

Bench & Bar Liaison Committee Meeting

Friday, November 6, 2015 (Ottawa)

Attendance:

Chief Justice Noël, Federal Cour of Appeal
Chief Justice Crampton, Federal Court
Justice Pelletier, Federal Court of Appeal
Justice Dawson, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Heneghan, Federal Court
Justice Phelan, Federal Court
Daniel Gosselin, Chief Administrator, Courts Administration Service
Chantal Carbonneau, General Counsel, Federal Court of Appeal
Lise Lafrenière-Henrie, General Counsel, Federal Court
Alain Le Gal, Registrar, Federal Court of Appeal
Manon Pitre, Registrar, Federal Court
Paul Harquail, Chair – Maritime Law representative
Michael Crane, member – Immigration and Refugee Law representative
Angela Furlanetto, member, Intellectual Property Law representative
Edwin Kroft, Q.C., member – Income Tax Law representative
Diane Soroka, member – Aboriginal Law representative
David Demirkan, member – Civil litigation representative
Gaylene Schellenberg, Staff Liaison, Canadian Bar Association
Alain Préfontaine, member – Department of Justice (Canada) representative
Recording secretary: Andrew Baumberg, Legal Counsel, Federal Court

Regrets:

Justice Trudel, Federal Court of Appeal
Justice Near, Federal Court of Appeal
Justice Shore, Federal Court
Justice O'Reilly, Federal Court
Prothonotary Aalto, Federal Court
Maryse Tremblay, member – Labour, employment, human rights & privacy law representative

1) Opening Remarks – Courts

Chief Justice Noël welcomed members of the Committee.

Chief Justice Crampton noted that the Court – *and government* – are in a period of transition. There have been numerous changes to the make-up of the Federal Court, with many new members appointed in the last year, and many senior members coming close to retirement. Also, a few Practice Notices have been issued in the last year.

2) Opening Remarks – Bar

Paul Harquail thanked the Courts for the opportunity to meet and discuss issues of importance to the Bar. He added that there are often opportunities for the Bar to engage in public issues, which it does from time to time. The agenda related to the Committee review has provoked an interesting exchange within the Bar, which looks forward to the discussion today.

3) Adoption of Agenda

Approved.

4) Adoption of Minutes (April 17, 2015)

Approved.

5) Follow-up Items from last meeting

a) Protocol for participation of judges & prothonotaries at conferences

Paul Harquail has discussed this within the CBA. Given the CBA's conference planning structure, it is not possible to have a blanket protocol allowing attendance. If a justice intends to attend an entire program, then this would normally be based on a normal registration. If a justice is interested in attending simply a part of a conference while in town (e.g., if a hearing ends early and the judge has time), it is possible for them to let their interest be known via the CBA. Also, the Bar intends to invite members of the Courts more consistently to relevant conferences.

Chief Justice Crampton noted that it is in everyone's interest for judges to drop in at a conference and make themselves available to discuss matters with the bar.

Paul Harquail added that if there are judges who are able to participate in local conferences on topics on which they have particular expertise, it would be unfortunate to miss this opportunity. He will try to pursue this item to see how best it can be addressed.

b) Ships' names in Court index

Andrew Baumberg reported that the Registry conducted a review of the last 5 years of admiralty files and corrected a small number of errors in the index.

CBA :

6) Update – National Sections

a) Aboriginal Law

Diane Soroka reported that the current revision to the Litigation Practice Guidelines is near completion. She acknowledged the work of Justice Mandamin. The Committee needs to work on a long-term agenda, including how to get the information to the public regarding the practice guidelines, particularly to self-represented litigants. There is a need for parties to better understand options for alternate dispute resolution. The Committee also can look at other ways to improve litigation practice and be of assistance to parties. Another project being pursued is the development of a seminar on alternate dispute resolution (ADR), which could be replicated in different forums. In her view, ADR is an important tool to assist parties.

Chief Justice Crampton noted that final feedback on the guidelines is expected soon. He looks forward to working with the Bar to promote the guidelines and set priorities for the Committee.

b) Immigration Law

Michael Crane expressed thanks from the bar for the dramatic shortening of leave times in Toronto. This is much, much better. He noted that there will be more transcripts on RAD reviews generated by the IRB, with the transcript being provided to the interested applicant. He also noted that the style of cause is still an issue for refugee claimants, from the IRB and PRRA, particularly due to foreign web sites making copies of decisions available and easily accessible on the internet.

Andrew Baumberg responded that the CAS web sites allow individual decisions searches but block automated bulk copying of decisions. He added that the Rules Committee is advancing with an amendment to allow for a simplified request for an anonymization order early in proceedings under the *Citizenship, Immigration and Refugee Protection Rules*.

CJ Crampton noted that the recent Notice regarding posting of precedential decisions was issued, in part, in response to this issue so as to reduce the number of non-precedential decisions being posted on the web site.

Paul Harquail added that for the maritime bar, the reduction in the number of published decisions is a significant loss to the bar. It is already a small practice area with a limited number of decisions.

CJ Crampton noted that he has encouraged members of the Court to use the ‘bare judgment’ model without a neutral citation only in the cases that are clearly not precedential. He added, though, that there are a couple recent appellate decisions that may affect how this policy is being implemented.

c) Intellectual Property

Angela Furlanetto reported that the June 24 Notice on proportionality has met with positive feedback from the IP bar, particularly regarding streamlining, discovery (including the steps leading up to discovery), and the short wait list for trials. The Committee continues to work on practice issues related to the goal of getting a trial within 2 years. On the Costs Discussion Paper, the IP bar is working on comments to be submitted. The IP day is May 12, 2016, including a forum with the Court and the judges’ dinner. Finally, she noted an amendment to the *Patent and Trade-Marks Act*, to be in force June 2016, which provides for privilege between patent and trade-mark agents and their clients.

Chief Justice Crampton added that there is another draft Notice to the Profession to be discussed with the IP bar.

d) Taxation Law

Edwin Kroft, Q.C. reported no issues from the tax bar. However, he had comments regarding practice in the Tax Court and the CRA that will affect workload in the Federal Court. The CRA is using its compliance order power more frequently under section 231.7. *BP Canada Energy Co.*¹ and *Amdocs*² are of particular interest to the bar and business community. Cases in the tax court are becoming more complex, involve more money, and raise more procedural issues, and points of law are being litigated more frequently. There is an open question regarding disclosure of expert working papers following the Ontario Court of Appeal decision in *Moore v. Getahun*³ (SCC leave denied). There is a question how uniformly this will be applied across the country. This issue will likely come before the Federal Court and Federal Court of Appeal. Finally, as co-chair of a tax law program, Mr. Kroft, Q.C would welcome speakers from the court on tax process. He extends the invitation to the courts.

e) Maritime Law

Paul Harquail reported that the section is preparing a response on the costs discussion paper. There was a joint CBA / CMLA program this Summer along with the Tetley lecture. The Courts were thanked for their participation. Next year’s session will be in Halifax in June 2016. This will include a professional development program for one day – members of the Courts will be invited. The date is still to be confirmed but will be communicated to the Courts as soon as possible. In early May 2016, the CMI is having its next meeting in New York.

f) Civil Litigation

David Demirkan reported that the bar has begun to reach out to see whether there is interest in creating a national civil litigation liaison group that can address such issues as access to justice. The CBA is open to the proposal but is looking to get feedback from the courts.

The CBA is conducting a ‘rethink’ on how it does business. It now has a new intervention policy, with an emphasis on larger and more meaningful consultation before a decision is made to intervene. The extra consultation will likely mean that the bar does not intervene in controversial cases. He noted, finally, that the CBA section annual meeting is being held tomorrow. The section members appreciate the feedback from this committee as well as the opportunity to raise issues.

¹ [Canada \(National Revenue\) v. BP Canada Energy Company](#), 2015 FC 714

² [Canada \(National Revenue\) v. Amdocs Canadian Managed Services Inc.](#), 2015 FC 1234

³ [Moore v. Getahun](#), 2015 ONCA 55

g) Other sections

Paul Harquail noted that Maryse Tremblay was not able to attend today. On her behalf, he thanked the Courts for the participation of Justice Mactavish at an upcoming program.

Justice Stratas noted that there are, occasionally, informal interventions by members of the CBA. If the CBA sees situations such as intemperate comments, it is encouraged to speak out. There is not a real freedom of speech for members of the court.

David Demirkan acknowledged that the bar can and should respond, though there are often competing interests within the CBA. He recommended, also, that a member of the Courts Administration Service could advise the bar of situations that they might not have seen on their own.

THE COURTS:

7) Discussion of Liaison Committee Mandate

Chief Justice Marc Noël noted that the Court is now up to 11 members – this helps the Court, which is very busy. This brought him to reflect on the efficiency of this committee – today’s reports were mostly with respect to practice issues in the Federal Court, which is a much larger court in terms of volume. There are different considerations that arise in Federal Court compared with the Federal Court of Appeal, which has a much larger proportion of tax matters. He noted that the provincial Appeal Courts generally have their own liaison structure with the local bar that is separate from the liaison with the trial court. The thought is to make the meetings more focused, perhaps with a morning session with the Federal Court and an afternoon session with the Federal Court of Appeal.

Paul Harquail responded that the proposal of Chief Justice Noël is one that was also suggested within the bar. It may promote different types of discussion at a more substantive level given that it will likely be of more interest to all participants.

There was an open question from the bar as to whether all the relevant practice areas were present for the purposes of the Committee. There is not sufficient funding to bring all sections, but perhaps issues from other sections could be represented via permanent members. Otherwise, a formal request could be made to the CBA for additional funds based on feedback from the courts.

CJ Noël noted administrative law, IP, Aboriginal, and tax law are regular practice areas before the Federal Court of Appeal. However, a CBA public notice regarding the committee seems to focus on practice issues more relevant to the Federal Court. There are some distinctions to be made between the practice focus – some practitioners may not necessarily go before the Federal Court given the allocation of jurisdiction between the courts.

Chief Justice Crampton supported the remarks made by Chief Justice Noël.

Paul Harquail added that it might be possible to bring substantive discussion issues for the smaller forum that do not appear to be possible under the current structure.

Edwin Kroft, Q.C. noted that it might be possible for feedback from the court to the bar

Andrew Baumberg asked whether there are enough common practice issues of interest to all CBA sections even in the revised format.

Paul Harquail suggested it is worth trying – oftentimes topics are not pursued due to not wanting to take too much time for the whole committee with both courts. The bar welcomes suggestions from the courts regarding issues for which the courts want feedback.

CJ Noël noted that the court does not have many practice issues, but wants to provide a forum for the bar to raise its own practice issues that the court might not be aware of.

CJ Crampton reiterated this point – the value of this forum is for the bar to tell the court how it can do things better.

David Demirkan acknowledged that members of the Bar are at times reticent to share critical feedback from colleagues. It is helpful to know that the court invites even this critical perspective.

CJ Noël encouraged this feedback – it is important that the Courts work and that litigants be satisfied. If there is something wrong, we need to know about it.

CJ Crampton added that the Court would like to continue to significantly improve the time to get to a hearing. If there are good suggestions, these are welcome. He noted that the Courts are still operating more or less the way they did 200 years ago.

8) Federal Court of Appeal

Addressed earlier.

9) Federal Court

The Honourable Paul Crampton circulated an information deck for information. He highlighted security screening across the country – there is an open question whether members of the bar will be required to go through the screening process or have a fast-track process.

Daniel Gosselin noted that the new equipment will be installed in the next 6 months. Feedback is requested.

Paul Harquail added that in his local court, the members of the bar have a fast-track process, though they still go through a metal detector.

David Demirkan noted that for Ottawa, it is necessary to complete a form with the local bar association, which then forwards the registration to the Courthouse. There is no consistent approach.

Diane Soroka said the Ontario Court of Appeal allows fast-track entry with any bar ID.

10) Retention schedule

Lise Lafrenière-Henrie noted that the Courts are considering the adoption of a retention schedule, as allowed at Rule 23.1 now. For example, there are many abandoned files that are being considered for destruction. The Courts are also looking at possible digitalization of paper files.

Andrew Baumberg added that the initial phase, for the Federal Court, would likely focus on abandoned files (i.e., proceedings that were not adjudicated on the merits), with a subsequent phase addressing document retention relating to proceedings adjudicated on the merits. He added that many superior courts around the world have retention schedules that provide for destruction of parts of the record.

CJ Noël expressed concern with destruction of any court record. A court of record is just that.

Paul Harquail suggested the possibility of the parties taking documents back. There was also a question regarding the time-line for feedback.

Andrew Baumberg indicated that once the Courts had established a framework for the project, a note could be sent to the Bar for consultation.

11) Rules Committee Update

Andrew Baumberg provided an update:

1. Review of the Rules on Costs

- A Discussion Paper on costs was published and circulated at the beginning of October

2. New Rules to Allow Limited Scope Representation (LSR)
 - A Discussion Paper was published in 2014
 - The project is at the drafting stage
3. Global review Implementation
 - a discussion paper was published in 2011 and a comprehensive report in October 2012
 - a key element of the report focuses on the principle of proportionality in Court proceedings and control of abusive litigation practices – this project is at the drafting stage
4. substantive amendments
 - the amendments address issues such as a new rule for notice of intent to defend; amendments to the time limits for filing an appearance and a defense; timeline for filing and format for books of authorities; an exemption for filing electronic authorities that are available electronically for free in a public database; increasing the monetary limits in simplified actions (Rule 292 (a)) and for the jurisdiction of prothonotaries to \$100K; and confidentiality of documents in pre-trial matters.
 - The project is close to pre-publication in Part I of the Canada Gazette
5. Amendments to Citizenship, Immigration and Refugee Protection Rules
 - These include modernization of the Rules, a minor change arising from amendments to the Citizenship Act, and an amendment to provide for a procedure to request (within the leave application) an Order for the anonymization of documents that are produced by the Court
 - The project is now at the drafting stage
6. miscellaneous amendments
 - These include a number of miscellaneous amendments that were considered non-substantive
 - The project is close to pre-publication in Part I of the Canada Gazette
7. amendments to the Rules of enforcement
 - The project is close to pre-publication in Part I of the Canada Gazette

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

Daniel Gosselin noted that he is on a national committee of court administrators which has a consultant assessing best practices across all courts, with a report to be provided soon. Based on preliminary feedback, the Federal Courts are doing very well.

CAS received multi-year funding of \$19M in the last budget related to court security. There are many new initiatives, but the projects are complex. For example, one challenge with screening equipment is that CAS is not the primary tenant and cannot install the equipment on the main floor. Another project relates to development of a peace officer position pursuant to an MOU with local police force, at cost. CAS is also revamping its group of commissionaires. There are also on-going discussions with central agencies for technology funding. Rust-out of infrastructure is approximately \$11M, with \$19M required for replacement of the case records management system. On the facilities front, there are numerous offices that require, or may require, relocation. There was concern expressed in particular with respect to finding a long-term solution for the Montreal office, for which the lease expires in a couple years.

13) Next Meeting

Andrew Baumberg and Chantal Carbonneau to consult with the Courts and the CBA to select a date.