Bench & Bar Liaison Committee Meeting

November 6, 2014

Minutes

In attendance:
Chief Justice Crampton, Federal Court
Justice Pelletier, Federal Court of Appeal
Justice Near, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Justice Shore, Federal Court
Justice O'Reilly, Federal Court
Prothonotary Tabib, Federal Court
Daniel Gosselin, Chief Administrator
Chantelle Bowers, General Counsel, Federal Court of Appeal
Roula Eatrides, General Counsel, Federal Court
Lucille Collard, Legal Counsel, Federal Court of Appeal
Alain Le Gal, Registrar, Federal Court of Appeal
Manon Pitre, Registrar, Federal Court
Paul Harquail, Chair – Maritime Law representative
Angela Furlanetto, member, Intellectual Property Law representative
Michael Crane, member – Immigration and Refugee Law representative
Joel Nitikman, member – Income Tax Law representative
Diane Soroka, member – Aboriginal Law representative
Maryse Tremblay, member – Labour, employment, human rights & privacy law representative
David Demirkan, member – Civil litigation representative
Gaylene Schellenberg, staff lawyer, Canadian Bar Association (CBA)
Holly A. Doerksen, Staff Liaison, Canadian Bar Association (CBA)
Alain Préfontaine, member – Department of Justice representative

Recording secretaries:
Andrew Baumberg, Legal Counsel, Federal Court
Regrets:
Chief Justice Noël, Federal Court of Appeal
Justice Heneghan, Federal Court
Justice Phelan, Federal Court

1) Opening Remarks
Chief Justice Crampton welcomed participants on behalf of the Federal Court.
Justice Pelletier extended a welcome on behalf of the Federal Court of Appeal, in the place of Chief Justice Noël, just recently appointed in that capacity.

2) Opening Remarks
Paul Harquail thanked the Courts on behalf of the CBA and noted their appreciation for the opportunity to have this exchange of views. Introduction of new members:

- Michael Crane – replacing Mario Bellissimo (immigration, refugee, citizenship)
- Angela Furlanetto – replacing Susan Beaubien (intellectual property)

Paul Harquail paid tribute to the late Chief Justice Edmond Blanchard.

3) Adoption of Agenda
Approved.

4) Adoption of Minutes (May 29, 2014)
Some minor corrections will be circulated to A. Baumberg by the CBA. It would be preferable to see the minutes posted as soon as possible for the wider membership.

CBA:

5) Introduction of new members

- Michael Crane – replacing Mario Bellissimo (immigration, refugee, citizenship)
- Angela Furlanetto – replacing Susan Beaubien (intellectual property)

6) Follow-up Items from last meeting

a) Condensed Book

Will be addressed in the Rules Committee report.

b) Public Commentary Regarding Federal Courts

Chief Justice Crampton provided some background regarding the issue that had been raised at the previous meeting, which concerned misperceptions of the work of the federal courts. He had spoken to the CBA Council, noting that from time to time members of the Bar have the opportunity to respond to public questions on this issue. The Barreau du Quebec is providing an opportunity to speak on December 4th at its "Conseil général du Barreau du Québec" as well as at its "Congrès annuel" in Malbaie on June 10, 2015. The Barreau de Montreal has also welcomed an exchange on this issue in the context of participatory justice.

A serious issue is the perception that the courts are 'government friendly,' tied in part to a misunderstanding of the standard of review for administrative law issues. He pointed out recent Supreme Court jurisprudence regarding the standard of review. To the extent that the Bar can promote awareness of this issue, it would assist in promoting a sound understanding of the administration of justice.

Justice Pelletier offered his personal view, noting that historically, the CBA has stepped up to the plate to address issues of national concern. At the same time, as a large institution, it does not always get a consensus view. The courts have traditionally relied on the CBA, but have not in the past adopted their own communications strategy, within the limits of their mandate. There may be room for further consultation.

Paul Harquail noted that at the last meeting, although individual CBA members may not always be aware of the media articles that are being circulated, the CBA as an institution may have resources to address this. The CBA can and does play a role when it can (e.g., prothonotary file). It would be good for this committee to develop channels of communication to become aware of issues as they arise, so that they can then be brought to the attention of the CBA leadership to respond as appropriate. For example, he noted that he did just this after the last meeting. He added that we need to find ways to have public awareness initiatives directly with the local practitioner levels to reach the wider public and within law school. He recommended a follow-up between meetings to explore options for further collaboration.

Chief Justice Crampton gave an example regarding Professor Daly, who wrote an administrative law blog related to the standard of law perspective, noting that it is an extraordinary remedy, challenging directly the negative narrative that was emerging in the press. Similarly, a professor in Laval took issue with personal attacks on the judiciary. Such attacks must stop. These types of responses – personal letters to the editor, for example – are needed.

Paul Harquail responded that his group will give further consideration to the issue and ponder on avenues to give messages. An update will be provided in due course.

Justice Stratas noted that there are other things that could be done. The Federal Courts system is the 'invisible' court system. It has no building of its own, and often is not well known. He gave an example of the upcoming Administrative Law conference that had no judge from the Federal Courts. This was eventually corrected, with Justice Gleason now on the panel.

Paul Harquail reiterated the same concern, noting that he had the same reaction, and described his own efforts to resolve the issue a few weeks ago.

Justice Shore added that there is greater need for synchronization between the English and French press, which sometimes have very different narratives being developed. The bijuridical, bijural, and bilingual nature of the Courts need to be stressed.

Joel Nitikman suggested that the Courts engage the media more directly.

Paul Harquail suggested that there be further communications between the CBA and representatives of the Courts.

7) Motions on consent

This is an item raised by the CBA for a discussion regarding: (a) when it might be appropriate to write a letter to the Courts requesting an extension of time (or some other relief) on consent, rather than requiring a motion; and (b) whether a practice direction on this topic might be helpful.

David Demirkan noted that there are evolving practices in the Courts that facilitate less formality if there is consent between parties. He noted that nearly all members of the CBA committee were in favour of this proposal, which is consistent with access to justice issues and also reduces the workload for the Courts. Although the Bar can circulate such developments internally, it might be preferable for the Court to consider for possible development as a practice guideline so as to clarify the expectations. He noted that counsel are hesitant to make a request by letter if they risk losing credibility with the court due to the informality of their request – a Practice Direction would be helpful to frame the option, as is now more common in the provincial superior courts.

Justice Stratas described the consultation by the Global Review Rules sub-Committee. This discretion to deal with the matter other than through a formal motion was recommended distinguishing between cases highly controversial and more simple cases. It has been the suggestion that this be dealt with via Practice Direction if the approach is adopted by each Court. This should be regulated by Practice Direction.

Chief Justice Crampton noted that in the Court's strategic plan, it was recommended to proceed with less formality. The Practice Direction on adjournments provides an example. Obviously, in the adjournment context, the Court must be concerned about the use of scarce judicial resources if it is not possible to re-schedule them on short notice.

Prothonotary Tabib noted that the informality does not remove the discretion of the Court. The sole consentment of the parties does not guarantee that the extension will be granted. The consent request must still provide sufficient information for the Court to consider before rendering its decision. Furthermore, there may be circumstances where the Court requires the full formality of the procedure.

Justice Pelletier noted that the Courts' consideration of an informal request will necessarily depend on the wider context of the case. He also cautioned that proceeding by letters may lead to inconsistent results.

8) Update – Specialized Liaison Groups

a) Aboriginal Law Bar

Diane Soroka noted that the last meetings of the aboriginal liaison committee were June 18 in Iqaluit and then October 2 in Calgary.

The next meeting is June 10, 2015. She described the development of new Practice Guidelines that will expand the alternate dispute resolution pilot to the full scope of Aboriginal law proceedings in Federal Court. However, a key issue is how to get this information out to the wider Aboriginal law Bar and especially to the Aboriginal communities. Even though published on the Court web site, unless someone knows that they exist, they will not know even to look. The Aboriginal law Bar can only do so much.

Chief Justice Crampton asked if the CBA has a distribution list-serve that might be used to communicate "success stories."

Diane Soroka confirmed that such a communication channel exists within the CBA and is available. She also noted that many parties need assistance but do not want the formality of a full lawsuit.

Chief Justice Crampton noted efforts to address the perception that the Court was an option of last resort. He added that the Court is open to parties 'triggering' its jurisdiction via a 'bare-bones' Notice / Claim. He added that a list of judges and others willing to do mediation has been developed – there is lots of interest within the Court.

b) Immigration, Refugee & Citizenship Law

Micheal Crane noted that a new visa process is in the works: not a formal application but instead a "sollicitation" to the government for the opportunity to file an application.

There is some interest in amending the practice of using the refugee applicants' full name in the style of cause. It is very frequent that clients ask about this, though usually after the fact. The UK has anonymized proceedings, but not the US.

Another issue relates to the time for granting of leave decisions and the interaction with stay applications. It appears that the hearing judge on a stay has some difficulty getting a confirmation within the court regarding the status of the leave application.

Chief Justice Crampton indicated that a process is in place: the stay judge will now get a notice that there is an intention to grant leave. He provided an explanation of the Court's backlog with respect to IMM proceedings, particularly in Toronto.

Michael Crane continued with respect to the stay application issue: in particular, whether there is a need to seek a deferral at the removals stage. More frequently, the Court is asking whether the party has requested a deferral and if not, why. There is a perception that there is a divergence between the Court's expectations and the trend within the Bar.

c) Intellectual Property

Angela Furlanetto provided an update related to amendments to the *Trade-Marks Act*, which now eliminates the use requirement before registration, leading to more disputes. She provided an update from the IP Day, particularly with respect to a 'best practices' document.

Chief Justice Crampton noted that the project was temporarily delayed within the CBA, but the court is still hoping to get feedback from the Bar on this project. He recommended that a target date be set for feedback in time for the next IP town hall meeting.

Angela Furlanetto noted that a number of practitioners sent a letter to the Minister of Justice in response to the proposition to replace prothonotaries with judges as they retire and regarding the importance of prothonotaries to the practice of the IP Bar.

Chief Justice Crampton thanked the Bar for their support.

Finally, **Angela Furlanetto** noted a recent initiative with the Advocates' Society regarding development of a protocol for communications between counsel and testifying experts.

d) Maritime Law

Paul Harquail noted the Convention of judicial sale of vessals, which passed at the most recent meeting. The next step is to move forward with implementation of the Convention. He expressed appreciation to the Court for its involvement with the maritime law CLC in St. John's. The annual Grunt Club dinner is planned for end of year. The Court confirmed that Justice Strickland will attend. The Courts' participation in the next CMLA meeting was confirmed.

e) Civil litigation

David Demirkan described the Section (38 000 members), which recently met and reviewed the CBA's new strategic plan, including promotion of the rule of law and legal profession. Upon review of the courts, he noted that some colleagues expressed concern with the current wait times to get a long trial scheduled. There were very positive comments from the Section regarding the Registries of the Federal Courts. There is an initiative to reach out to the Judges' Forum at the CBA regarding national issues. The Canadian Legal Conference will be in Calgary, Alberta. If there is any area where the courts are interested to participate, a speaker would be welcome.

f) Taxation

Joel Nitikman noted a recent appointment from within the Tax Bar as well as the upcoming transfer of jurisdiction related to employment insurance to the social security tribunal in 2015. He suggested a common list of cases for the tax area, as there are some very commonly cited cases.

Andrew Baumberg noted the Substantive Amendments sub-Committee proposal for a rules exemption from filing print versions of cases if it exists in electronic format. The amendments are still in draft format.

Joel Nitikman gave an example of a minor dispute related to interpretation of one case, which was the subject of a CRA circuler. There is a judges' panel at the upcoming annual meeting of the tax foundation.

Justice Stratas recommended that other Sections might wish to follow a similar approach.

g) Labour & Employment Law

Maryse Tremblay provided positive feedback regarding electronic service and filing, though noting that many members are not aware of this option. It may warrant more communications. She acknowledged the issue that arose in planning for the Annual Admin, Labour, and Employment law conference, and thanked the Court for its participation. The chair of the Labour Board is retiring – a new chair is yet to be announced.

David Demirkan provided an update on the intervention challenge. A panel has been struck to review the CBA's intervention policy.

THE COURTS:

9) Federal Court of Appeal Update

Justice Denis Pelletier noted that Chief Justice Marc Noël was appointed recently.
There are now 3 vacancies

- Justice Pelletier – supernumerary
- Justice Mainville – appointment to Quebec Court of Appeal
- Justice Sharlow – retirement

Other comments:

- The Court is essentially up to date.
- The Court web site has been re-launched recently.
- An e-filing project is under development. However, there is still a need for a solid infrastructure to manage the documents.

Justice Stratas noted that in June, the Federal Court of Appeal held its first all-electronic hearing. It went very well for all participants – incredibly easy to deal with the documents.

Chief Justice Crampton acknowledged that the Federal Court had a similar pilot with a patent trial, which saved considerable time. Similarly, a large Aboriginal law trial is currently proceeding electronically, with time savings of about 15% per day.

10) Federal Court Update

Chief Justice Crampton proposed a question to members of the Bar: "What can we do better?"

David Demirkan noted that the Bar had discussed possible feedback for the Courts. Overall, though, there was little concrete feedback. A general comment over the years: sometimes the Federal Courts are seen as more dogmatic on the Rules, whereas the provincial Superior Courts are more party-lead litigation. However, it is understood that the Federal Courts have more of a public law aspect than the provincial courts. Also, many of the practitioners who are familiar with the provincial courts may have difficulties simply due to lack of familiarity.

Joel Nitikman noted that the perception is that the Tax Court places more emphasis on the underlying substance, whereas the Federal Courts place the Rules as being more important.

Justice Stratas responded, in part, that some lawyers don't understand judicial review. For example, some practitioners file affidavits that are simply not admissible. He regularly gets requests for flexibility, and often sees the court responding positively. It is not clear that the perception is grounded in reality.

Justice Near noted that he is on Duty this week, and is generally very flexible in his handling of informal requests.

Prothonotary Tabib noted that given there is more work in writing in the Federal Courts, this in itself tends to require more formalism than courts that deal with more issues orally. The Federal Courts have more work that is in writing, with a decision in writing.

Alain Prefontaine added that his counsel have never complained about how the Court or its Registry treats them.

Paul Harquail noted that his experience, and that of colleagues, is that they generally get very helpful service from the Registry.

Chief Justice Crampton described his recent participation at a Competition Law conference – one speaker reiterated the need for innovation. For consideration by the Bar.

Justice Shore noted the need for self-reflection with respect to our work. He gave an example for stay applications – if counsel cannot take on the file, please pass it on as soon as possible rather than leaving it to the last minute. He recommended further efforts to have a critical self-examination.

Chief Justice Crampton noted that the Court now has a 'ready list' - a queue for earlier trials if another trial settles. There is a need to push counsel more to ensure that backup cases can be put in on shorter notice. Regarding IMM case scheduling, the backlog now is about 3.5 months for non-refugee and 3.3 for refugee cases.

Michael Crane noted that the success rate for the Refugee Appeal Division is about 15%.

Chief Justice Crampton then noted the following dates for IMM scheduling:

- In **Montréal** – the next date we give when a judge is granting leave is March 18, 2015 (1.5 months behind).
- **Vancouver** – no requests pending, with one to be received this week (2 weeks behind).
- **Ottawa** – 6 requests (will try to fit them in between March and June 2015).
- **Calgary** – we have 25 requests (we will have to send 3 judges to Calgary to hear 8 cases each in one week to clear the backlog).
- **Toronto –** there are 529 requests (we have 562 dates available so, as of today the last date that will be allocated to a Toronto Immigration case is June 24, 2015).

11) Rules Committee Update

Chantelle Bowers provided an update. There are now 9 initiatives, with a 10th planned to be launched at the upcoming meeting on November 14:

- Technology – almost complete, once final government approval is given (a subsequent subset is in progress re IMM rules);
- Citizenship – expect Ministerial recommendation soon; this amendment is needed to keep up to date with C-24 amendments;
- Substantive amendments (including suggestion by IMM Bar re 'ghost' representatives);
- Enforcement amendments – drafting in progress;
- Miscellaneous amendments – under way;
- Unbundling of legal services – relates to limited scope representation;
- Global review implementation;
- Costs – a new sub-Committee will be created.

Joel Nitikman noted that at the last meeting with the Tax Court, there was an initiative to provide the possibility for e-service by the Court. Will this be possible with the Federal Courts?

Chantelle Bowers noted that the new rules on technology that are soon to come into force provide for e-service.

Andrew Baumberg added that parties can do this now between themselves. However, the Court does not have the infrastructure to serve documents for the parties.

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

Daniel Gosselin provided an update regarding the CAS. He acknowledged the positive e-court pilot projects, though noting the need for proper IT infrastructure. There was an update regarding the recent security incident on Parliament Hill and its implications for the CAS security agenda. Regarding Court Facilities, a new office is planned for St. John's, Newfoundland, by March 2015. For Montreal, we will proceed with request for proposals. Other options are being considered, including the possibility of staying in the same building. This process should be complete by 2019. For Quebec, there is a need to relocate in 2017, with official notice in 2015.

QUESTIONS OF GENERAL INTEREST:

13) Next Meeting

Likely either May 29 or June 5 (preferable), to be confirmed.

14) Closing Remarks

Members of the Bar were thanked for coming to this meeting.