

# **Bench & Bar Liaison Committee Meeting**

Friday, May 5, 2017

## **MINUTES**

### **Attendance**

Chief Justice Crampton, Federal Court

Justice Mactavish, Federal Court

Justice Elliott, Federal Court

Prothonotary Tabib, Federal Court

Prothonotary Aalto, Federal Court (by teleconference)

Daniel Gosselin, Chief Administrator, Courts Administration Service (CAS)

Shane Brunas, Director General, Information Technology & Information Management (CAS)

Lise Lafrenière Henrie, Executive Director and General Counsel, Federal Court

Manon Pitre, Registrar, Federal Court

Paul Harquail, CBA Chair and Maritime Law representative

Angela Furlanetto, Intellectual Property Law representative

Diane Soroka, Aboriginal Law representative

David Demirkan, Civil litigation representative

Michael Crane, Immigration and Refugee Law representative,

Edwin Kroft, Q.C., Income Tax Law representative

Gaylene Schellenberg, Staff Liaison, Canadian Bar Association

Alain Préfontaine, Department of Justice (Canada) representative

Recording secretary: Andrew Baumberg, Legal Counsel, Federal Court

**Regrets:** Justice Heneghan, Justice Shore, Justice O'Reilly, Justice Phelan, Maryse Tremblay, Labour, employment, human rights & privacy law representative.

### **Additional Attendance for Common Agenda Items (from item No. 6 through to end of joint working lunch)**

Chief Justice Marc Noël, Federal Court of Appeal

Justice Dawson, Federal Court of Appeal

Justice Stratas, Federal Court of Appeal

Chantal Carbonneau, Executive Director and General Counsel, Federal Court of Appeal

Amélie Lavictoire, Executive Legal Counsel and Director, Law Clerk Program, Federal Court of Appeal

Alain Le Gal, Registrar, Federal Court of Appeal

Adam Aptowitz, Charities and Not for Profit Law Section representative

### **1) Opening Remarks**

The Chief Justice welcomed members of the Bar. Paul Harquail acknowledged the number of substantive responses by the Court in the materials circulated for the meeting.

### **2) Adoption of Agenda & Minutes**

Move item 5 (Court Update) before item 4 (CBA Section Updates), and item 5b (Modernization) before item 3 (Follow-up items). Comments on the minutes can be sent to A. Baumberg.

### **5) Update: Federal Court (this item was addressed out of order in the agenda)**

#### **a) Court modernization**

The Chief Justice noted that the Courts did not receive funding for the CRMS project – it will be necessary to explore creative alternatives.

Daniel Gosselin added that CAS is actively exploring alternatives, including discussions with the Cyberjustice Laboratory in Montreal, exploration of a possible user-fee model, or third-party investment.

i) **Expansion of e-trial pilot**

The Chief Justice noted that the Courts have received funding for installation of e-court equipment in a number of courtrooms later this Fall. The Court is looking for volunteers to proceed with trials electronically, which should provide substantial savings in trial time. He added that the project dove-tails into the e-filing project, though there is a need to find ways to facilitate e-filing without simply shifting the print burden to the registry. Many judges work electronically, but some still work with paper. The thin file project, to be discussed later, is one way to reduce the amount of paper.

Daniel Gosselin added that CAS has recent experience with two e-trials, for which all the costs were assumed by the parties. If one of the parties is the Attorney General, they have a mobile courtroom that may be available for the trial.

Andrew Baumberg noted that the *Southwind* trial was originally scheduled for approximately 100 days, a trial estimate based on a conventional paper trial process, but shortly before the trial, it was switched to an electronic trial, which required close to 50 days.

Diane Soroka asked about how the *Alderville* trial documents were stored – were they searchable?

Shane Brunas responded that they were scanned in PDF, but many documents had handwritten notes (e.g., old maps) that were not machine readable.

Paul Harquail noted the words “creative alternatives” that he heard the Chief Justice say was the way forward. This puts the onus on the bar to explore options with their clients. He asked for clarification as to whether there was a net loss of resources for CAS as a result of the federal budget.

The Chief Justice responded that CAS must absorb salary increases. Although the Courts received \$2M for translation (over two years), this has been partially offset by the salary increases and is in any event only a drop in the bucket compared with the ongoing translation requirements.

Daniel Gosselin added that the cost-containment measures related to salary increases alone represent a \$3M loss this fiscal year, \$1 M ongoing. All the various cost-containment measures together represent a total of \$7M annual loss. If we don't change the service delivery model, the Courts' ability to hold hearings will be undermined.

ii) **Records retention**

Justice Elliott noted that file retention is expensive. Furthermore, the Courts' archive facility is old and in need of repairs, itself creating a risk for the Court records. She added that feedback from the bar recommended retention of documents even in discontinued / settled files, which are sometimes relied on by counsel in other cases. However, there was one category that the Bar seemed to open to have included in the schedule for destruction, namely IMM files that did not pass the leave stage.

Michael Crane noted that there are a number of settled IMM cases even *before* leave is granted. It was his understanding that it was the *unperfected* IMM cases that were not included.

The Chief Justice asked for a reasonable temporal cut-off for file retention, adding that in most cases, lawyers should also still have a copy.

**Action:** the Bar to come back by end of June 2017 with concrete proposals. Paul Harquail to discuss the project with Justice Elliott.

Justice Elliott noted that a shift to e-filing is really the solution, though adding that most courts have some form of retention schedule.

Diane Soroka said that in Quebec they ask parties to pick up their exhibits right away after the trial.

David Demirkan suggested a triage of files to throw out things like books of authorities.

Manon Pitre indicated that these are already screened and thrown out.

The Chief Justice proposed reducing the number of paper copies required if electronic copies are provided, as an incentive to volunteer for the electronic courtroom pilot project.

David Demirkan suggested a list of styles of causes with notice that they are scheduled for destruction with timeline for requests for copies.

Paul added that if parties consider that certain files are of interest, they can make a request for certain files before they are destroyed.

### **iii) Registry screening of documents**

Andrew Baumberg gave a summary: as noted earlier, CAS is facing significant budget constraints in 2017-18, and one measure being considered to relieve chronic pressure on the Registry is to scale back the Registry's 'gatekeeper' function, such that it would follow the Federal Court of Australia model, whose Registry does not review incoming documents for compliance with the Rules (exception: documents submitted by self-represented litigants). Instead, legal counsel are expected to 'police' their own documents, and as a result, there is less work for the Registry and the Court in screening and resolving compliance issues. The Court is at an early stage of assessing this proposal, and feedback from the Bar is welcome.

Paul Harquail suggested that a discussion paper would assist the bar with consideration of the proposal. David Demirkan suggested, as an alternative, a draft policy for consultation.

**Action:** Court to circulate a paper or policy draft.

### **iv) 'Thin file' pilot project**

Andrew Baumberg gave a summary: as noted earlier, CAS is facing significant budget constraints in 2017-18, and the following pilot project will be launched soon: for judges who opt-in to the pilot, the Registry would prepare their Court hearings with only a 'thin file' (rather than every document on the record being compiled); e.g., for a motion, only the motion records would be available at the hearing, rather than previous motions, correspondence, affidavits of service, etc. Initially, such documents would likely be scanned and available for printing only on demand.

Prothonotary Tabib suggested that these scanned documents be linked to the record, and then the paper can be destroyed (savings for records retention purposes).

## **3) Follow-up Items from last meeting**

### **a) Expedited process for extensions agreed to by both parties (*draft Notice*)**

David Demirkan expressed his view that this is a great initiative. He has just one comment on paragraph (c): is this necessary if parties consent?

"Where the Rules provide for interlocutory relief only upon the filing of a motion, a moving party may seek leave, by way of letter, to be relieved from the requirement to bring a formal motion if the following requirements are met. In particular, the letter must:

- a) confirm that all parties either consent to the request or do not oppose the request;
- b) set out all facts relevant to the request;
- c) set out all the parties' submissions relevant to the request; and
- d) include a recital of the exact relief sought by the parties and attach a draft order."

Prothonotary Tabib responded that you still need some explanation, even if no evidence is filed.

Upon further discussion, the Chief Justice proposed the following wording: "provide the parties submissions relevant to the request."

**Action :** for comments on draft informal motion Notice from Bar by mid-June 2017.

### **b) Accommodating Maternity in Court Gowning Directives (Notice)**

This responds to the CBA's resolution.

### **c) Informal Process : Adjudication by Judge after Mediation**

The Chief Justice noted that this is part of the Court's strategic plan to increase access to justice. It is also a complement to the 'justice participative' initiative in Quebec. The Court is looking at options for triggering the jurisdiction of the court but without getting too far into litigation mode (e.g., Notice of Intent to file an Action).

Paul Harquail responded that there is an informal process in another jurisdiction for pending ship arrests, allowing a process to resolve issues without arrest of the ship (and consequent delay).

**Action:** The next meeting of the maritime bar is in June, and Paul Harquail will raise the option of an informal settlement process that might be proposed for the Federal Court. This will include one or more suggestions for triggering the Court's jurisdiction to facilitate mediation/settlement of disputes at an earlier stage than currently is possible.

#### **d) Addressing the Judicial Officers in Court**

The Registry prepared an info card to be placed on counsel tables in hearing rooms across the country. The sign-holders / info cards will be shipped to regional offices in the next week. A sample card holder was circulated during the meeting and endorsed by members of the Bar.

#### **e) Decisions not on Court's website**

The Chief Justice noted that the Court was waiting for funding to be able to post all final decisions simultaneously, and within three weeks of issuance to the parties. For now, interlocutory decisions are not posted unless the judge makes a specific request.

Daniel Gosselin noted that CAS spent \$2.5M on translation last year, but it is estimated that \$13M is required annually for translation of the decisions of all four Courts.

Lise Lafrenière Henrie added that the Court is currently looking at whether CANLII might be used for access to decisions.

The Chief Justice noted that the Court is trying to provide more resources for SRL's on the web site, and so he questions whether it is ideal to undermine the overall objective of driving traffic to the site.

David Demirhan noted that if CANLII does not include decisions from the Federal Court, then the Court may be under-represented in the wider search process. He typically searches CANLII or Quicklaw for searches, not the Federal Court web site. So, putting interlocutory decisions solely on CANLII should not result in less traffic going to the Court's web site.

Angela Furlanetto agrees. Counsel would go to the Federal Court website for updates on cases, but not to search for decisions.

**Action:** Bar to confirm if they generally search for decisions on broader search engines or on the Federal Court web site.

#### **f) Scheduling (draft Notice)**

The Chief Justice noted the primary problem (for non-IMM) is when both parties are not available – the Court simply needs to make a scheduling decision.

**Action :** for comments on draft scheduling Notice from Bar by mid-June 2017.

#### **g) Search syntax (names) in Court index**

Paul Harquail thanked the Court for resolving the search syntax issue. He then gave an example regarding the prefix of a ship name which may still require attention.

Andrew Baumberg gave a brief summary of the new search syntax on the web site, suggesting that outstanding issues for the ship index be addressed off-line with the maritime bar (i.e, a request from the bar to add a caveat on the site; and the issue regarding use of certain acronyms in indexing of ships).

**Action :** for follow-up by the Court with the maritime bar.

Lise Lafrenière Henrie added that the search syntax for intellectual property names has also been changed and will be discussed with the IP bar next week.

## **5) Update: Federal Court**

The Chief Justice noted that the Court has requested a 7th prothonotary, but this request was not accepted in the recent budget process. The Court will continue to establish the business case. The requests for translation and CRMS funding also were not granted. Finally, the request for an Associate Chief Justice remains outstanding.

He noted that there has been a drop in IMM workload due to an increase in settlements, but the workload is expected to increase significantly as the IRB addresses an increasing backlog.

Regarding the complement of the Court, there is one vacancy with the resignation of J. Camp, and four judges are expected to elect supernumerary status this year. Leading members of the bar are encouraged to apply for appointment to the bench. There may also be an increase in the complement to address expected increases in caseload over the coming year.

Regarding scheduling, the Court is scheduling nearly all IMM matters within 90 days across the country, though the 2017 YTD caseload is up slightly. The grant rate is around 22% of all IMM cases (37% of perfected). He acknowledged that there remains a variance issue.

The average time-frame for issuance of the decision following an IMM judicial review hearing is 4-6 weeks. Total time (from application to decision) is about 7.5 months.

For non-IMM proceedings, hearing dates are available even in the next couple months for short hearings; hearings from 4 – 10 days long are being scheduled later in the Fall; and hearings over 10 days are into 2018. The Court is proceeding with an internal e-scheduling module to be launched in the next few months, after which it can start to look at an external-facing portal, but this is at least 12 – 18 months out.

Lise Lafrenière Henrie added that the Court is looking to launch a twitter account by the Summer.

The Chief Justice noted that the Court has also launched a pilot project to conduct media / counsel lock-up's for release of high-media decisions.

Regarding time to trial for longer hearings (over 9 days): the Court is scheduling about 12 months out.

Prothonotary Tabib added that the admiralty bar currently asks for trial dates only at the pre-trial conference. She indicates that the bar is encouraged to adopt a different model, whereby trial dates would be set much earlier.

Paul Harquail noted that there was a question from a maritime bar colleague as to whether a rule amendment is necessary to set a trial date up-front.

Prothonotary Tabib referred to the [Notice: Streamlining Complex Litigation](#).

The Chief Justice added that the Court prefers to get the trial judge assigned early.

### **a) Trial management guidelines**

The Chief Justice noted that the Notice was issued at the end of April 2017 and is included here for any initial comment from the Bar. This builds on the Supreme Court's *Hyrniak* decision, which addresses the shift to a Court-lead process.

Edwin Kroft Q.C. commented on the new guidelines: "I think it is terrific."

Paul Harquail added that it will provide predictability.

### **b) Rules Committee - Legislative amendments sub-Committee (draft list)**

Andrew Baumberg provided a brief summary: the working draft list is for information only. The Subcommittee comprises the Honourable Justice Simon Fothergill (Federal Court); Peter Hutchins (Private Bar), and Sharlene Telles-Langdon (Public Bar). Suggested amendments have been proposed by various stake-holders, and the working draft list has been circulated via the public / private bar reps for further comments. Given the range of sources, and that it is a working draft list, it is not meant to carry the endorsement of either Court or the Rules Committee, but simply to be a collection of practice 'issues' – it will be discussed at the next Rules Committee meeting.

Although a Rules Committee project, some of the items might warrant more concrete discussion within the CBA liaison committee to see whether there are practice recommendations that might be developed to address the perceived limitations (ie., there is no guarantee that all, or any, of the items will be taken up by the government within any legislative amendment process).

**c) Rule Amendments re: monetary limits for Prothonotaries & simplified procedures**

This is simply a follow-up item from the last meeting. As noted earlier, the Court does not have enough prothonotaries to meet the current case management and related workload.

Regarding membership on the Rules Committee, Chief Justice Crampton encouraged the bar to recommend representatives who have significant experience with the Court's processes..

**4) CBA National Sections & New Points**

**a) Aboriginal Law**

Diane Soroka reported the ongoing discussions in the Committee regarding incorporation of indigenous legal traditions.

One issue is the need for more assertive use of mediation / dispute-resolution to narrow the scope of litigation or reduce the number of issues.

Chief Justice Crampton noted that the triage process (by Prothonotary Lafreniere or Justice Strickland) is now in full-use, though occasionally a case may not be referred to them by the registry.

Prothonotary Aalto noted that when assigned as case management judge, the first thing he looks at is the possibility of dispute resolution or mediation.

Diane Soroka responded that part of the issue is whether some of these measures can also be used more effectively in cases involving both First Nations and the Crown, which are typically the larger / more complex cases.

The Chief Justice added that he had heard the Minister indicate that the AG's litigation strategy is being reviewed.

Alain Prefontaine noted the government's priority to move on its relationship with First Nations, as well as a separate priority to review the litigation strategy more broadly.

**b) Immigration Law**

The Chief Justice noted that in many IMM cases, the Justice counsel does not get a mandate to discuss potential settlement/resolution until the last minute, meaning that everyone does work fully to prepare even for those cases which ultimately settle. The Court is considering the option of adding a term to the leave granted Order to require some discussion regarding mediation.

**Action:** feedback from DOJ is encouraged.

Michael Crane noted that judicial review cases proceed much faster than 3 years ago. He added that in addition to the current issue related to border crossings, there is a further issue in that the RPD is not in a position to hear legacy cases. By statute, the RPD must give priority to *new* cases. As a result, re-determinations are not being done. Scheduling is being done according to the original date of the claim. There are over 1500 cases from the Refugee Appeal Division and Federal Court that are not being scheduled. There was a hope for a regulatory amnesty in the budget, but this did not materialize.

**c) Intellectual Property**

Angela Furlanetto reported that the IP day is scheduled for next week. The main question relates to changes to the PMNOC regulations.

The Chief Justice noted that a revised practice direction cannot be issued until the lifting of the embargo on publication of information related to the amendments. However, he did state that the Courts view is that the hearings under the revised PMNOC regime should generally be no more than 2 weeks, so that everything could be completed within 2 years.

Lise Lafrenière Henrie added that Denis Martel is being invited as the policy analyst.

Angela Furlanetto will bring the “creative alternatives” proposal from the Chief Justice to the IP bar regarding electronic trials.

#### **d) Taxation Law**

Edwin Kroft, Q.C. noted that the tax bar is seeing an increase in acrimony with the CRA related to compulsion of information, both domestic and foreign. There will likely be an increase in caseload related to compliance applications and privilege, as well as interest and penalty relief. There is no need to improve on the existing process.

Regarding the bi-furcation of jurisdiction between the TCC and FC, both he and Mr. Harquail took the view that there is no substantive issue. There are different places that you go for different remedies – this is well understood.

#### **e) Maritime Law**

Paul Harquail noted all his items have previously been addressed in the meeting, though adding that the various sections of the bar have made submissions to support funding for the courts.

He asked whether it is permissible to circulate the Chief Justice’s update re scheduling.

The Chief Justice confirmed that this is not confidential information.

#### **f) Civil Litigation**

David Demirkan acknowledged the strong turn-out from the Court and CAS in support of this committee. Feedback from his section was circulated to members of the Committee via a written report.

**Action:** David Demirkan to send comments from Civil Litigation section electronically.

Paul Harquail noted a judges’ presentation to the bar “This Court has 22 judges” that provided pragmatic suggestions about preferences from the Court. There are some lawyers who come into Federal Court only once every 10 years – a basic practice session in key cities would be helpful to increase awareness of the court and understand practice. It would de-mystify the court.

On this point, Mr. Kroft Q.C. congratulated Justice Zinn for his recent participation in Vancouver on a panel with local judges regarding judicial review.

**Action:** the Court to present Information Sessions in collaboration with members of the Bar.

***Members of the Federal Court of Appeal joined the meeting.***

Chief Justice Noël welcomed members of the Bar, extending regrets from Justices Pelletier and Near.

#### **6) Update from the Chief Administrator of the Courts Administration Service**

Daniel Gosselin noted that CAS was successful in getting only \$2M over 2 years for translation of courts’ decisions in Budget 2017. However, there are efforts to pursue off-cycle funding, as well as to explore other options for the CRMS project.

The security screening equipment and processes are now in place in most offices. Three complaints have been received in writing, and a response has been provided to each.

Paul Harquail asked whether there is an issue regarding possible breach of solicitor-client privilege.

Daniel Gosselin responded that although lawyers’ briefcases etc. are scanned by equipment, documents are not reviewed directly. Counsel may refer to the CAS [web site](#). There is a clear protocol in place for security officers.

For facilities, the new office in Quebec will be open later this Fall. No site has been approved yet for Montreal, with relocation planned by 2019. For Vancouver, an increased footprint is needed, so a new floor will be rented by 2019 if funding is available.

On the proposed national judicial building, the government has not approved the proposal. For now, there is no plan for relocation of the federal courts. The Bar asks to be advised of any updates as they come up. Daniel Gosselin then noted the departure of Richard Tardif (Deputy Chief Administrator, Judicial & Registry services), with Chantal Carbonneau taking on the position on an acting basis.

Senior managers were complimented, in particular Manon Pitre and Imtiaz Rajab, for maintaining core registry services despite a significant budget shortfall.

David Demirkan noted that the registry has a great reputation across the country.

7) **CBA Items** - No items raised.

### 8) **Rules Committee Update**

Andrew Baumberg provided a brief update of the various Rules sub-Committees / projects:

- a. Limited Scope Representation
  - The amendments will allow for limited scope appearances for a defined mandate
  - Drafting process mostly complete – should go to Part I in 2017
- b. Implementation (Global Review)
  - Implementation of significant changes to the Rules to incorporate principles of proportionality and to provide tools to control abuse of the court's processes
  - Very early stage of drafting process
- c. Substantive Amendments
  - This project includes numerous changes to Rules that were published in Part I on November 5 for a 60-day comment period
  - There were numerous comments which will need to be assessed at the next Committee meeting before a decision can be made regarding publication in Part II
- d. Amendments to the *Citizenship, Immigration and Refugee Protection Rules*
  - Modernization amendments (similar to those for the Federal Courts Rules) as well as some substantive amendments, including amendments related to 'ghost representatives' and simplified procedure for an anonymity Order
  - Drafting process is complete and the blue-stamped version has been prepared by the legislative drafters; currently finalizing the RIAs for publication in Part I
- e. Miscellaneous Amendments
  - Numerous changes to Rules to address minor drafting issues, coherence between the English and French versions, etc.
  - Drafting process complete – should go to Part I soon
- f. Costs
  - Very early stage of drafting process
- g. Legislative Amendments
  - Status was noted earlier in the meeting
- h. Enforcement Amendments
  - Extensive revision of the Rules on enforcement to ensure that Rules are consistent with current practice
  - Drafting process mostly complete – should go to Part I in 2017

Current members of the Bar on Rules committee: Robert MacKinnon (DOJ), Neil Kathol (IP – Calgary), Chantal Desloges (IMM – Toronto). However there are now 3 vacancies.

Justice Stratas invited the Bar's suggestions regarding problems with the Rules that might warrant a fix.

Edwin Kroft Q.C. asked for any update regarding the requirements for a condensed book. In response, various members of the Committee suggested that the Rule amendments relate only to timing of filing the condensed book. He will therefore research the issue and come back to the Committee.