

Bench & Bar Liaison Committee Meeting

Thursday, May 29, 2014 (Ottawa)

Minutes

In attendance:

Chief Justice Blais, Federal Court of Appeal
Chief Justice Crampton, Federal Court
Justice Sharlow, Federal Court of Appeal
Justice O'Reilly, Federal Court
Justice Shore, Federal Court
Prothonotary Tabib, Federal Court
Daniel Gosselin, Chief Administrator
Chantelle Bowers, Acting Deputy Chief Administrator
Roula Eatrides, General Counsel, Federal Court
Lucille Collard, Counsel, Federal Court of Appeal
Marie-Claire Perrault, Acting General Counsel, Federal Court of Appeal
Alain Le Gal, Registrar, Federal Court of Appeal
Manon Pitre, Registrar, Federal Court
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
David Demirkan, member – Civil litigation representative
Gaylene Schellenberg, staff lawyer, Canadian Bar Association (CBA)
Alain Préfontaine, member – Department of Justice representative

Recording secretaries:

Lucille Collard, Counsel, Federal Court of Appeal
Andrew Baumberg, Counsel, Federal Court

Regrets:

Justice Pelletier, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Dawson, Federal Court of Appeal
Justice Heneghan, Federal Court
Justice Phelan, Federal Court

1) Opening Remarks

Chief Justice Blais welcomed members of the Committee, acknowledging the unfortunate controversy that exists in the wider legal community. He reiterated the important and solid work being done by the Courts. It is necessary to work in a climate of confidence between all those involved in the judicial system.

Chief Justice Crampton agreed with Chief Justice Blais' comments.

2) Opening Remarks

Mr. Harquail noted that the CBA's preparatory meeting provides for an open discussion of current events and assessment of options for review with the Court.

3) Adoption of Agenda

Minor revision to agenda – inclusion of additional specialized CBA section updates (tax section and then varia).

4) Adoption of Minutes (November 6, 2013)

Corrections:

Pg 3. – Mr. Bellissimo’s reference to E-Harmony was not the actual title of the program.

Pg. 4 – Mr. Demirkan noted that there were actually 2 proposals for intervention.

Minutes were adopted, as presented, subject to these 2 changes.

CBA:

5) Update – Specialized Liaison Groups

a) Tax Bar

Mr. Nitikman provided a report for the tax bar, noting upcoming retirements from the Tax Court of Canada and amendments to the *Income Tax Act*, the *Tax Court of Canada Act*, and Court Directions. There are various cases that have gone to case management, with thousands of tax shelter cases waiting to be heard on a single issue – the Court is trying to determine how best to handle this large group of cases. Changes are planned to the threshold for the simplified procedure. The Tax Bar thanked Justice Webb, who appeared on a judges’ panel.

Some substantive points: there is a joint committee of CBA and Chartered Professional Accountants which makes detailed policy submissions on proposed legislation. These materials are available to the Courts.

Finally, there have been a number of recent cases on costs that provide conflicting positions – there is considerable uncertainty regarding the Rules on costs.

Justice Sharlow noted that there is discretion on costs, which leaves the possibility of different outcomes.

Mr. Nitikman added that recent amendments to the Tax Court Rules have actually increased the diverging cost outcomes.

He added a supplemental suggestion: under the Supreme Court of Canada Rules (Rule 45), it is necessary to provide a condensed book. Parties also must provide a 2-page summary of your oral argument. The condensed book is also required in the BC Court of Appeal (via Practice Direction). This might be considered by the federal courts.

Chief Justice Blais noted that this suggestion will be brought to the Rules Committee for consideration.

Justice Sharlow agreed that the proposal would be useful, though possibly as a courtesy rather than a requirement under the Rules.

Mr. Bellissimo noted that this proposal, if established as a formal requirement for all cases, would be challenging for practitioners in the immigration and refugee law domain.

b) Indigenous Bar- Aboriginal Law Bar

Diane Soroka provided an update for the CBA. She noted that the work continues on the Court’s ADR pilot project. There was an opportunity last Fall for the Court to hear from Elders at a seminar on dispute resolution. Her key concern is how to get the message out to potential parties. The Practice Guidelines and Dispute Resolution Notice are on the web site, but are not well known within Aboriginal communities. It is important for members of First Nations communities to be aware of the Court’s dispute resolution resources that would significantly improve access to

justice. There is a need to build on this foundation. The next liaison meeting is June 18, 2014 – Iqaluit (at CBA conference).

Chief Justice Crampton noted that at a very recent in-Court meeting, this was identified as a key issue: how to promote awareness of the Court resources that are available to potential litigants. There was a strong endorsement of the sentiments raised by the Bar. There was also a question as to possible ways to promote reconciliation by facilitating the use of Indigenous legal traditions to resolve disputes.

Justice Shore noted that the Court is very open to the use of Indigenous custom to resolve disputes. This is a Court that belongs to all – there should be an emphasis on “therapeutic jurisprudence.” If there is a willingness on both sides, much can be done.

c) Immigration and Refugee Law

Mario Bellissimo provided an update for the CBA. The majority of the *Immigration and Refugee Protection Act* has been amended since he first joined this Committee, but further changes are still in the works. January 2015 will see the launch of a new project to match potential applicants with potential employers. The Refugee Appeal Division is starting to see its decisions subject to review. An early decision was issued recently by Justice Shore.

A large number of investor class cases are in progress.

Urgents removals will continue, and so there will continue to be many stay applications.

‘Temporary Foreign Worker’ cases will start to arrive in the court, such as applications for judicial review of the government blacklisting of an employer.

The government hopes to pass the *Citizenship Act* amendments before the Summer break.

The Bar continues to promote the fast-track pilot project.

There were over 400 attendees at the recent CBA conference. Next year’s conference is in Ottawa, with almost 500 attendees expected.

The CBA developed a video of a judicial review hearing for presentation at its last conference. It hopes to make this video available to the Court for educational purposes.

There is concern within the CBA regarding the government’s efforts to shield decision-making processes from judicial review – these will likely result in constitutional challenges. The CBA has passed a resolution challenging the government’s proposed use of Ministerial guidelines.

Finally, there is concern regarding the current public debate, raised earlier. The Bar would like to see the Court’s role strengthened.

Chief Justice Crampton noted his concern with the narrative in certain recent articles in the press, in which it was suggested that the Court is a government friendly Court that does not have expertise in Quebec’s Civil Law. He indicated that such perceptions undermines and the public’s confidence in the Courts and, more broadly, the rule of law.

Mr. Harquail noted that CBA members of this Committee have communicated with senior members of the CBA to highlight the misinformation often circulated within the media. For the CLC annual meeting, the criminal law section is putting forward a resolution defending the judicial discretion of the Courts. It would be helpful to use this opportunity to clarify the role of the Federal Courts. The wider public, and Bar, is not aware of the full scope of the Federal Courts’ jurisdiction. He is committed to ensuring that the views expressed in this committee are shared with senior members of the Bar.

Justice Shore noted that the negative messages about the Court affect practitioners as well as members of the Court. He noted the considerable efforts of practitioners in following the *Dunsmuir* trilogy regarding the standard on judicial review. How does the Court communicate to the public regarding the range of outcomes that are available on judicial review?

Susan Beaubien noted that the media tend toward the sensational, and (more and more) in 140 characters. Moreover, the mainstream media are competing with blogs, with less and less of substance. She noted that there was a symposium yesterday at the University of Ottawa, filmed by C-PAC. This type of forum may be the way to get the story out, rather than the main media outlets.

Chief Justice Blais noted that last October, the Federal Court of Appeal sent a correction to the news outlets – it was never published. Recently, there was only one article, issued by Professor Paul Daly, in an administrative law blog, that explained why, in light of the Supreme Court of Canada’s recent teachings on deference in judicial review, it is not surprising that the government tends to win a higher percentage of those cases than the applicants .

Susan Beaubien expressed concern with media interviews or submitting articles to the mainstream media – they often edit the content, which leaves a very different message than intended.

Justice Shore suggested that when practitioners speak with the media, they should describe how the Supreme Court reviews decisions, rather than just a narrow view of the case at first instance.

d) Intellectual Property

Susan Beaubien provided an update for the CBA. She noted an Ontario case of *Moore v. Getahun* (2014 ONSC 237) re expert reports, requiring separation between counsel and experts. This will be raised at the upcoming IP town hall meeting. The IP bar will be looking for guidance from the Court. The IP day is June 12. There is a professional development program, followed by a judges’ dinner, honouring Chief Justice Blais, Justice Snider, and Gary O’Neil (Gowlings).

A second issue was noted re transmission of Orders by fax: it is usually done by e-mail now, but sometimes by fax. A recent example was noted of counsel not having actually received a fax, even though the docket showed a confirmation of receipt.

This is Susan Beaubien’s last meeting, as her term comes to an end.

Paul Harquail noted that this is also Mario Bellissimo’s last meeting, as his term comes to an end this Summer. He acknowledged the very able assistance provided by both to the Committee over the years.

e) Maritime Law

Paul Harquail provided an update for the CBA. The Beijing draft of the proposed convention on the recognition of foreign judicial sales of ships is proceeding. The CMI is meeting mid-June to review the draft and vote at the plenary session.

There has been an interesting selection of maritime cases since the last meeting. It was noted that there is considerable strength on the bench. He was pleased to hear that a Common List of Authorities is under active consideration.

The maritime law section has received approval for a program in St. John’s on *Practice before the Federal Court*. A member of the judiciary will be invited to act as moderator. The purpose of the session is raise awareness of Federal Court practice.

Civil Litigation Section

David Demirkan noted that the civil litigation section is holding an education session at the St. John’s conference on social media and wanted to see whether a Federal Court or Federal Court of Appeal judge with interest in social media might be interested. This is scheduled for Sunday, August 17, but might be re-scheduled if necessary.

Chief Justice Blais noted that a member of the Federal Court of Appeal may be available to speak on this panel – to be confirmed.

David Demirkan added that the topic of the address does not necessarily have to focus on the use of social media in evidence. It might instead look at the Court's use of technology and social media. It could also be an outreach opportunity for the Court.

Chief Justice Crampton responded that the Court could speak to what it is doing with technology in the Courts.

Paul Harquail took the opportunity to congratulate Chief Justice Blais as he nears retirement. A key theme: service to Canada, in the House of Commons with all its demands, and then on appointment to the Federal Court of Canada. There has been a demonstration of service, but more importantly, leadership. On behalf of the CBA: "bon retour"! The Chief Justice will be sought out on Twitter and Facebook.

THE COURTS:

6) Federal Court of Appeal Update

Chief Justice Blais provided a report on behalf of the Federal Court of Appeal. There have been two appointments: Justice Richard Boivin and Justice André Scott, both from the Federal Court. At the same time, Justice Pelletier became supernumerary in February. Justice Sharlow is set to retire later this Fall, and will act as interim Chief Justice in his absence.

On June 4, the Court will hold a full electronic hearing, using the hearing room of the Competition Tribunal. The modernization of the Court takes time, but this is something that the Bar continues to request and which the Courts Administration Service is supporting.

Regarding scheduling, he noted that on a couple of occasions recently, an appeal could not be scheduled quickly because counsel were not available.

Chief Justice Blais provided further comments to follow-up on earlier remarks concerning the public discourse surrounding the Courts. Finally, a summary was provided of conferences at which judges spoke on panels.

7) Federal Court Update

Chief Justice Crampton provided a report on behalf of the Federal Court.

The base complement of the Court has now increased to 32 judges. Three appointments on April 11, 2014:

- Justice René Leblanc - litigator with the Department of Justice Canada in Ottawa
- Justice Martine St.-Louis – an immigration and labour lawyer with McCarthy Tétrault in Montréal
- Justice George Locke – an IP lawyer with Norton Rose Fulbright in Montréal

He then added the following points:

- Supernumerary status of Justice Harrington (April 2014)
- Ongoing vacancy of Justice Snider's position
- Justice O'Keefe to go supernumerary in June

There remains a significant backlog, the result of both vacancies and medical issues.

The Court is pleased with the government's response regarding prothonotaries. However, the Chief Justice noted that the process to establish a pool of qualified candidates has been put on hold. This may be problematic if, as expected, one of the prothonotaries retires soon after the implementation of the government's response. The Court will have difficulty functioning with only 5 prothonotaries – the work of the 6th prothonotary would need to be distributed amongst judges, but they are often on travel status.

The Court's strategic plan was issued recently. Among other priorities is the effort to expedite the issuance of decisions and make more use of oral decisions or short, written endorsements. Historically, the Court has been a writing court. Ultimately, though, it is for the judge to decide how to render a decision. A brief summary of other highlights from the strategic plan was provided.

The Court is actively developing a list of recommended amendments to the *Federal Courts Act* (if an opportunity arises for amendment) that would improve the administration of justice. Any suggestions are welcome.

8) Rules Committee Update

Lucille Collard provided a brief report of the work of 7 sub-committees, with 9 active files. She provided a brief reference to the Rules Committee work regarding condensed books, which is already under active consideration.

Chief Justice Blais noted that the Committee works proactively to advance recommendations for rules changes from the Bar within the framework of the *Federal Courts Act*.

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

Daniel Gosselin noted that the Courts Administration Service continues to seek additional funding under the next budget as well as off-cycle. There are incremental advancements re technology, including a digital audio recording system (DARS) for all hearing rooms. The next priority is to improve electronic filing, where CAS is vulnerable.

Following discussions with Public Works, there is approval to proceed with a new office in St. John's, Newfoundland, that will belong to CAS. It should be open December 2014. CAS continues to work with Public Works regarding a new Montreal office: construction of a new building; purchase of the existing building; renovation of an existing building. This is needed by 2019. Finally, CAS received notice recently of the need to find alternate space in Quebec City within the next 2 years.

QUESTIONS OF GENERAL INTEREST:

10) Next Meeting

The next meeting is scheduled for November 6.