo noted that there are regular media requests on issues. However, on this issue, there has not been a single request.

Mr. Prefontaine asked for notice once the Federal Courts publish any evidence regarding their work. He would be able to provide it to his colleagues who are involved in this case.

Chief Justice Blais confirmed that clear information about the work of the Court will be posted on the Court's web site.

Mr. Harquail undertook to communicate with those within the CBA who would be acting in this file, in an effort to ensure the factual record is correct. He looks forward to seeing the statistics on the Courts' web sites.

Chief Justice Crampton took the opportunity to acknowledge the work of the CBA in its intervention before the Special Advisor for Compensation Issues for Prothonotaries.

Mr. Nitikman provided some comments regarding the tax section, which includes income tax as well as commodities / GST. Each part is quite distinct. The tax section has few issues to note with respect to practice before the Federal Courts. There is an upcoming annual tax conference, including Justice Rothstein and Justice Webb. Justice Sharlow has attended the past few years.

Chief Justice Blais noted efforts by the Federal Court of Appeal to attend this annual meeting.

6) Recent Technical Updates to Federal Court Website

Ms. Beaubien noted that there have been updates to the Courts' websites. It is no longer possible to search decisions from both the Federal Court and Federal Court of Appeal at the same time. Also, in 'recent decisions', the new site provides only an URL, but not the neutral citation.

Ms. Bowers noted recent technical changes to the web sites. This has arisen as a result of changes to address web site accessibility standards. The previous Decisions platform was not capable of supporting the accessibility requirements, and so the Court migrated to a new platform, which was meant to provide a more robust capability. Unfortunately, there have been numerous problems in the transition, which are being addressed.

7) Potential Impact of Bill S-6, *First Nations Elections Act*

Addressed earlier in the agenda under the report by Ms. Soroka.

COURT ITEMS: / POINTS SOULEVÉS PAR LES COURS :

8) Federal Court of Appeal Update

Chief Justice Blais noted that:

- there are 2 vacancies from Quebec as a result of recent changes, and there are 2 other positions (created by previous legislative amendments) that have never been filled;
- a new Court web site was launched a few weeks ago, which allows simpler editing control by the Court if changes are needed; the work of Ms. Collard was acknowledged;
- the Court is looking to implement a pilot project to allow an electronic version of documents to be filed, such as via a USB key, rather than completely in paper; this will likely proceed by way of Practice Direction.
- Scheduling of cases: the Court is up to date and responds in a timely fashion to requests for expedited hearings.
- the Court continues to participate in legal conferences across the country.

9) Federal Court Update

Chief Justice Crampton noted that:

- Justice Pinard retired in July and Justice Snider in October; the Chief Justice hopes to get a new appointment to backfill Justice Snider's position soon;
- Beginning in 2017 there will be a significant increase in the number of judges eligible to elect supernumerary status – leading practitioners are encouraged to apply for appointment to the Court;
- the Court is waiting for the government response to the Special Advisor (prothonotary file); there has been an anticipatory process launched for appointment of a prothonotary in case a vacancy occurs; this is currently at the short-list stage, with interviews starting soon;
- Toronto: hearings are currently scheduled to the end of March 2014. Another 459 requests for hearing dates remain to be filled. If dates were given out until the end of June (184 slots), there would still be approx. 275 hearings to schedule during the summer & fall.
- Vancouver: Next available date is Feb. 27th, which is 114 days from today.
- Montreal: Next avail date is April 24th, which is 170 days from today
- Ottawa: Have scheduled to March 17th. There are another 32 requests pending.

Chief Justice Crampton then provided an overview of the Court's development of a strategic plan, which focuses on two main themes:

(1) Access to Justice

- Reducing Time and Costs: Revising and simplifying the Federal Courts Rules; Case Management; Court Assisted Resolution of Disputes; Expediting the Issuance of Decisions; Accommodating Differences in Practice Areas (Immigration, Aboriginal); Physical Accessibility; Promoting Greater Awareness of the Court (Law Schools, Bar Associations, Media, Public Forums)
- Ease of Interaction with the Court (Reduction of Barriers): Tables of Concordance for the Rules, Making More User-friendly Information Available to the Court's Website, Special Resources for Self-represented Litigants and Ongoing Development of Best Practices
- Some of these initiatives will be addressed through the work of the Rules sub-Committee on implementation of the global review report.

(2) Modernizing the Court

- Digital Audio Recording – beginning in early 2014, all court proceedings will be recorded by DARS
- E-Filing/Service – the Court is relying on a temporary solution given the departure of LNC;
- E-mail as Default Mode of Communication with the Court – there are problems with sending out paper in terms of timeliness and changes of address;
- Enhanced Video-conferencing – important to maintain a physical presence in the regions, but in high-capacity offices, like Toronto, it might be possible to increase the use of VC
- Electronic Courtrooms – need to increase capacity, as has been done in Competition Tribunal
- Court and Registry Management System – once in place, this will allow, among other things, electronic access to any court document; it will require at least a few years to implement
- Electronic Access to Court Records and Tools for the Judiciary

On May 8, 2013, the Court issued a *Notice to the Profession on Adjournments*. The Court wants to be more flexible, but last-minute requests result in a waste of judicial resources.

Regarding Books of authorities, the Chief Justice noted that it is important for parties to side-bar the relevant passages for ease of reference.

If the *Federal Courts Act* is opened, amendments may be proposed for consideration. Suggestions from the Bar are welcome.

One way to shorten these meetings and allow for extra time to discuss substantive issues: the CBA members are invited to consider preparation of short written reports between or at meetings.

Mr. Bellissimo noted that receipt of a book of authorities on Friday, *in preparation for a Monday hearing*, is too late. There should be additional time to allow counsel to review the authorities.

Chief Justice Blais noted the challenge of allowing e-filing of books of authorities and capturing all of them on a USB key. Sometimes there are up to a hundred authorities, which may not all fit on a key, and a hyperlink may not always be accessible.

10) Rules Committee Update

Ms. Perrault provided a report for the Rules Committee. There are 5 statutory members from the Bar, and these positions were all vacant, as members had reached the end of their terms. Three new designations were made recently:

- Ms. Chantal Desloges (Toronto) – Immigration
- Mr. Neil Kathol (Calgary) – Intellectual Property
- Mr. Lloyd Duhaime (Vancouver) – Civil Litigation

Justice Hughes has been renewed as Chair until 2015.

There are various sub-committees whose work is on-going:

- Technology sub-committee – a draft will soon be ready for pre-publication
- Enforcement – a discussion paper was published July 17 for comment – on-going work
- Substantive amendments – amendments proposed to both general and immigration rules
- Global review – the sub-committee approved the implementation report, and the working group will be making submissions at the December meeting of the committee

11) Update from the Chief Administrator of the Courts Administration Service

Chantelle Bowers (for Daniel Gosselin) provided a report regarding a review of registry services: DARS, Registry processes, Efficiency of registry delivery.

Both Chief Justices have spoken regarding limitations in technology. CAS is looking for \$10M for infrastructure and \$15M for CRMS. This year, CAS has tagged \$1M for IT performance.

Financial sustainability: at last meeting, the Chief Administrator spoke of efforts to secure funding to ensure program integrity: \$67M over 5 years. Central agencies said that this was too aggressive, and CAS needs to come back with urgent issues. We have come back on IT / security issues, including a request for \$18M on security based on a comprehensive threat and risk assessment (TRA). The TRA was designed to assess the security requirements for the 4 Court and its users and has been shared with the RCMP. The Montreal office lease ends in 2019. CAS is working with Public Works and considering different options.

Mr. Harquail noted that the CBA has a close working relationship with government. It is important for the Bar to highlight the operational issues from the perspective of the Bar.

Ms. Bowers welcomed the Bar's support.

QUESTIONS OF GENERAL INTEREST: / QUESTIONS D'INTÉRÊT GÉNÉRAL :

12) Next Meeting

The CBA and the Courts will agree on a meeting date for 2014.

13) Other / Varia

Mr. Harquail raised the question regarding the scope of issues to be raised by the Bar at this committee.

Chief Justice Blais suggested that we not by-pass the mandate of the Rules Committee. Suggestions can be made to the Offices of the Chief Justice of the 2 Courts for referral.

14) Closing Remarks

Mr. Harquail noted the need to pursue action items between meetings so that they are not moot by the time we get to the meeting.