Bench & Bar Liaison Committee Meeting

November 16, 2018 (Ottawa, ON)

MINUTES

Meeting of Federal Court with CBA

Attendance

Federal Court: Chief Justice Crampton, Justice Kane, Justice Heneghan, Justice Shore, Justice Lafrenière; By teleconference: Justice Diner, Justice Manson, Prothonotary Aalto.

Courts Administration Service: Daniel Gosselin, Lise Lafrenière Henrie, Manon Pitre, Andrew Baumberg.

Members of the Bar:

- Kamleh Nicola (Toronto, ON) — Intellectual Property
- Guy Régimbald (Ottawa, ON) — Administrative Law
- Joshua Jantzi (Calgary, AB) — Environmental, Energy & Resources Law
- Erin Roth (Vancouver, BC) — Immigration Law
- Paul Harquail (Saint John, NB) — Maritime Law
- Diane Soroka (Montreal, QC) — Aboriginal Law
- Catherine Lawrence (Ottawa, ON) — Department of Justice
- Marc-André O'Rourke — CBA staff lawyer

1) Opening Remarks

Welcome by the Chief Justice and Paul Harquail.

2) Adoption of Agenda & Minutes

The order of the agenda was adjusted according to limited availability of participants on the phone. No comments on the minutes.

3) Follow-up Items from last meeting

a) Informal Settlement Process

Josh Jantzi provided examples from the Alberta and B.C. courts: for example, a procedure for fraud and asset recovery allows for extraordinary relief before filing of the primary originating document, because otherwise the relief would be compromised. An undertaking is required that counsel then file a normal originating document, which is submitted under seal along with a request for a sealing Order. If the sealing order or extraordinary relief is not granted, the undertaking may be waived.

Paul Harquail made reference to a Texas pilot project, which allowed a pre-arrest phase to seek assistance before the arrest of a vessel, which would have numerous undesired consequences. In response to a question raised at the last meting (why parties don't just talk?): it is because there is an inability to resolve the dispute through dialogue that the party comes to court. The bar is seeking assistance from the court to develop a similar mechanism – namely, *timely* intervention to avoid the arrest of the vessel, possibly with an undertaking to file a formal originating document as appropriate.

The Chief Justice questioned the source of the Court's jurisdiction – is it proposed that this is part of the Court's inherent jurisdiction?

Paul Harquail: in maritime matters, yes. There may need to be some undertaking, as in the Texas Court pilot. It would be useful to have early involvement of the Court, such as a case management judge, to provide guidance.

The Chief Justice noted jurisprudence regarding the statutory jurisdiction of the Court, and its limits. However, in *Liberty Net*, it was noted that the Court has certain "plenary powers" to control its own process, which would cover matters within a proceeding. But queare whether this would cover matters arising before the proceeding is formally initiated?

J. Lafrenière: the Court already accepts jurisdiction in maritime matters or IP on an undertaking that the party will file a claim, but it seems that the maritime bar wants something more. The Court does have a category of preliminary files – for instance, you request an extension of time to bring an application for judicial review, which

opens a preliminary file in the Registry. He would be open to the possibility of a letter being used to create a T-file to give the jurisdiction to anticipate further matters coming to the Court; this could be an informal process to avoid the need for a full motion record.
The Chief Justice suggested that the undertaking require that the claim be filed if the dispute is not resolved, which clearly links the preliminary process to the underlying dispute.
Josh Jantzi made reference to the *ITO* case for the purpose of anchoring the jurisdiction – if the matter is in pith and substance an admiralty matter, then it is in the Court's jurisdiction.
J. Lafrenière referred to Rule 67(6), which provides for motions prior to commencing a proceeding. We can even dispense with the formal requirements of a motion. However, given *ITO*, the Court is not going to accept a matter which is not at all within its jurisdiction.
J. Manson: for IP cases, this would be problematic to start without a formal action filed. The bar is trying to get the court involved in private mediation. There may be a resource issue to address this.
The Chief Justice noted that we have been speaking with the Aboriginal bar on this point: if we can get involved prior to the filing of an application or an action, the prospects of resolving the dispute likely would increase and may ultimately save judicial resources overall.
J. Lafrenière acknowledged that in IP matters, it may not be feasible to have early involvement by the Court, but for maritime and Aboriginal law matters, it seems to be useful.
Kamleh Nicola agreed that for the IP bar, it is not likely to be used. If it is available and the mechanics are there for other cases, it might be used exceptionally.
J. Lafrenière gave an example: an Ontario proceeding involving patent or TM law; but with issues blocking the process in Ontario. The parties might not want a completely new proceeding to address these side issues.
The Chief Justice referred to the Liaison Committee that covers Labour Law, Human Rights, Pension Benefits, Privacy and Access Review, which wanted to have a triage project available similar to that provided for Aboriginal law proceedings. He suggested that we move forward with this 'pre-claim' initiative to make it available when needed for the practice areas that are interested. If the IP bar later expresses interest, they can discuss it separately and provide feedback.
J. Shore noted an example in an IP case of using mediation to get some issues off the table, or even to have both Ontario and Federal Court cases discontinued. Also, with the 60's scoop, there were concurrent cases in Ontario and Federal Court.
Andrew Baumberg: how would the bar like to move forward with this agenda item?
Paul Harquail: the bar has received useful feedback from the meeting today, and has sufficient guidance to proceed on an informal basis in appropriate cases.
J. Lafrenière: suggests that any requests for direction from the maritime bar, on an informal basis, could go to a limited group within the Court.
Andrew Baumberg questioned how to ensure transparency within the bar for this approach.
Paul Harquail: the CBA can communicate this with its members.
J. Kane: if the request for directions is put to the Court, what timing is needed to respond?
Paul Harquail: yes, timing is major factor – e.g., next high tide.
J. Kane: the Court would need a fixed roster and prioritization of who deals with it.
The Chief Justice noted that we do this already in certain areas, including Aboriginal, IP and Maritime matters.
J. Lafrenière: this is useful, but he does not expect a deluge of cases.
J. Shore: for concurrent cases, it would be useful to develop a protocol for joint sittings by a Federal Court judge and a superior court judge from a province.
The Chief Justice: this has been discussed in the Canadian Judicial Council, in relation to the CBA's recommended Class Action protocol ; it is also part of the mandate of the class action working group.
Josh Jantzi: it would also be useful for environmental law and energy to have early access to court. Early intervention can help narrow the scope of the dispute.
The Chief Justice responded that he considered this to be part of his earlier suggestion of a general mechanism for early intervention and triage.

b) Scheduling Practice

Erin Roth referred to the revised Practice Direction (dated October 24, 2018), which was well received by the Bar.

c) Consent judgment template

The Chief Justice refered to the consent judgment template in the Notice for the IMM settlement pilot. There is a roughly equal split amongst judges open to granting consent judgments in cases lacking details from parties regarding the grounds warranting intervention. In such cases, some members of the court require more detailed disclosure. The template provides for this. He invited input from the Bar on this initial draft.

The ideal is to have limited number of templates.

Kamleh Nicola offered to assist for the IP bar to provide feedback on the template currently proposed for the IMM bar.

J. Shore noted that this is a good idea, though settlement discussions can be problematic for self-represented litigants, for whom there can be an issue regarding consent.

J. Kane noted that it is usually DOJ counsel who would be raising a possible settlement, after they review the file. However, they are not disadvantaged by the proposed template.

Erin Roth agreed it is usually DOJ that initiates a settlement proposal; if the client refuses settlement, it is typically moot by the time of the hearing – there is usually no longer a live issue. Sometimes there is some discussion in Court at that stage regarding the terms of settlement.

J. Shore – there are some situations where the party may want to have the Court look at a problematic decision and provide detailed information in support of the request for a consent order.

Action: Paul Harquail agreed that the CBA will review the proposed template and provide feedback.

d) Registry Screening of Documents

Josh Jantzi summarized the underlying proposal. On discussion with members of the Bar from different practice areas, no-one likes the idea of the Registry dropping its gate-keeper function. In the Bar's view, the Registry performs an essential role. Their interventionist approach is appreciated. He then referred to Rule 3: the cost of proceedings would increase considerably if interlocutory measures were needed to police compliance.

Lise Lafrenière Henrie noted that Rule 72 allows the Registry to refer non-compliant documents to the Court for direction. The Rules committee is looking at the option to give greater discretion to the Registry regarding the handling of such documents.

Josh Jantzi added that a minority of counsel were of the view that the Registry should not prevent counsel from filing a document that the Registry considers non-compliant – in their view, non-compliance issues could be addressed later at the hearing or via a procedural motion by opposing counsel. In his view, though, the Registry officer should not be compelled by counsel to accept a document if the Registry considers it non-compliant.

Paul Harquail suggested a possible checklist for self-vetting of documents to allow for more efficient handling at the Registry.

There was general agreement among those present.

Lise Lafrenière Henrie: this could be added to website. She asked whether members of the Bar might assist with review of draft material for the website.

Paul Harquail: the Bar would welcome the opportunity.

e) Confidentiality Motions– comments on Draft Report on Confidentiality Orders

Justice Manson consulted with the IP Bar / IPIC, then circulated a revised draft of the Report for wider consultation.

He referred to jurisprudence on protective orders – where needed, the court is prepared to entertain such requests. There is no template yet (as requested by the IP bar), but the Court is open to considering this option.

Kamleh Nicola: for the IP bar, any direction or template agreement (or order) would be helpful. There is still concern regarding the issue of protective orders / agreements. There is a jurisdictional question, whereas for general confidentiality orders, the bar understands clearly what is required. There remains a question how to enforce an agreement, if this is the route that is followed. If there is acrimony between parties, the process is challenging. Case management is helpful, though there is some debate whether this issue should be brought to the case management judge (CMJ).

Justice Manson: if you can't agree, bring the issue to the CMJ. If intervention of the trial judge is needed, they are now assigned much earlier. If there is obstruction, there are cost consequences.
Kamleh Nicola: can we bring the request for a protective order to the Federal Court?
Justice Manson: if the protective Order is within the Court proceeding, it can be enforced by the Court; however, for private agreements, this is still an open question.
The Chief Justice noted that in IP especially, but also in other areas, you want to get the matter before a specialized judge. It is preferable to bring a motion for a special sitting, with a request for a specialized judge. If on general motions, there is no guarantee the judge will have a practice background in that area of law.
Justice Lafrenière referred to Rule 35 for special sitting. Regarding protective orders, there is a precedent (bifurcation Order). The Court is trying to ensure consistency in this area. A new Court working group has been created to identify templates for Orders for different issues. He requested that the bar identify types of orders that warrant inclusion on this list and provide examples of Orders that are recommended. This would assist with consistency.

Action: for the project to establish a list of Order templates, the bar is requested to identify types of orders that warrant inclusion on this list and to provide examples of Orders that are recommended.

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

Erin Roth: three new Practice Directions were issued in the last 2 months. There has been no negative feedback at all, and positive feedback regarding the simplified process for an anonymity order. She is awaiting feedback on the e-process pilot.
The Chief Justice noted that the Practice Guidelines were launched at the AQAADI conference in Montreal. He referred to a previous pilot that was started in Montreal for scheduling IMM cases, and the upcoming pilot regarding Quebec Rules of Procedure. He added that this settlement project was launched in Toronto because a critical mass of judges is needed for the e-process pilot.
Justice Diner asked how the bar shares this information to its members. Some senior counsel were not aware.
Erin Roth: there are many emails each day on the CBA listserve, so some counsel might miss specific items due to volume.
Justice Diner: please send a reminder – these are important for litigators.
There are a number of practice issues that arise, which are addressed in the Practice Guidelines.
The Chief Justice thanked Justice Diner for his leadership on these projects.

g) Court web site re-design

Report by the Chief Justice regarding the new web site:

- it will be much more intuitive and user friendly;
- we have added a lot of new content and reorganized the main menus as well as drop-down menus;
- we also have a new mobile interface;
- there are many new resources, such as flow-charts, time-line calculators and checklists for Self Represented Litigants;
- there are also new tools that will improve access to justice;
- the launch is scheduled for this coming Spring.

Feedback and suggestions are welcome.
Lise Lafrenière Henrie thanked the bar for agreeing to revise draft material. Also, she noted that the Court is exploring options, for major cities, to have access centers with computers and other resources to assist litigants.
Paul Harquail: the Bar is available to help. He noted previous assistance re searching for names of ships.
The Chief Justice: a similar issue was also raised within the IP bar. It would be useful for the bar to identify one or two representatives from key sections who are available to provide input early in the process.

Action: for the website, the bar is invited to identify one or two representatives from key sections who are available to provide input.

h) Access to documents on the Court web site

Chief Justice: this is one of the priorities from the Strategic Plan. Initially, the focus will be on providing access to court documents and possibly pleadings, but not necessarily evidence.

There is already online access in some other jurisdictions, like the British Columbia Court of Appeal and the federal competition Tribunal. The Federal Court has some limited capability to move forward, but full implementation will likely be feasible only once we have a new case records management system. In the interim, it is important for the Bar to identify concerns regarding possible access to different types of documents.
Lise Lafrenière Henrie noted the Model Policy, which does not suggest publication of pleadings, but the docket. We get many requests from counsel or journalists, so we are looking to make documents more accessible, though there is a need to identify sensitive information that may exist in certain documents.
Justice Lafrenière: this initiative is not just for the Bar, but would also be useful for the Court; for many files, only part of the file is available electronically.
Daniel Gosselin: there are numerous incremental steps – e.g., electronic screens for each office; better quality translation. Without significant investment, it is difficult to implement the full electronic vision for the Courts.
Chief Justice Crampton made reference to live-streaming of court hearings (example: Justice Zinn's trial, with remote access for members of a First Nation who were unable to attend the full trial in person).
Diane Soroka: would all documents be available online for judge / counsel, but with login access, for example, for sensitive documents?
Chief Justice Crampton responded that anything that is not available at the counter will similarly be unavailable online, but anything that is accessible at the counter should, eventually, be accessible online. There is some concern in some practice areas. Members of the Court have been asked to apply the model policy related to drafting of reasons so as to avoid unnecessary personal information that might create risk.
Erin Roth: currently, there is protection via the requirement to go to the Registry to review a paper document.
Chief Justice Crampton noted the competing perspectives, even within the Bar (e.g., media section vs. IMM section), regarding online access to court documents.
Erin Roth: the IMM section supports a move to e-filing, but would like password protected access to documents.
Diane Soroka: a full electronic database with password protection was implemented for residential schools.
Justice Lafrenière noted that in some IP cases, a draft judgment is circulated for review of potentially confidential info; however, this is resource intensive.
Chief Justice Crampton expressed concern regarding limited access to the record for a national court. The Bar needs to identify only those cases that truly require anonymization.
Erin Roth: all refugee cases and protected person cases were *in camera* at the Immigration and Refugee Board; there is concern that some claimants hesitate to bring Applications for Judicial Review due to the public access.
Diane Soroka: regarding the residential school process, the tension was between privacy and historic records – the SCC came down on the side of privacy.
Justice Kane: in immigration and refugee matters, there is often considerable personal data throughout the tribunal record, which is sometimes voluminous. It would be challenging to anonymize all this. Also, there is a separate issue regarding citation of anonymous cases.
Justice Heneghan asked what other jurisdictions do for refugee cases.
Andrew Baumberg referred to a law clerk research memorandum, completed some years ago, which found that a number of jurisdictions, including the U.K., had moved to default anonymization of refugee cases even for judicial processes in the Courts.
Chief Justice Crampton made reference to the Sun Sea and Ocean Lady series of cases, with multiple related cases identified only by a number.
Justice Lafrenière referred to the similar situation with pharmaceutical cases, with a limited number of parties bringing a large number of cases, leading to many cases with identical styles of cause.
Lise Lafrenière Henrie added that in family law, it is standard practice to use numbers rather than names for cases.
Andrew Baumberg noted a report of the National Centre for State Courts regarding automated redaction tools, which in recent years have become much more effective and less expensive.
Erin Roth noted that for IMM cases, there is a lot of handwriting, which is difficult to redact for automated tools.
Lise Lafrenière Henrie suggested a default posting except for IMM cases, with delayed posting until after review.
Justice Kane: for online access, some constraints will be needed, especially early in the implementation. We can't put up everything at the initial phase – there are too many risks. There continue to be issues in finding the proper balance between privacy and public access.

Justice Shore: we need to assess the policy issues and consequences very carefully.
Diane Soroka suggested 2 levels of access – one level for parties and narrower access for the public.
Chief Justice Crampton identified one key constraint: the Court cannot be responsible for redaction of the certified tribunal record. However, if there is an anonymity Order, it is of course feasible for the judge to pay special attention to the details included in the Reasons for Decision.
Erin Roth: the Tribunal is not able to take on the redaction role either.

> **Action:** further discussion is needed within the Bar, with input from various sections (including the Media Section). The Court will then move forward on the issue.

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

Andrew Baumberg noted that the minutes could have noted an action item to highlight the follow-up. At the last meeting, the Court had asked for feedback from the bar regarding specific practice areas / scenarios, or processes, by which exceptions would be made to the practice direction.
Chief Justice Crampton: it would be good for parties to try to agree on a lump-sum before the end of the hearing – this has been found to be very helpful. Based on Appeal case-law, the amount should be linked to the tariff.

> **Action:** feedback from the Bar regarding specific practice areas / scenarios, or processes, by which exceptions would be made to the practice direction. For follow-up in writing.

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

Justice Lafrenière: the Court struck a working group, of which he is chair. The protocol now includes the Federal Court, but without reference yet to its *Rules*.

- Rule 384.1 – class actions are now automatically case managed
- Rule 385 – the case management judge has wide discretion

Generally, the protocol was well-received by the Court committee – it is consistent with Court practice and is practical. There is some concern, though, with the national database, which requires alignment of the Court with the CBA rather than it being managed by an independent group. However, the database is useful for everyone – there are often cases initiated in different Courts in parallel. The Federal Court would benefit from updates about these cases.

> **Next step:** for review at the upcoming Court meeting. Under consideration: possible recommendation of a formal notice adopting the protocol.

The Committee also discussed the identification of a core group of judges / prothonotaries focused on class actions – this is recommended. There is a need for judges to have appropriate training. There is an upcoming Bar seminar, and at least one member of court will attend.
Marc-André O'Rourke: no other Courts have expressed concern regarding the direction that parties submit updates to the CBA.
Chief Justice Crampton has had discussions with representatives of the class action bar. He has encouraged them to spread the word that a litigant can have a *single* proceeding in Federal Court rather than *multiple* proceedings in many provinces; there would be huge efficiencies for claimants and defendants.
Guy Régimbald noted that the main fight is over carriage motions between law firms; ideally, these could be stay of proceedings pending certification in Federal Court.
Justice Shore added that a majority of Chief Justices would probably be supportive. He referred to the Federal Court of Appear decision on the 60's scoop class action. Although many lawyers would be supportive, there are likely some outliers.
Guy Régimbald agreed.
Chief Justice Crampton: for these and other national / interjurisdictional issues, it is important to include the Federal Court in the discussion – we need to look for ways to advance access to justice and reduce costs.

Joshua Jantzi: there is some concern in the class action bar regarding section 50.1 for actions against the Crown if there may be a third party issue. This is a law reform issue. One option might be to proceed with the primary claim in Federal Court and then allow the third party claim to proceed separately.
The Chief Justice noted that this is on the list of the Legislative Reform sub-Committee of the Rules Committee.
Joshua Jantzi gave an example of a claim against Dow Chemical that was stayed due to section 50.1.
Justice Lafrenière: perhaps change "shall" to "may stay."
Justice Shore referred to the upcoming class action involving electric shock treatment in Montreal.

> **Action:** Paul Harquail will raise the class-action issue within the CBA for possible options regarding communications.

Finally, the Chief Justice noted recent discussions with the Advocates Society to develop some liaison relationship for Toronto similar to the Montreal Bar Liaison Committee.

4) Update: Federal Court

The Chief Justice provided a report:

- Associate Chief Justice position - we understand that the Minister will be forwarding her recommendation for the Court's new ACJ sometime in the next few weeks;
- Additional prothonotaries - the budget created 3 new positions, and we are awaiting an imminent appointment of two new prothonotaries, one in each of Toronto and Ottawa;
- Vacancies – J. Shore went supernumerary in March, and one Ontario judge is scheduled to go supernumerary later this month; 2 judges are eligible in May and November next year, respectively; there is a new position in Bill C-6 as part of the national IP strategy;
- Looking to increase diversity from leading members of the bar;
- Scheduling – scheduling trials of 5^{+} days for Fall 2019, and for others, by Summer 2019;
- Electronic proceedings – CAS is installing 6 sets of state-of-the-art equipment in Quebec City, Toronto, Montreal, Ottawa and Vancouver over the course of the next year, and will then install 5 more in the rest of our facilities the following year; we are looking for volunteers from Bar for e-trials, which provide significant savings (J. Mandamin estimated approximately 1 hour per hearing day, and J. Zinn's 100-day trial finished in 70 days); the Chief Justice's experience sitting on e-trial was very efficient – it provides access to justice and reduction in costs, and is very efficient for writing decision; please get the word out, and for input, talk to lawyers in the competition section;

Paul Harquail: perhaps we can reach out to our principle counter-parts at the CBA provincial level re: efficiencies.

Joshua Jantzi: is this available for hearings of applications for judicial review? Some judges have had difficulty with a very large electronic record.

Andrew Baumberg noted the recent IMM e-process pilot, based on an opt-in model for judges / lawyers.

Diane Soroka questioned how to find hand-written documents.

The Chief Justice noted that everything is scanned in.

Andrew Baumberg: the evidence management system allows for key word coding for documents to assist with searching.

The Chief Justice thanked the CBA for its support for CRMS funding, adding that translation funding is also an issue. For a national court, decisions should be issued in both languages on a timely basis, but we don't have the budget.

Daniel Gosselin noted the funding request for more revisers and jurilinguists to increase quality control, not just for final decisions but also selected interlocutory decisions. The quality has improved with recent funding, as there were many complaints in the past, but more resources are still needed: 2500 decisions per year are translated, with the goal set for 4000 decisions per year if funding is committed.

The Chief Justice noted the Courts' recommendations for designations of private bar members to the Rules Committee, which has been missing members for close to two years. Experienced members of the Bar are needed.
Ask bar to make greater use of Rule 54 for early conferring of experts to narrow issues and expedite matters and avoid last-minute challenges. This also includes early qualification of experts.

5) CBA National Sections & New Points

a) Treatment of Certified Questions

Erin Roth (IMM section) – the Section is concerned with the number of appeals, following certification of question, that are then dismissed for lack of jurisdiction. We will ask for a sub-committee possibly to develop an early screening process.
The Chief Justice noted that this was an important issue at a recent AQAADI meeting, which expressed concern regarding the very limited number of questions due to the restrictive test for certification.

b) Update from practice areas

i) Immigration Law

Erin Erin Roth noted that we have touched on most IMM issues already.
One item of note is that the Bar would like to have the DOJ site provide a dual-column bilingual version for *past* versions, not just current versions. This is apparently in progress at DOJ.
The Chief Justice agreed that this would be helpful for the Court as well.
Andrew Baumberg described the sub-committee for assistance for unrepresented litigants, which will focus on providing some pro bono assistance to litigants who have been refused legal aid. The sub-committee is looking at possible collaboration with LexUM to have access to an artificial intelligence research resource.
J. Diner added that the DOJ and bigger firms are supportive.
J. Shore: there are law students who could get credits for helping *pro bono* lawyers.

ii) Environmental, Energy and Resources Law

Josh Jantzi: the Court remains very relevant for litigants in this field. More proceedings are likely on the horizon, e.g., challenging protection orders *not made* under the *Species at Risk Act*, judicial review of multi-disciplinary decisions, of decisions on navigation and shipping, and of pipeline arbitration committees.

iii) Administrative Law

Guy Régimbald: the executive section meeting was held yesterday – no issues to report. The section welcomed members of the Courts on education panels.
Andrew Baumberg noted an issue raised in the Labour Law, Human Rights, Pension Benefits, Privacy and Access Review Liaison Committee. The Committee met on October 26, and a sub-Committee was struck to consider the practice under Rules 317/318 regarding the tribunal record.

iv) Maritime Law

Paul Harquail thanked Justice Heneghan for her participation at CMI in London.
He noted an offer of support from J. Southcott for CMLA, to assist with an open meeting in Eastern Canada.
Also, the upcoming Grunt Dinner in is upcoming in Montreal, and members of the Court are welcome.

v) Intellectual Property

Kamleh Nicola expressed appreciation for the section's relationship with the Court, leading up to IP day held each Spring. The IP section is compiling comments for the time-lines on PMNOC.

The Chief Justice noted the productive exchange at the patent symposium. The discussion continues regarding the goal of limiting most trials to 2 weeks, and the requirement to keep the overall process under 2 years (which includes the trial-time and subsequent writing time for the judgment). Although the Court can be flexible, parties must show how any additional trial time requests will be 'made up' early on in the process.

Kamleh Nicola: we need to get claim construction off the table, so that it is not taking up any time.

The Chief Justice responded that the Court is receptive to motions on this issue.

vi) Aboriginal Law

Diane Soroka: work continues to develop space for indigenous law, including possible use of the assessor Rule. It is complex due to the number of indigenous cultures.

Justice Lafrenière noted the November 1 meeting of the Aboriginal Law Bar Liaison Committee – there is a continuous discussion regarding space for indigenous legal traditions. The Committee is also working on an addition to the Practice Guidelines – a framework for receipt of oral history evidence. It is also considering issues related to the scope and cost of litigation, including intervention by the Court. For chronic disputes between the same parties, measure are being put in place so that someone from the court can, if feasible, be assigned who has experience with previous disputes from the same parties. The Judicial Administrator will check previous cases before making assignments.

J. Shore referred to a new project by judges with experience in indigenous law to compile examples of methodologies used – we need to recognize the diversity of indigenous tribes in Canada.

End of Morning Meeting

Bench & Bar Liaison Committee Meeting

November 16, 2018 (Ottawa, ON)

MINUTES

Meeting of Federal Court of Appeal & Federal Court with CBA

Attendance

Federal Court of Appeal: Chief Justice Noël, Justice Pelletier, Alain Le Gal, and Amélie Lavictoire.

Federal Court: Chief Justice Crampton, Justice Kane, Justice Heneghan, Justice Shore, Justice Lafrenière.

Courts Administration Service: Daniel Gosselin, Lise Lafrenière Henrie, Manon Pitre, Andrew Baumberg.

CBA Committee members:

- Kamleh Nicola (Toronto, ON) — Intellectual Property
- Guy Régimbald (Ottawa, ON) — Administrative Law
- Joshua Jantzi (Calgary, AB) — Environmental, Energy & Resources Law
- Erin Roth (Vancouver, BC) — Immigration Law
- Paul Harquail (Saint John, NB) — Maritime Law
- Diane Soroka (Montreal, QC) — Aboriginal Law
- Catherine Lawrence (Ottawa, ON) — Department of Justice
- Marc-André O'Rourke — CBA staff lawyer

1) Adoption of Agenda & Minutes

No comments.

2) Update from the Chief Administrator of the Courts Administration Service (Daniel Gosselin)

Security screening: where possible, a second line is now being provided (for screening of lawyers separately provided that they identify themselves as counsel), and if not, lawyers will be screened on a priority basis.

New construction is under way for facilities / hearing rooms in Ottawa. In Toronto, a new floor is planned for 2020, and another later. So, 5-6 new courtrooms are to be completed by 2021. In Calgary, Winnipeg, and Edmonton, there are issues regarding screening equipment. Consultations are under way for a possible change of location.

CAS is also investing in e-filing and e-trial capability.

Translation: the goal is to publish decisions simultaneously in both languages, or at most within 5 weeks. Delays in translation are decreasing.

Budget 2019 proposal (relocation of the Montreal office): 2 options are still on the table for discussion – the existing Saulnier building or a new courthouse.

Issue re registry staff turnover: we are working to address this issue, which should not impact litigants.

Paul Harquail: a follow-up discussion is proposed with Daniel Gosselin on the issue of CAS' budget requests in order to ensure that the CBA is well informed regarding CAS's needs.

Daniel Gosselin has asked for a meeting with the Hon. Scott Brison (President of the Treasury Board) regarding digital infrastructure (CRMS) and with the Hon. Melanie Joly (Minister of Canadian Heritage) regarding translation.

3) Follow-up Items from last meeting

a) Safeguarding Judicial Independence & Bill C-58

Marc-André O'Rourke: the Bill is before the Senate Committee, and the CBA made written and oral submissions. It appeared before the Senate Committee on October 24th 2018.

CJ Noël: the CJC made submissions, noting that the statute is without precedent, purporting to give the executive branch the power to decide what impacts judicial independence. The Canadian Superior Court Judges Association made submissions as well. Bill C-58 may lead to litigation, which is unfortunate, as it will likely undermine public opinion regarding the administration of justice.

CJ Crampton agreed. It is incongruous how, pursuant to this Bill, the executive branch could be deciding what does and does not constitute a breach of judicial independence. He referred to submissions from Marc Giroux who appeared before the Committee on this issue, as well as to the submissions of Suzanne Legault.

Paul Harquail noted that the CBA has and will continue efforts to present its position in appropriate forums.

b) Security Screening

Update provided earlier by Daniel Gosselin.

4) CBA Items

Paul Harquail noted that all items have been addressed.

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

a) Rules Committee Update

Chief Justice Crampton: upon request, new recommendations for Rules committee members drawn from the legal profession were recently made to the Minister's office.
CJ Noël: the delay may have been based on a misunderstanding, with the nomination of these candidates being treated akin to judicial appointments.
Andrew Baumberg added that Francois Giroux, now in the Minister's office overseeing this file, was formerly a Secretary to the Rules Committee and understands very well what is in play.
Paul Harquail: The CBA can reinforce this need for nominations as a priority that enables the Courts to do their work.

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

Chief Justice Noël noted that this is a joint effort with the Federal Court. The pilot would provide a procedure that more closely resembles the rules of procedure in Quebec. Within the working group, there is good representation from the Quebec Bar and DOJ.

6) Next Meeting

May 10, 2019.

END OF THE JOINT FC-FCA PORTION OF THE MEETING

Bench & Bar Liaison Committee Meeting

November 16, 2018 (Ottawa, ON)
MINUTES

Meeting of Federal Court of Appeal with CBA

1) Opening Remarks / Mot d'ouverture

Chief Justice Noël invited feedback with respect to the CBA's needs and the work of the Court

P. Harquail indicated that the CBA members present appreciate the opportunity to dialogue with members of the Court and, in their role as officers of the Court, to assist the Court in its efforts.

2) Adoption of Agenda & Minutes / Adoption de l'ordre du jour et du procès-verbal

Not discussed.

3) Update: Federal Court of Appeal / Mise à jour sur la Cour d'appel fédérale

a) Changes in the composition of the Court / Changements dans la composition de la Cour

Chief Justice Noël reported that Justice Marianne Rivoalen has been appointed to the Court in replacement of Justice Woods who has become a supernumerary judge. Justice Rivoalen is formerly Associate Chief Justice of the Court of Queen's Bench of Manitoba, Family Division. She has already been sworn in and has begun to hear appeals.

Chief Justice Noël also reported that Justice André Scott retired in October 2018 for health-related reasons. A replacement from the province of Quebec is now needed to replace Justice Scott.

b) Caseload statistics and request to increase the complement of judges / Statistiques relativement au nombre de dossiers et demande pour augmenter l'effectif de la Cour

Chief Justice Noël indicated that the current statistics demonstrate that the Federal Court of Appeal is short-staffed. The Federal Court has doubled in size over the past 20 years while the Federal Court of Appeal has remained static in terms of numbers. He has communicated with the Minister of Justice and has conveyed the need to increase the complement of judges. The FCA is seeking funding for one position that already exists in law but is not funded as well as the creation of a new judicial position. The latter of these requests requires a legislative amendment.

Chief Justice Noël reported that the workload of the Court is increasing, with judgments taking longer to issue due to increasing complexity and the high workload created by vacancies within the Court.

P. Harquail indicated that the complexity in litigation is increasing.

Chief Justice Noël discussed statistics that show a reversal in tendencies: where the Court used to render more judgments from the bench than it took under reserve, the Court now takes more cases under reserve than it disposes of from the Bench. The number of reserves and the time that cases are under reserve has been increasing continuously.

c) E-filing update / Mise à jour quant au dépôt électronique

A. Lavictoire provided an update on the Federal Court of Appeal's e-filing initiative which is currently in the planning stages. Currently, the Court is identifying its needs and the requirements that will be imposed on documents submitted electronically.

P. Harquail offered the assistance of CBA members when the time comes to do beta testing of the e-filing system.

P. Harquail also indicated that the Court's Twitter account is a refreshing rapprochement with the legal community across Canada. It increases awareness of decisions rendered by the Court. The CBA can examine how it can support the Court in conveying its messages to a broader audience.

J. Jantzi reported that he suspects that the Twitter account will be increasingly used, with visits to the Court's website decreasing over the long term.

A. Lavictoire reported on recent efforts by the Court to publicize an important decision (the "Transmountain" decision) through traditional media as well as social media. Advance notice of the decision was provided, a media lock up was held and a summary of the Court's reasons was made publicly available.

J. Jantzi indicated that the measures taken by the Court in that case were appreciated by counsel involved, in particular the advance release of the embargoed decision. The media lock-up was also appreciated by counsel as it allowed for accurate reporting of the outcome.

G. Régimbald reported that the Supreme Court of Canada routinely offers lock ups for the media.

Chief Justice Noël indicated that where a decision will have a wide-ranging impact, the Court can take such additional measures to assist media and the public to understand the reasons of the Court and the impact of the decision.

d) Court website redesign / Mise à jour du site Web de la Cour

A. Lavictoire reported that the Court will be undertaking a redesign of its website in order to give it a more modern look and feel and to increase the content available to assist both counsel and unrepresented litigants. Feedback is sought about the current site and its content, as well as suggestions about new content required.

P. Harquail indicated that the CBA members present represent their sections, can canvass their sections for feedback and report back to the Court. Those sections represent most of the Court's areas of jurisdiction.

4) CBA National Sections & New Points / Sections nationales de l'ABC et nouveaux points

P. Harquail reported that the Committee is currently without a representative from the Tax Bar, the term of the former member having expired. The CBA shall search for a new representative from the local Tax Bar.

a) E-filing : Gap between Rules and Practice Directions / Dépôt électronique : Écart entre les Règles et les Directives sur la pratique

The Rules permit for electronic filing in the Federal Court of Appeal, yet a practice direction dated February 12, 2015 indicates that the options for electronic filing set out in the Rules are not yet available to parties before the Court.

Chief Justice Noël indicated that the 2015 practice direction will likely be withdrawn once the e-filing project is launched. That practice direction was to address the fact that the Rules were amended before the Court was technologically able to receive electronic documents. Justice Pelletier added that parties could and can file electronic documents with the consent of the Court.

b) Treatment of certified questions in the FCA / Traitement réservé par la CAF aux questions certifiées

E. Roth reported that a number of immigration cases are heard by the FCA only to be dismissed for lack of jurisdiction because the Court finds that the Federal Court should not have certified a question. Earlier identification of such cases would avoid the waste of judicial resources.

Chief Justice Noël responded that judges of the Federal Court have the power to certify questions where an issue transcends the particular case before them. At the FCA, it is difficult for the judges to identify an issue with the certified questions before being seized of the matter and delving into it.

Justice Pelletier added that the Supreme Court of Canada has said that once a question is certified, any question is open for debate on appeal. That has been interpreted by some as a licence to certify any question. It is difficult for a judge of the FCA to get far enough into a file early enough into the process as to advise counsel of an issue well in advance. If counsel becomes aware that a question ought not have been certified in the Federal Court, they may want to go back to the Federal Court judge to have the certified question amended.

Chief Justice Noël indicated that the Court will generally allow a debate as to whether the question was properly certified.

c) Update from practice areas / Mise à jour des champs de pratique

i) **Immigration Law / Droit de l'immigration** – Erin Roth

Nothing to report. See discussion above about certified questions.

ii) **Environmental, Energy and Resources Law / Droit de l'environnement, de l'énergie et des ressources** – Josh Jantzi

J. Jantzi indicated that it is a busy time in energy law at the moment, with the recent release of the Transmountain decision and others.

iii) **Maritime Law / Droit maritime** – Paul Harquail

The Comité Maritime International will be holding its 2019 conference in Montréal. The Canadian Maritime Law Association will be holding its 2019 conference in Quebec.
P. Harquail would like to express the CBA's appreciation for the participation of members of the Court at its conferences. Justice Stratas will soon be speaking at an administrative law conference.

iv) **Charities law section / Section du droit des organismes de bienfaisance** – Adam Aptowitzer

A. Aptowitzer absent.

v) **Intellectual Property / Propriété intellectuelle** – Kamleh Nicola

The honourees for the 2019 edition of Judges' dinner during IP Day have not yet been identified. The event takes place in May. The section acknowledges the Court's participation and presence at the 2018 edition of this event.

K. Nicola indicated that hopefully the new PMNOC regime will not add to the workload of the FCA discussed earlier.

Chief Justice Noël indicated that the first few applications for leave to appeal under this new regime have been filed with the Court.

vi) **Aboriginal Law / Droit autochtone** – Diane Soroka

Nothing to report.

vii) **Administrative Law / Droit administratif** – Guy Régimbald

The yearly Administrative law conference is currently underway. Every year, a judge of the FCA participates and the section is grateful for that participation. Justice Stratas will be discussing the trilogy of standard of review cases currently before the Supreme Court of Canada.

In closing, Chief Justice Noël expressed his thanks for the CBA's continued collaboration.