

Bench & Bar Liaison Committee Meeting

April 17, 2015 (Ottawa)

MINUTES

Chief Justice Noël, Federal Court of Appeal
Chief Justice Crampton, Federal Court
Justice Pelletier, Federal Court of Appeal
Justice Dawson, Federal Court of Appeal
Justice Near, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Shore, Federal Court
Justice O'Reilly, Federal Court
Justice Phelan, Federal Court
Daniel Gosselin, Chief Administrator
Chantelle Bowers, General Counsel, Federal Court of Appeal
Roula Eatrides, General Counsel, Federal Court
Sylvia MacKenzie, Federal Court
Lucille Collard, Legal Counsel, Federal Court of Appeal
Alain Le Gal, Registrar, Federal Court of Appeal
Marie Desrosiers, for the Registrar, Federal Court
Paul Harquail, Chair – Maritime Law representative
Angela Furlanetto, member, Intellectual Property 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 Demirhan, member – Civil litigation representative
Gaylene Schellenberg, Staff Liaison, Canadian Bar Association
Alain Préfontaine, member – Department of Justice (Canada) representative
By teleconference: **Michael Crane**, member – Immigration and Refugee Law representative
Regrets: **Justice Heneghan**, Federal Court
Recording secretary: **Andrew Baumberg**, Legal Counsel, Federal Court

1) Opening Remarks

Chief Justice Noël extended a welcome on behalf of the Federal Court of Appeal.

Chief Justice Crampton welcomed participants on behalf of the Federal Court.

2) Opening Remarks

Paul Harquail welcomed participants on behalf of the CBA.

3) Adoption of Agenda

Item 7 c) is removed and replaced with:

- i) Consultation of counsel when scheduling of hearing
- ii) Role of registry in issuing directions to counsel on record

4) Adoption of Minutes (November 6, 2014)

Approved with possible minor amendments after meeting.

5) Follow-up Items from last meeting

There are some items on the agenda that may relate to follow-up issues, but these can be addressed during the meeting.

CBA/ ABC :

6) Update – National Sections

a) Aboriginal Law

Ms. Soroka reported for the Bar, referring to existing Practice Guidelines for Aboriginal Law Proceedings. These are available on the Court website and are being revised to include judicial review applications and alternate dispute resolution. The next meeting of the Committee is planned for June 10th in Membertou, Nov Scotia. An issue that remains is how to make practitioners and self-represented litigants aware of the available procedural options. The Court's engagement on these issues is appreciated.

The CIAJ Aboriginal law conference this year is mid-October in Saskatoon.

Chief Justice Crampton raised the issue of pre-claim procedures and the minimum trigger for the jurisdiction of the Federal Court and the start of mediation.

Andrew Baumberg discussed the 3 options under consideration:

- Pre-claim protocols – adopted in the U.K.
- Pro forma claim – described in the Federal Court Practice Guidelines
- Notice of action – available in the Rules of two provincial jurisdictions

Paul Harquail noted that the Rules in New Brunswick allow for a Notice of Claim.

Maryse Tremblay added that this might have been useful in a recent case where parties were hard pressed to meet the statutory filing deadline, noting that motions are more stringent than necessary in certain cases.

Chief Justice Crampton tied this into the Court's work regarding a Practice Direction on adjournments and extensions and that a similar initiative could be considered to include more informality. The Global Review considering access to justice could be another way to address a potential need for flexibility with the procedures.

b) Immigration Law

Mr. Crane provided a report, noting the revised government process for visas. Some reforms from the *Citizenship Act* amendments have been delayed from May until July 2015. Pre-removal risk assessments were expected to be done by the Refugee Board, but this may not happen after all. He reported that a CBA member suggested more flexibility regarding requests for extensions and adjournments in IMM proceedings. Preferably, it could be done informally. He noted as well that sometimes the Court schedules a case on a provincial holiday, including Family Day.

Chief Justice Crampton noted that the Federal Court had launched a 'blitz' on immigration hearings by adding judges and overbooking in anticipation of some cases reaching a settlement. The Court is reducing the backlog to bring scheduling back to 90 days. There currently is a small backlog still in Calgary and Toronto. He added that the IMM fast track process has not been the success expected. Some modifications were made to make it more attractive but there was no real enthusiasm for it. The pilot project will end.

c) Intellectual Property

Ms. Furlanetto reported for the bar. There is a working document from the IP Users Committee dealing with issues to make IP practice more efficient and streamlined. The Committee will meet on May 28. She noted that a further letter has been prepared by the IP bar reiterating the importance of prothonotaries to IP practice.

Chief Justice Crampton responded that the Federal Court, as an itinerant court, is not able to have judges working on case management in the same way as prothonotaries. It is simply not efficient. The Chief Justice has written the Minister on this point. He noted that the Court has also struck a case management working group to develop recommendations, which will likely be rolled out in phases.

d) Taxation Law

Mr. Nitikman reported for the Bar. The *Foreign Account Tax Compliance Act* (FATCA) rule has been implemented by legislation, which may be challenged. There have been some changes within the leadership of the tax sections of the CBA. Thanks were extended to members of the Courts on the judges' panel at a recent Tax Conference.

e) Maritime Law

Mr. Harquail provided a report for the bar. The upcoming Canadian Maritime Law Association (CMLA) meeting is in Montreal from June 18 to 20. The recent Grunt Club dinner also took place in Montreal, with Justice Strickland representing the Court. One concern raised by the Bar related to inconsistency in the naming of the ships / parties in the recorded entries on the Court web site. Sometimes part of a vessel's name is abridged, potentially causing difficulty for lawyers conducting their due diligence.

Action: for follow-up by Courts' registry.

f) Civil Litigation

Mr. Demirkan provided a report for the bar. The CBA litigation section is asked evaluate the interventions of the CBA. A working group is conducting a policy review. The Section is proposing to conduct a liaison with the Canadian Judges' Forum. (If someone is speaking with Justice Goodrich, it would be appreciated to provide an indication of the value of liaison with the bar.) There was a recent CBA resolution regarding the naming of courthouses, with a recommendation not to name courthouses after a living person (CBA Resolution 15-03-M).

He then asked a question from the section: *Are trial wait times the same across the country? If not, why not.*

Chief Justice Crampton responded that in principle, they are the same. At present, the Court has availability in early 2016 for short to medium trials. If less than 5 days, dates are available in the Fall of 2015. Concerning workload, the Chief Justice noted that current national security bills will likely have an impact, but at present do not provide for increased judicial complement.

g) Labour Law

Ms. Tremblay reported for the Bar, indicating that the annual conference will be held jointly with the administrative law section at the end of November. Justice Strickland was invited to provide a view from the bench and Justice Wagner will be there for a special session. There is a new Chair at the Canada Industrial Relations Board: Ginette Brazeau has a term ending December 27, 2019.

7) Other proposed items

a) Calculation of Deadlines and Acceptance for Filing

Mr. Nitikman raised an observation: if a deadline is a Saturday, and an extension is requested, allowing for half the allotment, do you include the Sunday? It was suggested that a Notice to the Profession be issued to clarify whether one starts counting on Sunday or Monday.

Justice Stratas noted that the Rules Committee has a 'laundry list' of issues for possible amendments to the Rules.

Mr. Demirkan added a further point: the perception is that the court is particularly strict on formality. Different offices seem to treat similar issues differently. A slightly more lenient approach is recommended, particularly if there is ambiguity in the rules and close timing for compliance.

Justice Stratas discussed the policy surrounding such an approach: where do you do enforcement? If there is discretion given to the Registry at the counter, there may be inconsistent results as well. It may be preferable for counsel not to put themselves in a situation where they are non-compliant.

Justice Pelletier noted that counsel can always ask that a matter be referred to the Court for direction. When there is good-faith and an effort to be in compliance, the Courts are usually quite flexible. However, some counsel tend to play close to the line.

Justice Shore added that for stay hearings, where the party sometimes has at least some notice, a stay application should be filed as soon as possible. A recent example was given of an application filed at 5 pm for a scheduled 6 pm deportation, even though the party had 2 weeks' notice of the deportation. Finally, for complex pleadings, parties should request more than the 2 hours for a general sittings motion.

b) E-Filing and Service

An issue was raised by **Mr. Harquail** regarding the possibility of e-service for *personal* service.

Action: For consideration by Rules Committee.

Chief Justice Noel noted that the Rules amendments re modernization were meant to enable new processes, but were still dependant on necessary Court infrastructure, which is still not available.

c) Setting out Basis for Consent to Judicial Review applications

Mr. Harquail raised the issue.

Justice Dawson noted that this is governed by the jurisprudence.

Justice Shore recommended that parties ask the Court for assistance with mediation if there is a possibility of a consent resolution.

d) Consultation of counsel when scheduling of hearing

It would appear that sometimes counsel are not consulted for the scheduling of hearings.

Action: Chief Justice Crampton will bring the issue to the attention of the Judicial Administrator.

e) Role of registry in issuing directions to counsel on record

A question was raised regarding the role of the registry in issuing communications to counsel of record. **Mr. Harquail** gave an example of a registry officer circulating new caselaw. This is not standard registry practice.

Justice Dawson noted that she sometimes directs that recent jurisprudence be provided to counsel so that they may comment.

Finally, **Mr. Harquail** noted that David Demirkan and Joel Nitikman are at the end of their mandates, but have indicated that they plan to put their names forward again within their sections on this committee.

THE COURTS / LES COURS :

8) Federal Court of Appeal Update

Chief Justice Noël provided an update for the Court. When he arrived as Chief Justice, the Court was short 3 judges, with two appointments in the interim: Justice Ryer and Justice Rennie, replacing Justice Sharlow who retired and Justice Pelletier who elected supernumerary status. This has been challenging for such a small Court – a full complement at present is 10 judges plus a Chief Justice, though by statute it is 12 plus the Chief Justice. He is trying to increase the complement, in part due to the increasing complexity of cases coming before the Court. Evidence of increased complexity is the frequency of giving judgment from the bench – down 70% – and the increased length of decisions.

9) Federal Court Update

Chief Justice Crampton provided an update, noting the following recent appointments:

- Justice Fothergill
- Chief Justice Bell
- Justice Gascon

The Court is moving forward on its strategic plan:

- creation of a case management working group to make recommendations;
- new emphasis on shorter decisions, including oral judgments, as part of a culture shift within the Court;
- Rules Committee is active – update by Ms. Bowers later in agenda;
- tables of concordance for Rules;
- mediation list in Aboriginal law;
- ‘trial-ready’ list for parties ready to schedule on short notice if another trial settles;
- additional liaison with law schools to promote awareness of Federal Courts, including hearings at law schools across the country;
- additional information and resources on Court web sites;
- digital recording in hearings rooms across the country;
- e-hearings, starting with a major Aboriginal law trial in Toronto.

Mr. Harquail asked that the bar be advised of upcoming law faculty hearings so that local members of the bar could promote the activity.

10) Protocol for participation of judges at conferences without having to register

Mr. Baumberg provided an overview of the issue.

Mr. Harquail noted that he has raised this within the CBA. In his view, the bar should have a welcome mat out for judges to attend CLE events. The issue is moving forward within the CBA – in progress.

Chief Justice Crampton noted that under the *Judges Act*, only \$500 is allocated per judge per year for general attendance at conference.

11) Service of court documents by electronic document exchange on consent

Mr. Nitikman noted that the more ways to serve documents, the better

Ms. Tremblay added that there needs to be some guarantee of reliability.

Ms. Soroka added that this is used in residential schools adjudication, and has been found to be very useful.

12) Rules Committee Update

Ms. Bowers provided an update on the active sub-committees:

- Modernization amendments complete on *Federal Courts Rules*
- Citizenship
- Substantive amendments – expected to go to pre-publication soon
- Miscellaneous
- Enforcement
- Limited scope representation – a draft to be provided at next plenary meeting
- Global Review Implementation – moving ahead
- Costs – newest sub-committee, taking on a key part of the Global Review Report

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

Mr. Gosselin provided an update for CAS :

- Newfoundland office to open in May.
- Montreal – the Saulnier Bldg. is not an option anymore; 360 McGill is a new option; 30 McGill is back on the list.
- Quebec City – still waiting to hear whether relocation is required.
- Toronto – a major construction project nearby is impacting Court operations.

QUESTIONS OF GENERAL INTEREST :

14) Next Meeting

November 6, 2015 proposed and agreed.

15) Other

Chief Justice Noël thanked Chantelle Bowers, whose last day working with CAS is today, for all her work over the years.

16) Closing Remarks