Bench & Bar Liaison Committee Meeting

June 22, 2018 (Ottawa, Ontario)

Attendance

Justice Kane, Federal Court
Justice Heneghan, Federal Court
Justice Diner, Federal Court (by teleconference)
Justice Lafrenière, Federal Court
Chantal Carbonneau, Deputy Chief Administrator, Courts Administration Service (CAS)
Lise Lafrenière Henrie, Executive Director and General Counsel, Federal Court
Judy Charles, Director, Federal Court Registry
Andrew Baumberg, Legal Counsel, Federal Court (Recording secretary)
Paul Harquail, CBA Chair and Maritime Law representative
David Demirkan, Civil litigation representative
Erin Roth, Immigration and Refugee Law representative,
Josh Jantzi, Environmental, Energy and Resources Law representative
Angela Furlanetto, Intellectual Property representative
Marc-André O'Rourke, Staff Liaison, Canadian Bar Association
Catherine A. Lawrence, Department of Justice (Canada) representative
Regrets: Chief Justice Crampton, Justice Phelan, Justice O'Reilly, Justice Shore, Prothonotary Aalto, Diane Soroka, Edwin Kroft, Q.C.

Additional Attendance for Common Agenda Items (joint working lunch)

Chief Justice Marc Noël, Federal Court of Appeal
Justice Dawson, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Amélie Lavictoire, Executive Director and General Counsel, Federal Court of Appeal
Alain Le Gal, Registrar, Federal Court of Appeal
David Taylor, Aboriginal Law representative
Adam Aptowitzer, Charities and Not for Profit Law Section representative

Meeting of Federal Court with CBA

1. Opening Remarks

Justice Kane expressed appreciation for the CBA's submissions on Bill C-58 to the Senate and House of Commons, as well as support regarding funding for the courts. The recent funding will provide needed support to improve Court services to litigants.

Paul Harquail acknowledged the work of Marc-André O'Rourke on these files.

2. Adoption of Agenda & Minutes

Agenda and minutes approved.

3. Follow-up Items from last meeting

a) Informal Settlement Process

Paul Harquail reported that in some jurisdictions, there is a procedure to trigger the court's jurisdiction very quickly to allow parties immediately to engage in mediation with judicial dispute resolution assistance. He referred to pilot projects in Texas, for example, though he is still trying to confirm details about how the court's jurisdiction is triggered in those pilots.

Justice Heneghan questioned why litigants cannot simply speak with each other without the court's involvement.

Justice Lafrenière noted that the Aboriginal Law Bar Liaison Committee has discussed this issue, and in particular regarding a possible Notice of Intent that might be filed to trigger the Court's jurisdiction.

Justice Kane asked why a bare proceeding is not started and then discontinued.

Paul Harquail noted that some issues can arise, and become expensive, very quickly.

Justice Lafrenière suggested consultation between the Maritime Bar and Aboriginal law bar. However, there is no jurisdiction until *something* is filed.

David Demirkan noted a similar issue related to a motion for injunction, which required a Notice of Application or Statement of Claim. Preparation of these documents may be secondary to the urgent dispute at hand. The framework needs to be fixed to avoid this.

Justice Lafrenière replied that a simple letter is sometimes sufficient – there is flexibility in the Rules.

David Demirkan added that the difficulty is that this is not clear from the Rules, and may depend on Registry or judicial practice that vary from region to region. A Practice Direction or Rule change might clarify this.

> **Action:** Justice Lafrenière will raise this within the case management working group, or with such other court committee the Chief Justice deems appropriate.

Regarding a question as to how a statutory court could have jurisdiction triggered by a simple letter, Justice Lafrenière responded that in intellectual property practice, for example, some items are front-loaded, with a bare letter triggering a file being opened.

Josh Jantzi referred to examples from Alberta where the court has jurisdiction for ex parte relief in exceptional cases without an underlying action being filed.

> **Action:** Josh Jantzi to share with the Committee examples of jurisdiction for ex parte relief without an underlying action.

David Demirkan noted that the preferred practice seems to be more common with large firms, which rely on practice precedents that are not visible for small firm practitioners.

Josh Jantzi asked whether the jurisdiction could be triggered by a request for extension of time, even if the deadline has not yet passed, but then requesting interlocutory relief based on this file.

Justice Lafrenière suggested that although this might ultimately be acceptable to a judge on duty, it is preferable to develop a more formal and transparent framework. He added that for Aboriginal law, there is a triage process for all cases. He referred to the Aboriginal Litigation Practice Guidelines which include a framework for pro forma triggering of the court's jurisdiction.

> **Action:** Andrew Baumberg to circulate Guidelines to Committee.

b) Decisions not on Court's website & Public access to a Court decision before confirmation of receipt by counsel: Notice (Publication of Court Decisions)

Lise Lafrenière Henrie referred to the Notice circulated in the materials. Interlocutory decisions with reasons an decisions on a motion for stay of removal are now sent to CANLII.

Justice Kane reiterated the Court's goal to secure sufficient translation resources for posting more decisions on its own website.

Justice Lafrenière noted the challenge historically to get funding to translate all court decisions, with the majority of interlocutory decisions by prothonotaries not being available.

David Demirkan applauded the work of the Court on this initiative. This is a practical approach that will be very useful to the bar.

Justice Heneghan noted that in many practice areas, most of the decisions are not precedential.

Justice Kane added that even if not precedential, public access evens the playing field between large firms (including the Department of Justice) and small or single practitioners, who have limited access. She also referred to the new timing framework for posting, based on the Federal Court of Appeal approach: 48 hrs. for files with counsel and 10 days otherwise.

c) Scheduling Practice

Erin Roth referred to a letter submitted to the Committee with statistics regarding Immigration Appeal Division time-lines. The IAD schedules 120 days ahead of the hearing, whereas the Federal Court

schedules less than 90 days ahead, leading to more conflicts, with neither institution agreeing to postpone their hearing. The Bar's preference is to include IAD hearings as a limited exception in the Notice.

Justice Diner suggested that this be raised with the Court's scheduling office, with follow-up within the IMM Liaison Committee separately.

Action: review of CBA letter (IAD scheduling) by Justice Diner with Court scheduling office.

David Demirkan expressed concern with a scheduling framework that does not provide reasonable flexibility. It is really not feasible constantly to be sending availability updates every time a lawyer's schedule changes.

Justice Kane responded that the Court must balance numerous scheduling issues, and considers counsel's indication of availability, and counsel can provide updates if his or her schedule changes. Although the electronic scheduling system is an ideal solution, it will take some time to develop.

David Demirkan noted that the underlying issue that first arose under this agenda item related to large firms being expected to find alternate counsel.

Catherine Lawrence replied that this was an issue in the past, but to her knowledge has not been a problem in the last year.

Josh Jantzi added that the complaints that he has heard are from smaller firms, where a matter is set down before the Court, but then a related proceeding is set down before the National Energy Board in a proceeding with dozens of parties, with absolutely no flexibility.

Justice Lafrenière referred to the Practice Notice.

d) *Federal Court Rules* Regarding Expert Witness Reports

Paul Harquail reviewed the scenario in the letter circulated to the Committee:

> A plaintiff filed a request for a pre-trial conference [PTC] pursuant to Rule 258 ('Form 258') accompanied by its pre-trial conference memorandum, which included its expert evidence in chief pursuant to Rule 258(4).
>
> The defendant then filed its pre-trial conference memorandum thirty days later pursuant to Rule 262(1), which included its expert evidence in chief. At that time, the defendant had no objection to the plaintiff's expert and therefore made no reference to Rule 262(2).
>
> At the pre-trial conference, the presiding Prothonotary reviewed the items listed in Rule 263, and in particular, under rule 263(c)(iii).
>
> At that time, the plaintiff did not seek to rebut the defendant's expert evidence but the defendant asked to rebut the plaintiff's expert evidence pursuant to Rule 263(c)(iii). This request was refused.
>
> The Prothonotary advised defence counsel that Rule 258(4) refers to all affidavits or statements of expert witnesses. It was the Prothonotary's view that the defence counsel and its expert witness ought to have been able, in the thirty days allotted for the reply to the plaintiff's requisition for pre-trial, to complete, not only its own expert evidence in chief but, to also have its expert rebut the plaintiff's expert evidence in chief in a separate affidavit.
>
> The Prothonotary's assessment was that to allow the defence to have an extra thirty days to consider the plaintiff's expert evidence in chief with its expert, and perhaps tweak its evidence in chief, would provide the defendant with an advantage over the plaintiff. At this juncture, the time for filing a motion to address an extension, etc. had passed but was nevertheless filed. Eventually, the matter was resolved without a hearing of the motion.

According to counsel who raised the issue, the idea that a plaintiff can ask for time to rebut evidence at the PTC but the defendant cannot is unfair to the defendant. The rules are unclear and should be amended. For further context, counsel advised that to have an expert complete a report within thirty days is usually unworkable. Either party can file a pre-trial requisition but when the plaintiff has carriage of the action and then triggers the process once all of its materials are ready, it often does so without even asking the defendant if it is ready. Therefore, the thirty days to complete the memorandum and to get the defendant's expert evidence in chief finalized, and in addition rebuttal evidence, is a daunting task given factors such as the availability of the expert and competing commitments. The result is that only the responding party is required to do both within a thirty day period. Suggested amendments:

- Amendment of Rule 263(c)(iii) to read "the need of each party for any additional rebuttal expert witness evidence;" and/or;
- Amendment of Rule 258(4) to read "…all affidavits or statements in chief of expert witnesses."

In this instance, a senior litigator/member of the CBA is seeking clarity with respect to his obligations under the above noted rules. In following up on this issue, it appears that in courts which have concurrent jurisdiction, the practice is much more flexible and has more predictable application in that parties tend to be obligated to file their experts' evidence in chief by Motions Day (i.e. the event triggering pre-trial and trial dates), and thereafter they would have flexibility including up until the settlement conference date, or eve of trial, to provide rebuttal evidence on reasonable notice and without leave of the Court.

Justice Lafrenière responded that PTC's are, in large part, being replaced by case management which addresses pre-trial issues. He has overseen many PTC's where the evidence had not been served, and he allowed them to be filed later, given that the trial was still a long way off. Ultimately, he is surprised by the example raised.

Angela Furlanetto noted that IP practitioners regularly reach an agreement on exchange of expert witness reports.

Justice Heneghan suggested that a lot can be done if parties are speaking with each other or if there is case management.

David Demirkan agreed, but not all files are case managed, and there is sometimes disagreement between counsel.

Justice Lafrenière reiterated that even outside formal case management, there is a lot of case management.

David Demirkan responded that for regular practitioners, there may be a perception that the Court is flexible, but not for practitioners who appear less often in the Court.

Justice Heneghan noted that the Federal Courts Rules are very user friendly.

Justice Lafrenière added that with most prothonotary decisions now being published on CANLII, there may be more transparency regarding interpretation of the rules and practice.

David Demirkan suggested that the perception is that other courts have more of a hand's off approach, whereas the Federal Court pushes files according to more strict schedules.

Justice Kane noted that parties can ask that a file be put into abeyance with annual status reviews.

e) Consent judgment template

Justice Kane noted that this will likely be posted in September.

There was some discussion regarding the need to provide sufficient information about the reasons for granting the request.

Catherine Lawrence asked whether the template was only for IMM cases.

Justice Kane indicated that a more general template would likely be available.

Action: Court to finalize the consent judgment template for publication.

f) Registry Screening of Documents

Justice Kane noted that this proposal came from the Federal Court of Australia approach, whose registry does not screen incoming documents filed by lawyers.

Lise Lafrenière Henrie added that new counsel in the office will provide support to pursue this initiative.

4. Update: Federal Court

a) Confidentiality Motions

Lise Lafrenière Henrie noted that the Court has struck a working group to consider current practice issues under Rule 151; although initially focused on IP practice (especially protective orders), there are other issues that affect other practice areas. Given that there are ongoing appeals related to the issue of protective orders, discussion on this issue has been delayed.

Justice Lafrenière added that the goal of the initiative is to ensure certainty for litigants seeking confidentiality orders. There are, however, different issues and approaches across practice areas.

b) Judicial appointments

Justice Kane summarized recent appointments:

- Prothonotary Alexandra Steele – effective May 15, 2018
    - Prothonotary Morneau retired from the Montreal office) 95/11/28 - 18/05/15
- Justice Elizabeth Walker and Justice John Norris, February 26, 2018
- Prothonotary Kathleen Marie Ring, December 19, 2017
- Justice Paul Favel, November 29, 2017
- Justice Sébastien Grammond, November 9, 2017

c) Associate Chief Justice position

This position is included in the *Budget Implementation Act, 2018, No. 1*, which amends the *Judges Act* to authorize the salaries for one judge and a new Associate Chief Justice position for the Federal Court.

d) Pilot projects for immigration proceedings: settlement & e-process

Justice Diner described the two pilot projects to be launched this Fall in Toronto:

- E-process pilot – for selected cases, parties and the judge will proceed with an electronic record.
- Settlement pilot – to reduce late drop-off of cases (i.e., settlement shortly before the hearing), a number of mechanisms have been proposed to ensure early access to the CTR and then review.

A Practice Direction is also being finalized for proceedings under *IRPA* or the *Citizenship Act* to clarify court practice and procedural flexibility.

e) Court web site re-design

Lise Lafrenière Henrie noted that a recently hired lawyer has been working on this initiative, with a target launch by end of fiscal year (April 1, 2019). Suggestions are welcome for useful content.

Paul Harquail offered the CBA's support.

f) Access to documents on the Court web site – <u>Model Policy for Access to Court Records in Canada</u> (Canadian Judicial Council, 2005)

Lise Lafrenière Henrie referred to the model policy of the CJC, though it does not recommend publication of all records online. Some tribunals do provide such materials online, including the Supreme Court and the Competition Tribunal. For now, this is under discussion within the Court.

Angela Furlanetto encouraged the Court to publish at least the pleadings online – this would be very helpful. However, evidence would raise confidentiality issues.

David Demirkan suggested that the approach might vary across different practice areas.

Justice Kane indicated that a consistent approach would be needed.

Josh Jantzi added that for the energy sector, they would like to see all public documents available online.

g) Varia

Lise Lafrenière Henrie noted that the FC and FCA are planning for the 50th anniversary of the Federal Court of Canada (created in 1971), with an event and book anticipated.

She added that funding for 3 prothonotary positions was also included in the federal budget, with 2 appointments possible by late in the year.

5. CBA National Sections & New Points

a) Costs (draft bill of costs, lump sum)

Angela Furlanetto raised this item, which came up within the IP bar. Although the tariff is being revised, pending its implementation there remain issues with current practice, which is inconsistent. Lump sums are awarded but not always consistent in terms of what is covered.

Justice Kane referred to the existing practice direction – does the bar prefer to continue following this, or do they prefer to wait until after the decision is rendered before making submissions on a bill of costs?

Angela Furlanetto indicated that more flexibility is preferred. However, a standard procedure for follow-up costs submissions is recommended. Sometimes submissions are limited to 5 pages, sometimes 10, etc.

Josh Jantzi added that in the energy sector, litigants sometimes seek increased indemnity, but would need more evidence (such as to demonstrate litigation misconduct). This can not easily be marshalled at the same time as the hearing.

Justice Kane asked for feedback from the bar regarding specific practice areas / scenarios, or processes, by which exceptions would be made to the practice direction.

David Demirkan suggested that arguing costs at the hearing should be the exception, rather than the norm. Costs issues might be linked to the conduct of the hearing itself. Also, to prepare for costs at the hearing may be a lot of time that is not necessary – only one side is awarded costs.

Justice Kane noted that there are many straightforward judicial review proceedings for which costs are usually requested and simple to address, whereas it might be extra work to come back to make submissions.

David Demirkan suggested three basic categories for judicial review proceedings: standard, enhanced, and then exceptional cases.

Angela Furlanetto offered assistance from the IP bar in the drafting process.

Paul Harquail added that the CBA will follow-up on efforts to ensure that the Rules Committee appointments be finalized in a timely manner.

b) Summary procedure for clearly abusive proceedings

Catherine Lawrence referred to rules in other jurisdiction to address this.

Ontario Rule 2.1 and Quebec Rule 51 allow the court, on its own motion, to deal with a proceeding that is clearly vexatious on its face. If triggered, the party then is given an opportunity to address the issue or risk being dismissed.

Lise Lafrenière Henrie referred to the Rules global review sub-committee report addresses this issue.

Justice Kane added that the Rules Committee's work has been hindered by the delayed ministerial designation of members of the private bar.

c) E-trials

Angela Furlanetto expressed the Bar's support for the Court's e-trial pilots.

Lise Lafrenière Henrie responded that the Court has e-court infrastructure in Toronto and Quebec, and will be installing equipment in other major cities across the country. Requests can be raised in case management.

Justice Lafrenière added that not all case management judges are familiar with technology issues.

Lise Lafrenière Henrie noted that even if parties proceed with an e-trial, the presiding judge is not bound to use the electronic system. In a recent example, the parties presented their evidence electronically but the judge used a paper-based system for note-taking.

d) CBA Resolution 18-03-A: Class Action Judicial Protocols 2018

Josh Jantzi indicated that this is a recommended code of best practices that would dove-tail with the Federal Court Rules and would enhance transparency and public access. If there are any concerns within the Court, please let the CBA know.

Justice Kane noted that Court will review the Resolution and Revised Protocol and provide an update at the next meeting.

Action: the Court is to review the CBA's Class Action Judicial Protocols 2018.

e) Update from practice areas

i) Immigration Law

Erin Roth- no additional update.

ii) Environmental, Energy and Resources Law

Josh Jantzi noted the Bar's appreciation of case management practice in the Federal Court.

iii) Maritime Law

Paul Harquail expressed thanks to Justice Southcott for assistance with the Fall CLE, and the Court's ongoing support in this regard.

iv) Civil Litigation

David Demirkan noted that the SCC will be revisiting the standard of review.

He noted the passing of Wylie Spicer and Joseph Schuck.

v) Intellectual Property

Angela Furlanetto expressed appreciation of the bar for the IP forum. Regarding the new patent regime, the bar noted the front-end focus – this might need some adjustment. Also, use and timing of claim charts needs to be clarified.

vi) Aboriginal law

Justice Lafrenière referred to the Committee's efforts to make space for Aboriginal law to be used before the Court. A sub-committee was struck to explore options for reliance on Indigenous experts using the assessor rule.

Andrew Baumberg also referred to the new sub-committee on scope and cost of litigation. This may have relevance for other practice areas.

Working Lunch

Meeting of Federal Court of Appeal & Federal Court with CBA

1) Update from the Deputy Chief Administrator of the Courts Administration Service

Chantal Carbonneau reported that the Courts Administration Services received Program Integrity funding, which will primarily support judicial and registry services and will better enable the federal courts to address their caseload ($41.9 million over five years, and $9.3 million per year ongoing). However two items were not addressed: 1) CRMS and 2) Translation. Requests for funding for these two priority items will be forthcoming and some work is being done in-house in order to identify the requirements for a new CRMS.

An update was provided on the location of courtrooms that are (or soon will be) set up for e-trials: installation completed in Toronto in room 5C, and planned for Ottawa, including the 10th floor courtroom of the Federal Court of Appeal, a trial hearing room in the Supreme Court building, Toronto, Montreal, Québec and Vancouver.

CAS opened a new office in Hamilton, but it is a temporary location, and currently only for the Tax Court. CAS is looking at having additional floors in the Toronto office. For Montreal, the lease at the current location has been extended to 2022. Options for a new location include either a new building or renovating the Saulnier building.

2) Follow-up Items from last meeting

a) Rule 481(2)(e) - Arrest of Sister Ships

No further action required.

b) Safeguarding Judicial Independence & Bill C-58

The CBA provided their submission on C-58 to the Senate and then sent it to the two Chief Justices. This submission follows up on what the CBA had undertaken to do at the last meeting. They also mentioned speaking to individual Senators and staff to explain the situation and indicated that the CBA would be seeking to testify before the Senate committee. The Courts thanked the CBA for their support. Chief Justice Noël asked that the thanks of the courts be conveyed to the President of the CBA and indicated that example of the CBA's collaboration illustrates the usefulness of this Committee and of exchanges between the Bench and Bar. Chief Justice Noël also thanked Marc-André O'Rourke for his work on this file.

3) CBA Items

a) Security Screening

The Immigration Section mentioned that they didn't have an issue at first with the March 2017 Notice. However, since then there have been issues with screening. In Toronto, counsel have to be screened multiple times (before robing, after robing to go to court, during breaks, etc.) because of the layout. In Montreal, an older lawyer with a metal implant was subject to more intense screening; another lawyer had to open his pants to show his suspender clips. These situations can be embarrassing for counsel, particularly when such screening occurs in front of their client. The CBA asked if it is possible to have: a pre-approval process so that counsel can have easier access; the provision of an ID badge once screened so that further screening is not required; a separate entry for counsel; a special screening location for counsel; less rigid screening for counsel, etc. Paul Harquail mentioned that in New Brunswick, there's a separate line for officers of the court with a different level of security. Associate Chief Justice Kane indicated that because CAS shares commercial office space, there is a greater need to control access of the public than in some other courthouses. Chantal Carbonneau mentioned that CAS will follow up on the specific incidents relayed by the CBA and will consider how it can improve the screening process to address these concerns in light of the layout of the various offices and the need to ensure the safety of the members of the Court.

4) Joint Items for Federal Court of Appeal & Federal Court

a) Professional Development of Judges and Prothonotaries – Canadian Judicial Council Policy

The CJC has issued new guidelines for the continuing education of new and current judges. Justice Kane reported that the new CJC resolution addresses substantive content and social context awareness training for judges. More information will be available on the CJC website. Under the new guidelines, judges are expected (not mandatory) to attend 10 days of judicial education every year.

5) Rules Committee Update

a) Working group examining the feasibility of a bijuralism pilot project

Chief Justice Noël mentioned that the Federal Court of Appeal and the Federal Court have been building stronger ties with the Québec bar and are looking at making the Court more accessible to them. The Rules Committee has formed a working group to look at the feasibility of a pilot project allowing the filing of documents in accordance with some of the Quebec rules of civil procedure. The goal of this proposed pilot project is to make the federal courts more familiar to Quebec lawyers. The working group members are: Justice Boivin, Justice Goulet (Québec Superior Court), Prothonotary Tabib, Eric Hardy (Norton Rose Fulbright - Québec), Claude Joyal (Department of Justice – Montréal), Amélie Lavictoire, Andrew Baumberg, Professor Denis Ferland. A first meeting is scheduled for the Fall of 2018.

Regarding the constitution of the Rules Committee, the CBA mentioned that they will add the designation of members of the private bar (to fill the 3 vacant positions on the Committee) as an action item.

6) Next Meeting

Not discussed.