# Bench & Bar Liaison Committee Meeting

**Friday, December 9, 2016**

# MINUTES

**Attendance**

Chief Justice Crampton, Federal Court
Justice Phelan, Federal Court
Prothonotary Aalto, Federal Court (by teleconference)
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
Adam Aptowitzer, Charities and Not for Profit Law Section 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, Michael Crane, Immigration and Refugee Law representative, Edwin Kroft, Q.C., Income Tax Law representative, Maryse Tremblay, Labour, employment, human rights & privacy law representative.

**Additional Attendance for Common Agenda Items (from item No. 5 through to end)**

Chief Justice Marc Noël, Federal Court of Appeal
Justice Dawson, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Richard Tardif, Deputy Chief Administrator, Courts Administration Service
Chantal Carbonneau, Executive Director and General Counsel, Federal Court of Appeal

1) **Opening Remarks**

Chief Justice Paul Crampton and Paul Harquail welcomed members of the Committee.

Paul Harquail noted that this was the second meeting under the new format, with the CBA members meeting the Courts separately, along with a joint working session for agenda items of interest to both courts. In his view, the last meeting did not provide sufficient time for the agenda items, in particular for the Chief Justice's report, which provides numerous updates of particular interest to the Bar. He therefore suggested that the Chief Justice's presentation be placed earlier in the meeting, with the CBA reports to follow. He added that there has often been a challenge, from the perspective of the Bar, to identify 'problems' for discussion. It would be preferable to have an advance conference call with counsel for the Court to identify issues for discussion.

**ACTION:** for next meeting, a conference call will be planned in advance to discuss the agenda.

Andrew Baumberg referred back to a Committee meeting a decade earlier, at which there was suggestion from Dick Pound that there be a more formal review of key areas of the Court's work to assess whether the Court was meeting its underlying mandate and the needs of its clients.

Paul Harquail agreed. This type of review was what prompted the maritime bar to ask for statistics regarding key practice issues (e.g., time to get a hearing scheduled or time to get judgment issued).

The Chief Justice expressed support for this approach to focus on the needs of the Bar and their clients. He referred to the Court's strategic plan, with its focus on access to justice and modernization, to provide concrete benefits for parties and their counsel. Funding is a key issue though. He added that the Court's

request for appointment of a 7th prothonotary position is also dependent on government funding. A further key item on the Court's agenda is the Rules Committee work, now chaired by Justice Rennie. One matter of concern to members of the bar relates to the difficulty that some counsel have with mastering both their provincial rules as well as the federal rules of procedure, and the perception that the federal rules are too detailed and prescriptive. There is a need for some strategic thinking at the Rules Committee, with input from the bar.

Paul Harquail responded that in discussion with maritime practitioners, they opt for the federal rules because they are found to be easier to use and more favourable to their clients.

**Federal Court Update**

The Chief Justice then presented a PPT deck that he had circulated to the immigration bar.

**ACTION:** the Chief Justice's presentation to be circulated to Committee members.

Key items noted:

- Recent and upcoming retirements; leading members of the Bar were encouraged to consider applying for appointment to the Court;
- Workload changes – although there has been a significant drop in IMM cases over the last few years, there may eventually be an increase as a result of the lifting of VISA requirements in some countries, and other factors; the increased workload may in turn lead to additional appointments;
- He asked that counsel identify bilingual proceeding requests early in the process to ensure that a bilingual member of the court is assigned

David Demirkan asked whether the IMM workload has changed significantly over the years. Given the proportion of IMM cases, which make up the majority of Court files, it seems that the Federal Court is taking on a role similar to that of an administrative tribunal.

CJ Crampton responded that the significant number of administrative decisions in the immigration area that are made and then subject to judicial review is a government policy matter.

**2) Adoption of Agenda & Minutes**

There was a small change to item 6.(g) Labour:

> Ms. Tremblay noted that the annual conference is November 18 and 19, with a 'view from the bench' panel. She has received no comments from the bar regarding practice issues. The only comment relates to item 10 (requests for an expedited process for extensions). Members of the Bar would like to be able to seek extensions without having to file a formal motion. A final point, related to substantive law, is the *Atomic Energy* decision, holding that an employer has a right to dismiss an employee without cause. The case represents something of a reversal of the jurisprudence, but some employers are waiting to see the outcome of the Supreme Court.

Alain Préfontaine proposed a revision to item #9 "Counsel unavailability when Justice Canada/larger firms involved." Amendment: "ACTION: for review and feedback from the Court."

The Chief Justice responded that the Court is looking at the possibility of issuing a Notice to allow for adjournments in IMM cases shortly after leave is granted, on an informal request. In non-IMM matters, the issue is somewhat different because the dates assigned typically are dates that have been given by the parties. As for the initial scheduling issue, the court is often faced with parties providing availability dates with no overlap, especially in intellectual property matters. For access to justice reasons, the Court generally prefers to be flexible while also trying to schedule the hearing in a timely manner. If there is a good reason that a particular government lawyer should be on the file, then the Court will consider this.

Alain Préfontaine said that he has canvassed the seven regional offices, and this issue remains a significant irritant for counsel, though he does not have a detailed breakdown of the specific case types that are of concern.

Prothonotary Aalto expressed surprise with the scheduling issue; for case managed files, he has not heard any concern from counsel.

Alain Préfontaine added that the message is generally received directly from the Judicial Administrator, and counsel act professionally and make alternate arrangements for counsel, even if it means a considerable burden for the new counsel (and thus cost for the client) to assume carriage of the file.

**ACTION:** review and feedback from the Court regarding its scheduling practice when counsel are unavailable.

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

**a) Expedited process for extensions agreed to by both parties under Rule 8[1]**

Prothonotary Aalto noted that the Court prefers to reduce the burden of excessive motions. 'Informal' motions are regularly accepted, particularly in case managed files. If unopposed and on consent, a simple letter is usually sufficient, as long as it is precise and provides sufficient detail. The Court simply needs sufficient material on which to exercise its discretion. However, if the request is opposed, a formal motion is usually required. Furthermore, informality does not justify counsel being sloppy.

CJ Crampton noted that for case managed files, there appears already to be a flexible practice. Perhaps the issue is for files that are not case-managed. A practice direction might be needed.

Paul Harquail suggested that it may relate more to areas of concurrent jurisdiction – the Rules currently require a high level of formality. A Practice Direction would be welcome.

**ACTION:** for follow-up by Court regarding a possible Practice Direction for informal motions.

CJ Crampton noted the need for a balanced approach – if procedure is too informal, it may be difficult to get to a final hearing on the merits due to the number of adjournments and delays.

Justice Phelan agreed with the utility of a Practice Direction to reduce the perception of formality. In his view, the case managed files are very informal, but there may be a need to address the files that are not.

**b) E-Service on Crown**

Alain Préfontaine noted that e-service would require further infrastructure with the Court. He added that he had discussed the matter with Mr. Crane, who had a follow-up request regarding service in Calgary, for which there is no service on the Crown.

Mr. Préfontaine read the following reply that he had sent to Mr. Crane:

> "Where the "document" in issue is an application for leave and judicial review, counsel from Justice's Calgary office can accept service on behalf of the Ministers where there is a logical connection to the work of that office. The generally accepted practice is for the Edmonton office to accept service of such applications where a matter originates in Alberta but a lawyer from the Calgary office could accept service of an application, in an appropriate case. That long-standing practice complements the Federal Courts Citizenship and Immigration Rules. In the case of other "documents", they are normally served on the counsel with carriage of the file, whichever office that counsel works out from."

He noted that in his exchange with Mr. Crane, a further practice question arose, the question / response were read to the Committee:

> "Why can't an applicant for a mandamus in an immigration case have the ability to get the basic materials before filing his material?
>
> Assuming that the "basic information" is the certified tribunal record ("CTR"), access to the CTR is governed by the Federal Courts Citizenship and Immigration Rules. While the CTR is normally provided once a judge has granted leave (r. 15(1)(b) and 17), an applicant can move for earlier disclosure (r. 14(2))."

Finally, Andrew Baumberg clarified the issue regarding electronic service of documents. In his view, this is a matter between the parties that is not dependent on Court infrastructure.

**c) Retention Schedule**

[1] Rule 8 (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

Angela Furlanetto noted that the IP bar has some concern with discontinued proceedings – in some cases, there is evidence on these files that may be of interest in subsequent proceedings.
Diane Soroka added that this is also true for some Aboriginal law proceedings. Sometimes, it is very useful to have access to old files to see the evidence that was submitted. Aboriginal law practice puts significant reliance on historic documents, and in some cases, the evidence is simply not available elsewhere. Ideally, the historic documents would be retained in perpetuity.

There was some discussion of the option for scanning documents to keep them digitally. It was noted that most counsel are working with documents in electronic format. It may be easier to convert to an electronic record by getting the e-record from parties, rather than the court scanning items again.

**d) Accommodating Maternity in Court Gowning Directives**

No comments on the Notice. [But see item 4(d), below.]

**e) Informal Process : Adjudication by Judge after Mediation**

Chief Justice Crampton noted that for Aboriginal law cases, the Court does a triage of all cases to look at opportunities for an informal, mediated process. This is also true of case-managed files generally.
However, the current rule is that if a member of the Court is involved in mediation, that judicial officer does not adjudicate the file unless on consent of all parties.
The Competition Tribunal is also looking at a variation on this option: parties could approach the tribunal and ask for an informal process, similar to a mediation, but with the judge rendering a decision at the end of the process, rather than following a very formal hearing process. This would likely be very amenable to certain cases, where there is a need for a timely final decision.
However, there is a need to trigger the Court's jurisdiction, such as via the Notice of Intent procedure that is used in Ontario. He suggested that members of the CBA speak to competition law counsel to explore options to go forward. There are some challenges – for instance, the lack of a formal transcript that normally is needed for an appeal process. Parties might need to waive the right to an appeal.
Justice Phelan acknowledged that a full trial is important to get to the truth, but often a much more informal process that targets the real issues in dispute is more efficient and leads to a good result. Unfortunately, the accumulated knowledge, which the judge gets when conducting a mediation, is lost if the mediation is not successful. The process must then start again with a new judge under an adjudication model, at considerable cost to the parties and the court. There may be a need to reconsider the traditional mindset regarding the concerns of bias, knowledge of prejudicial information, etc.
CJ Crampton suggested that it need not be a binary choice. The Court is looking at the trial judge getting involved earlier in case management to steer the parties towards a more efficient trial.
Paul Harquail noted that if confidential information is provided, in some cases the judge can simply indicate that it will not be used. This happens many times already in trials – evidence that has been presented to the Court is struck as being inadmissible, for example.
Diane Soroka noted that in Aboriginal law, the challenge is often one of the Crown getting a mandate to engage in mediation.
Alain Préfontaine noted that in public law areas, the cases are usually advanced solely on a litigation model.

**f) Addressing the Judicial Officers in Court**

Chief Justice Crampton referred to the current Notice, which is quite clear.
Prothonotary Aalto often leaves the Notice on counsel tables to resolve any confusion.
Justice Phelan added that it can sometimes be embarrassing to correct counsel in front of their clients. It may be preferable for the Registry to post something near counsel's tables. The usher could possible make a short announcement before the hearing opens.

**ACTION:** for follow-up by Registry to provide copies of the Notice ("Addressing Judicial Officers In Court") for reference at Court hearings.

**g) Confidentiality pending decision on motions under Rule 151**

Following up on the discussion at the last meeting, Chief Justice Crampton confirmed that a motion is required to request that documents be filed on the record on a confidential basis. If the motion itself contains confidential information, it should be filed under seal with a request for direction from the Court. Prothonotary Aalto added that there is a decision by Prothonotary Tabib, *A. v Canada*, 2008 FC 1115, which addresses the appropriate procedure.

CJ Crampton further noted that the registry should not accept documents on a confidential basis without an Order unless there is at least a direction from the Court.

**h) Question about decisions not on Court's website**

Chief Justice Crampton confirmed the Court's commitment to post all final decisions, which must also be translated according to the requirements set out in the Official Languages Act. For interlocutory decisions, these are not posted by default, but only if selected by the judge or prothonotary.

**4) Update: CBA National Sections**

**a) Aboriginal Law**

Diane Soroka reported that the bar is working on several ideas to make space to use indigenous law in court processes. It will take considerable work to refine the ideas to pursue.

CJ Crampton noted that there are two dimensions: substantive and procedural law. The Committee has made considerable progress on the procedural side, and continues in its work on both fronts.

**b) Intellectual Property**

Angela Furlanetto reported that the practice focus continues to be how to manage the complexity of these files and make them more efficient. There is some uncertainty in pharmaceutical litigation following the signing of CETA. Finally, she noted that the IP bar is strongly in favour of court modernization.

**c) Maritime Law**

Paul Harquail reported that the bar had its conference and annual meeting this Summer. The issues of informal process and statistics came from the feedback from that meeting. He added that the issue regarding the Court index for ships took considerable time for discussion with the bar. Regarding the proposed rule amendments, he has sent out a consultation request to the bar.

**d) Civil Litigation**

David Demirkan reported commentary from individual members of the Civil Litigation Section:

- perception of excessive formality in the federal court;
- one comment that the Court is the best run court in the country, and the registry are very helpful and polite across the country;
- positive feedback on e-filing, which avoided the need to bring 10 banker's boxes to court.

He then referred to the Ontario Court of Appeal, which now has a new practice direction on their web site regarding gowning for pregnant counsel. He suggested that the draft Practice Direction mention pregnant counsel.

Angela Furlanetto suggested that it might simply indicate "for example, for maternity."

David Demirkan continued his report to indicate that the CBA put forward a resolution to ensure consultation regarding closures of courthouses. Regarding the new criteria for judicial appointments, he added that they are not necessarily good predictors of who will be a good judge. He also mentioned that one court is doing quadruple bookings on the assumption that many will be cancelled.

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

Paul Harquail noted that the changed limits were well received by the Bar, but a question was raised regarding the impact on prothonotary workload.

CJ Crampton responded that the current case management workload is shared between prothonotaries and judges. However, for many IP trials with set trial deadlines, it is not feasible for a judge to case manage the file, given that judges have many other assigned files with fixed hearing dates and so do not have sufficient flexibility to address case management matters as quickly as necessary.

## Rules Update

Andrew Baumberg provided a report on the Rules Sub-Committee and amendment 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

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 mostly complete – should go to Part I in 2017

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 in 2017

f. Costs
   - a discussion paper was published in Fall 2015, resulting in extensive comments from many different sections and groups; divergent views were expressed throughout the comments
   - the comments were discussed at the June and October 2016 Committee meetings, with a Committee decision to increase indemnification, simplify the tariff, and add new tariff items for practice tasks that are not currently reflected in the tariff
   - Very early stage of drafting process
   - CJ Crampton added that the indemnification increase will be around 25%; and that a Federal Court of Appeal decision is expected to be issued soon regarding 'lump sum' cost awards.

g. Legislative Amendments
   - This project involves compilation of practice 'issues' that can be addressed only via amendment to legislation (as opposed to Rules)
   - A working draft list has been prepared for comment / additional suggestions, with consultation by Sharlene Telles-Langdon (DOJ representative) and Peter Hutchins (CBA representative).

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

Members of the Bar found the time available this morning to be better than previous meetings. The advance call for the next meeting will help to determine how much time is needed.

**5) Update from the Deputy Chief Administrator of the Courts Administration Service**

Richard Tardif reported that he has received very positive feedback regarding registry staff.

On security, CAS has received additional funding and will install security screening equipment across the country. All individuals will need to be screened, though there may be some express lines for counsel.

Digital recording systems are being upgraded to prepare a digital recording via the CAS network, which will be available to counsel.

He then noted that CAS has two key funding priorities:

- translation of court decisions
- replacement of the Court's proceedings management system – if no investment is made, the system risks collapsing in the next 3 years. He thanked the CBA for its support.

CAS will begin equipping the courtrooms with modern hearing systems that will support electronic hearings. Finally, regarding facilities, a new lease has been signed in Quebec, which will be ready for late 2017 or early 2018. In Montreal, the lease has been extended for another 3 years.

Paul Harquail reiterated the points made earlier regarding the very positive feedback about the Registry.

**6) CBA Items**

**a) CBA Letter in Support of Funding**

Paul Harquail reported that the CBA has now submitted its letter to the Minister. The letter represents the culmination of consultation among many different CBA sections.

**b) Ships' names in Court index**

Paul Harquail noted that this is not just an issue related to the ship's name, but the index more generally. He mentioned that the issue arose within the maritime bar where search results did not properly disclose the existence of a file in the Court.

Andrew Baumberg reported that the Bar had requested a more flexible search engine that does not require the user to know the exact prefix used by the registry when entering the ship's or party's name. He has raised the issue with the CAS information technology group, which has now developed a new search algorithm for the online search engine which would allow the user to search for a phrase that might appear anywhere in the index. The upside is that, if implemented, the new search function would make it much more likely that the desired case would be included in the return on the search; the down-side, though, is that the search engine will likely return more 'hits' that are not relevant. The new search algorithm can be implemented independently for each Court's web site.

Paul Harquail suggested that the search engine err on the side of caution to ensure that the results are more inclusive. He asked that the Info link on the search page be improved to make it more accessible.

**ACTION:** implementation of the proposed changes on the Court web sites.

**c) Statistics re volume of cases, time to hearing, decision etc.**

CJ Noël indicated that the Federal Court of Appeal is scheduling matters as they come up – there is no backlog. However, the workload has increased -- last year, the Court reached 600 dispositions, the highest level on record.

David Demirkan asked how many of the 600 are original judicial reviews as opposed to appeals.

CJ Noël responded that the appeals form the greater part of the workload.

**ACTION:** the statistics regarding the Federal Court of Appeal will be circulated after the meeting.

7) **Next Meeting**

To be discussed in consultation with representatives of the FCA (Chantal Carbonneau), the FC (Andrew Baumberg), and the CBA (Paul Harquail and Gaylene Schellenberg)