Bench & Bar Liaison Committee Meeting

May 10, 2019 (Ottawa, ON)
MINUTES

Meeting of Federal Court with CBA

Attendance

Federal Court: Chief Justice Crampton, Justice Heneghan, Justice Lafrenière, Justice Pentney, Justice Diner, Prothonotary Aalto.

Courts Administration Service: Daniel Gosselin, Lise Lafrenière Henrie, Manon Pitre, Patrick O'Neil, Shane Brunas, Andrew Baumberg.

Members of the Bar:

- Faylene Lunn (Ottawa, 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
- David Taylor (Ottawa, ON) — Aboriginal Law
- Catherine Lawrence (Ottawa, ON) — Department of Justice
- Marc-André O'Rourke — CBA staff lawyer

1) Opening Remarks

The Chief Justice welcomed members of the Bar and noted the addition of the Strategic Plan to the agenda.

2) Adoption of Agenda & Minutes

Item 3(c) tabled.

In response to a question regarding the Grunt Club Dinner, Paul Harquail responded that it is an annual maritime industry dinner with approximately 1200 people from around the world.

3) Follow-up Items from last meeting

a) Access to documents on the Court web site

Catherine Lawrence noted, in particular, the potential for phishing, given that BOTS can be used to search for personal information very easily online. The TCC has a practice directive regarding e-filing that addresses personal information to mitigate this type of risk. The concern relates to tax information, but also social insurance or telephone numbers and other personal information.

Chief Justice Crampton responded that we are all going to need to change. The first phase of the proposed pilot project would be to post documents generated by the Court as well as pleadings. However, we need to keep in mind the types of privacy concerns raised. Redactions should be relatively simple for things like a social insurance number. As a general proposition, the CBA should liaise with its media law section, and come back to the Court with a joint position.

In discussions with the immigration bar, we are looking at making an exception for risk-based files. However, there is concern that requests for confidentiality may become the new norm. The Court hopes to find a reasonable compromise to balance risk / privacy issues with the public interest in the transparency of Court proceedings. However, it is not expected that the full certified tribunal record would be posted – there would be too many challenges to ensure necessary redactions. Also, it is likely that online access would include only those immigration cases in which leave is granted to proceed to a full oral hearing on the merits. It is recommended that members of the Bar review the decision in *Sierra Club of Canada v. Canada*, 2002 SCC 41 and familiarize themselves with the underlying principles. The overall goal is to

move away from a paper-based court, and to permit the legal community and clients to access documents from their offices/homes, rather than having to go to the registry office and pay x cents per page to photocopy documents.
Erin Roth: a new issue has arisen regarding allegations of incompetence against former counsel, even in stay motions. It is preferable not to have such allegations published without first providing some formal process to allow the counsel an opportunity to respond.
Chief Justice Crampton: in competitions matters, processes were developed to maintain confidentiality of preliminary material that remains to be assessed by the Court.
Erin Roth added that if the online access was not triggered until after leave was granted, then this would also avoid early stay motion materials being posted.
Faylene Lunn: generally the IP bar is in favour of online access. In most proceedings, there are both public and confidential versions submitted. As long as safeguards are in place to ensure confidential material is not posted, the IP Bar supports the initiative.
Chief Justice Crampton: we are also looking at options for parties to electronically access their own confidential material.

b) Court web site re-design

Chief Justice Crampton noted the extensive work by Harley Daout and other members of CAS on the new website, which has many new resources.

Suggestions for additional content are welcome.

Erin Roth: Bar has provided some feedback, including positive response regarding the new deadline calculator. However, it was noted that when you search online for the Court's website, there are still many cached links to old website addresses. Also, the search function on the website seems to be inconsistent.

Paul Harquail: for the maritime bar, there is a new issue with the search function for the shipping database. On the commercial side, lawyers rely on the database when giving advice. If you do not know the *in personam* parties, counsel are not able to find the names of individuals to send notices regarding ships that are affected by a particular legal issue.

Josh Jantzi: noted that some searches require different search terms to get the right result, such as if the spelling is close but not exactly as expected.

Chief Justice Crampton: on the web, searches that are close but not a direct hit will produce alternate results that typically include what one is seeking. The Court will endeavour to develop a similar functionality.

Paul Harquail: there is also an issue with standardization of the style of cause. Given that different parties may enter the name of a ship differently, it would be helpful if the search tool could suggest close alternates.

David Taylor: this would be helpful for historic aboriginal law cases.

Catherine Lawrence: the deadline calculator is very useful. She suggested an option for a *printable* docket list.

c) Consent judgment template

Paul Haruqail: tabled to the next meeting.

Chief Justice Crampton noted that the purpose behind the development of the template was to increase standardization for judicial review applications, by facilitating the preparation of proposed consent judgments by the bar. Individual members of the Court will continue to have the flexibility to depart from the language of the template. It is recognized that in civil actions, the template may be less helpful/appropriate.

d) Registry Screening of Documents

Joshua Jantzi: the Environmental, Energy & Resources Law bar prefers that the Registry continue its screening and refuse non-compliant documents. If counsel has an issue, it can be raised under Rule 72.
Prothonotary Aalto: the Toronto office continues its screening function. A key issue is how far offside the document is.
Justice Lafrenière: the Registry has no discretion to refuse a document. If they find a problem, they must refer it to the Court.
Lise Lafrenière Henrie: a key question is whether the screening should be done by counsel.
Chief Justice Crampton: in Australia, there is 99% voluntary uptake of e-filing, with automatic stamping by the Registry's system. Initially, some documents were vetted by the Registry. Over time, a "trusted user" system has developed, pursuant to which documents filed by those users are automatically accepted. (Those users risk losing that status if they file materially non-compliant documents.) This has permitted the Registry to reallocate staff and achieve significant efficiencies.
Daniel Gosselin reiterated that the administrative stamp is not a confirmation that the document is compliant. The onus is still on the parties.
Josh Jantzi: most parties would not complain about minor formatting issues. However, if a 50-page memorandum is filed, that might result in a complaint.
Prothonotary Aalto: these are the outliers. The difficulty is primarily with self-represented litigants (SRLs), many of whom are not familiar with the Rules.
Justice Lafrenière: what parties think is acceptable for each other is not necessarily acceptable for members of the Court. He favours a Nexus-type system that would allow trusted filers to have their documents automatically filed without screening.
Harley Daout: we are working on addressing some of the issues for the fillable forms.
Justice Lafrenière: there may be a different approach in the other courts.
Justice Pentney: in the U.S. and other jurisdictions, there are significant efforts to assist SRL's with additional tools such as fillable forms. Even with lawyers, some e-file a single PDF document but arrive with separate electronic documents. It is necessary to adapt to the electronic medium with a very different format. He gave examples of unwieldy documents filed electronically. Judges then have to figure out where each exhibit/tab is located.
Josh Jantzi: there is a big disbursement issue for e-filed documents that don't need to be printed.
Chief Justice Crampton raised a question regarding legal aid coverage for electronic processes in IMM proceedings.
Erin Roth responded that she had heard that there is a legal aid issue concerning expenses related to scanning and optical character recognition.
Faylene Lunn: the IP bar wants to provide workable copies to the Court, and paper is more reliable. Also, there are some technical issues with the e-filing portal. Finally, the Notice indicates that there is an automated time-stamp, but sometimes there is a processing delay by the Registry. Given that there is no clear service standard, some counsel are reluctant to use the e-filing portal if the document is being filed near a deadline or for a hearing the next day, for example.

Chief Justice Crampton noted that as parties move to e-filing, there should also be an uptake of electronic hearings. There are six new e-courtrooms installed across the country. There will soon be ten, but they are underutilized, and so members of the bar are encouraged to consider an electronic hearing / trial. These are much more efficient, for parties and the court.

Catherine Lawrence asked when the Department of Justice could expand its use of the e-filing portal.

Andrew Baumberg: there is no technical limit.

Shane Brunas agreed, though adding that the process is inefficient for the Registry, because registry staff still have to photocopy and then process the documents.

Chief Justice Crampton: the internal process is still paper-based; we have not received funding for a new case records management system (CRMS). A fully-electronic process would be much more efficient. There are massive records in some files. Until we get a new CRMS system, electronically filed documents

will not get posted directly into our registry system, and then be available to staff and judges across the country

Erin Roth: a greater use of compendia might address this issue.

Chief Justice Crampton agreed; many judges ask counsel to file a compendium.

Justice Lafrenière: there is sometimes too much included even in compendia. However, a compendium should probably be produced in every case.

Prothonotary Aalto: the bar in general, and the IP bar in particular, do not know how to prepare a compendium. If it is more than an inch thick (or close to the size of the record that it is meant to replace), it is too much.

Paul Harquail: if there is a particular urgency, is there a way to have e-filed documents processed electronically in a timely manner?

Patrick O'Neil: many lawyers indicate something is urgent when it is not.

Fayleen Lunn: the e-filing system has a time-stamp, but there is still a short delay before it is reviewed / approved by the Registry. So it is not always possible to correct a deficiency within the deadline.

Patrick O'Neil: this happens at the counter as well.

Chief Justice Crampton: minor deficiencies could be let through the e-filing system as of the original submission date.

Justice Lafrenière: there are also consequences for the recipient who is being served. Time-lines start to run, but the recipient does not know if the document was accepted notwithstanding it being irregular. For irregular documents sent to the Court, he often issues a direction that accepts the document but with the subsequent next time-line starting from the date of the direction.

Fayleen Lunn: there are some documents rejected due to an error by the Registry (e.g., tariff required); in these cases, flexibility is preferred.

Chief Justice Crampton: the Court is moving to a more flexible approach.

Lise Lafrenière Henrie: it may be possible to have a registry officer reviewing e-filed documents real-time.

Josh Jantzi: in one urgent situation, he called the Registry, which agreed to review the e-filed document right away.

Justice Diner: for stays of deportation, if materials are filed electronically, the Department of Justice may not get notice if served electronically, and the Registry may not see it. The proposed solution was to have counsel fax a letter advising that the document was filed electronically.

e) Confidentiality Motions

Fayleen Lunn: there is a split in the bar regarding between protective Orders and agreements. As with bifurcation order templates, a template for protective Orders might help address the issue. The IP bar is open to assist with drafting of such a template.

Justice Lafrenière: there are 3 decisions that indicate protective Orders may be sought and normally should be granted on consent. We are moving forward with draft protective Orders that have been submitted by a joint committee. The Court is reviewing this, subject to what the FCA may have to say in a matter that is under appeal. There will be an update at the IP town hall.

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

Justice Diner: the settlement pilot has decreased the number of last-minute settlements, which now occur earlier in the process. Given the positive results, the Court is considering an expansion of the pilot nationally. The Department of Justice expressed reservations that need to be addressed before expansion, and the Court also needs to address some internal process issues.

On the e-process pilot, there has been low uptake by the Bar, and so adjustments are being made to the process to facilitate participation. We are also discussing the possibility of parties filing pleadings as well as stay motions in electronic format by default. There remain some issues to resolve for both the court and department before moving forward.

Chief Justice Crampton: ideally, the Department and its clients in IMM matters, as well as the decision-maker, will be able to shift to a fully-electronic process.

Andrew Baumberg noted the update from Deborah Drukarsh (Department of Justice counsel), who had advised the Immigration Committee that the Department has no general electronic service capacity after-hours; they are looking at a pilot drop-box type solution.

Justice Diner: the Department is very aware of the need to move forward.

Andrew Baumberg: the IRB is committed to the pilot, but other tribunals are not yet included. A general protocol for electronic certified tribunal records might assist other tribunals to follow the lead set in the pilot with the IRB.

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

Josh Jantzi: at the hearing on the merits, it is not always practical for a bill of costs to capture all disbursements; there are usually many other priorities to prepare for the hearing. Counsel are often reluctant to address costs in the written submissions due to the limited space in their memorandum – the priority is on addressing the merits, with submissions on costs later.

Chief Justice Crampton: if parties can settle costs, they don't need to make submissions on a bill of costs. Parties are more reasonable if they deal with costs before they know who has won. If they cannot agree, they could perhaps make submissions shortly after the trial but before the judgment is issued; this avoids a lengthy process later.

Justice Lafrenière noted that his practice is to ask counsel, after submissions, to speak with each other and try to reach an agreement, or otherwise to make brief submissions. The most reasonable submission is usually the one that prevails. As for disbursements, a generic request can be made to the court regarding the categories / types of disbursements allowable.

Guy Régimbald: in the Ontario civil procedure rules, a sealed envelope is submitted to the Court with submissions.

Justice Lafrenière: if a party is seeking costs on a motion, the request needs to be raised somewhere, at least in the Notice of Motion.

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

Paul Harquail: formal Notice by the Court adopting the CBA protocol might provide an opportunity for the CBA to integrate communications about the Notice and about the Court's national class action jurisdiction.

Justice Lafrenière: a draft has been approved, similar to what has been adopted by other Courts. Also, a core class action working group (judges / prothonotaries) is being formed within the Court. On the Court's own website, we are looking to create a listing of Federal Court class actions.

Chief Justice Crampton: the Court is considering internally whether the Court's class action jurisdiction is underutilized for multi-jurisdictional issues. This is an access to justice issue.

Guy Régimbald: there is no doubt that the Federal Court is the best Court to deal with national class actions. As the Court's expertise and efficiency is recognized, more counsel may be inclined to consider it, even though they are more familiar with the provincial rules.

Chief Justice Crampton: there remains an issue if the Attorney General raises a section 50.1 issue. The Department needs to consider the efficiency of defending in multiple jurisdictions.

Josh Jantzi: there is a chilling effect. What is wrong with bringing the main class action in Federal Court and then the third party proceedings to follow separately in the different provinces?

Chief Justice Crampton questioned whether a stay of proceedings is really necessary, given the ancillary jurisdiction discussion.

Josh Jantzi: in the Dow and Monsanto case related to Agent Orange, the Federal Court class action was stayed, resulting in 10 separate provincial proceedings.

Justice Lafrenière: as a national court, notices to the class (and other related contact to members of the class) must be available in both languages, even if the proceeding itself is in only one language.

We are looking to post selected interlocutory Orders along with notices in both official languages, which provide templates for other class proceedings.

Catherine Lawrence noted that she will bring these discussions back to the Department for consideration.

4) Update: Federal Court

Chief Justice Crampton provided an update.

- Budget: the Court's substantial requests for CRMS and translation were not granted, but funding was provided for the Montreal office relocation. There were also 3 new statutory positions created.
- Judicial Appointments: last week, Justice McHaffie and Justice Pamel were appointed. There are still 2 vacancies for Quebec judges and 1 for Ontario, as well as 1 vacant prothonotary position.
- 2020-2025 Strategic Plan: there is strong internal support to keep the priority on Modernization (including initiatives for Electronic Court files and proceedings, online access to court records, and online dispute resolution); the other main theme that has emerged relates to Strengthening the Court as a national institution. We welcome the bar's input. A public consultation process will be launched soon.
- Workload and Scheduling: the Court's workload is in balance, as it has not yet seen the expected surge in IMM proceedings. Also, there has been an increase in IMM settlements and a dramatic decline in citizenship revocation proceedings. In IP matters, there are still many settlements at the last minute. An increase is expected in DES proceedings. For hearings lasting 1-3 days, the Court is scheduling for the Fall of this year, but still has some availability in July. For hearings lasting 4 days or more, the Court is offering dates in Fall 2019. For hearings lasting 10 or more days, the Court is scheduling for Winter 2020, or Fall 2020 for IP cases (due to priority for assignment to an IP judge)

a) Common List of Authorities

Andrew Baumberg gave brief update regarding the initiatives in some of the specialized liaison committees to develop a new list of cases as a resource for self-represented litigants, with cases selected according to relevant issues.

Guy Régimbald: recommended that we look at the Supreme Court rules regarding books of authorities.

b) Twitter

Chief Justice Crampton: the Court is exploring different options for its twitter account.

Lise Lafrenière Henrie: with the new website, we are looking to tweet more often regarding the new resources and tools on the site. Suggestions are welcome.

Paul Harquail: noted that the twitter account keeps the court in mind, and improves accuracy of reporting.

c) **Webcasts**

Chief Justice Crampton: we are looking at using webcasts more regularly, particularly for parties that cannot easily get to hearing e.g., trial in Blood Tribe was webcast to community

Erin: even for large audiences that cannot get into hearing room; or for law faculties

Guy: also useful for class actions; how translation might be an issue

d) Online dispute resolution

Chief Justice Crampton: this was noted earlier regarding initiatives under the strategic plan.

e) Varia

Justice Lafrenière : there are a number of practice directions that are not used. Members of the Court and bar are simply not aware of them all. E.g., process for confirmation of motions.

The Court will be reviewing the Notices to rationalize them. For instance, a lot of ideas in one type of litigation could easily apply to all. The Court is more open to informal processes, including informal motions. However, parties are expected to provide a draft Order that addresses all relevant issues. Also, the moving party is expected to confirm that the other party consents or, at least, is not opposed. If there is missing information, the Registry will not send it to the Court for adjudication.

Guy Régimbald: the Court might also consider the rules in a dynamic way – if permanent, the practice directions could be integrated into the Rules.

Catherine Lawrence: draft Orders are prepared yet often not used by the Court. Is a formal draft Order needed, or simply the proposed details within a letter.

Justice Lafrenière: if I can easily find in the letter what is needed, this is sufficient. However, letters often provide sufficient detail about the nature of the request, why, and the consequences (e.g., what happens if a request for extension is granted).

Prothonotary Aalto: for many matters in Toronto, the Court is proceeding by way of direction rather than formal Order, which requires more effort by the Registry.

Justice Lafrenière agreed, though in some contexts (like IMM files), a formal Order is required.

Chief Justice Crampton: if it might be contentious, an Order is more likely to be issued to allow the opportunity for an appeal. A draft Order is preferred, because it saves time, and so allows the Court to issue the Order more quickly.

5) CBA National Sections & New Items

a) New Items

i) E-trials & ii) Informal Requests for Interlocutory Relief

Discussed earlier.

b) Update from practice areas

i) Immigration Law

Discussed earlier.

ii) Environmental, Energy and Resources Law

Joshua Jantzi : the Court continues to be relevant. No other feedback.

iii) Administrative Law

Guy Régimbald: the CBA Section has intervened in the trilogy of cases related to standard of review.

iv) Maritime Law

Paul Harquail: a webinar is being developed on various subjects; he is developing a presentation regarding practice in Federal Court. Subjects are requested from the Court to address.
The CMLA is meeting in June, including a continuing professional development component.
He noted a recent issue getting an arrest warrant for a ship. The Registry officer in Fredericton did not have authority, but the Registry officer in Halifax had already left the office, so a third office had to be contacted.
St. John's is the third busiest port, and the bar is becoming more active.
Chief Justice Crampton indicated that he can assign more officers as needed.

Manon Pitre: arrest of a ship is the most significant authority exercised by registry; they need more training.

v) Intellectual Property

Faylene Lunn: there is praise from the IP Bar for the work of case management in Federal Court, including the registry support, particularly under the new regulations.
IP day: this is close to being sold out. Prothonotary Morneau and Patrick Kierans are being honoured this year. The town hall with the Court is the main event during the day.
Lawyers who are not familiar with Federal Court are often surprised by the level of involvement by members of the Federal Court in education and liaison initiatives.
Chief Justice Crampton: two members of the IP bar were recently appointed as prothonotaries. The Court is still looking to fill additional vacancies (judge and prothonotary) with leading members of bar.
The Court's most senior judges with experience in IP are leading the way with the first wave of trials under the new regulations.

vi) Aboriginal Law

David Taylor: the upcoming conference is June 19. There is focus by the Section on the Indigenous Languages Bill and the Child Services bill.
Justice Lafrenière acknowledged the significant volunteer effort by members supporting the liaison initiatives.
Chief Justice Crampton noted that the Court is seeking more representation on the liaison committee from other areas of the bar. Further applications for judicial appointment are also encouraged.
He also reiterated the Court's efforts to engage with the bar to make space for Indigenous law.

End of Meeting

Meeting of Federal Court of Appeal & Federal Court with CBA

Attendance

Federal Court of Appeal: Chief Justice Noël, Justice Pelletier, Justice Dawson, Justice Stratas.

Federal Court: Chief Justice Crampton, Justice Heneghan, Justice Lafrenière, Justice Pentney, Justice Diner, Prothonotary Aalto.

Courts Administration Service: Daniel Gosselin, Amélie Lavictoire, Alain Le Gal, Lise Lafrenière Henrie, Manon Pitre, Patrick O'Neil, Andrew Baumberg, Witold Tymowski.

Members of the Bar:

- Faylene Lunn (Ottawa, 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
- David Taylor (Ottawa, ON) — Aboriginal Law
- Catherine Lawrence (Ottawa, ON) — Department of Justice
- Marc-André O'Rourke — CBA staff lawyer

1) Adoption of Agenda & Minutes

Paul Harquail: the minutes were circulated earlier.

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

Daniel Gosselin: CRMS funding remains a major issue. CAS is seeking off-cycle funding, but the window of opportunity is very narrow.

Chief Justice Crampton: modernization is a priority for the Courts, but an upgraded CRMS is required to move forward.

Justice Pentney provided some context to off-cycle requests.

Daniel Gosselin: if there were a system failure, the Court process would be significantly delayed. On other matters, Budget 2019 provided the funding for the relocation of the Montréal office and a slight increase for translation services. CAS is also moving forward with the Program integrity funding received in Budget 2018 to increase the capacity in Registry Services across the Country and the expansion of the Toronto office . Finally, CAS has conducted a review of Registry Services across the country in 2018-2019, which (among other results) has highlighted the lack of consistency nationally in registry service. There is a request to open a new facility in Saskatchewan – this is under consideration but has yet to be presented to the government.

3) Follow-up Items from last meeting

a) Safeguarding Judicial Independence & Bill C-58

Paul Harquail: the bill left the Senate with amendments. The CBA will continue to monitor it.

Chief Justice Noël: from the Courts' perspective, the Senate's response is positive. The efforts by the CBA are appreciated. If the bill is adopted as revised, the Courts will be required to disclose expenses but

but individual expenses will not be published. It remains to be seen how the House of Commons will proceed.

b) Security Screening

Paul Harquail: there continues to be an issue regarding consistency.

Erin Roth: one counsel had a razor confiscated at the security screening – perhaps a list of prohibited items could be posted, or a cloaking room provided outside the screening area. Some counsel fly in for the day and bring luggage.

Chief Justice Noël: it is a challenging issue. Reviewing the minutes of the last meeting, it was noted that the Chief Administrator indicated that we are doing all we can to provide a separate line for counsel.

Daniel Gosselin: Each CAS location is different. We are trying to accommodate counsel and address any issues. If counsel bring luggage with them, it may be possible to agree to set aside the luggage in the lobby with security without it having to be brought into the Courtroom. Simply inform registry staff.

4) CBA National Sections & New Items / Sections nationales & points soulevés par l'ABC

a) Vexatious litigants

Catherine Lawrence: we may wish to consider informal ways of addressing pleadings that are clearly vexatious on their face. The Department of Justice (DOJ) is interested in exploring options with the Courts and private bar. One option is for the Registry to advise DOJ that a deficient document is before the Court under Rule 72.

Lise Lafrenière Henrie suggested an informal working group with Amélie Lavictoire and Catherine Lawrence.

Chief Justice Crampton: perhaps an amendment to section 40 could be considered so that the Attorney General (AG) does not need to be involved in every case.

Catherine Lawrence: in many cases, a section 40 application is not warranted – e.g., there are simply complex issues within a single proceeding.

Chief Justice Noël expressed appreciation for DOJ's efforts.

Justice Stratas: from the judicial perspective, this is one of the most difficult provisions in the Federal Courts Act. It is not appropriate for the Court to make recommendations to the AG regarding litigants who should be considered for a section 40 application. We are in the hands of the AG. Parliament is also limited in the actions that it can take – the Courts are meant to be, and be seen to be, impartial. Section 40 is probably already as good as possible. The onus is on parties, especially the DOJ, to bring such applications.

Section 40 applications are rare. The view appears to be that the test is very high. In a recent case, though, Justice Stratas confirmed a lower threshold. This does not prevent access to justice, but establishes an extra layer to assess the merits – they must seek leave of the court to enter the court. (see *Canada v. Olumide*, 2017 FCA 42, cited more than 70 times)

Vexatious litigants take up considerable judicial resources. This is an access to justice issue – these litigants take up to 100 times more time than litigants who use the system properly. In *Fabrikant v. Canada,* 2018 FCA 17, many tools were suggested that can be used when faced with a vexatious proceeding. For other cases, use the search term "plenary powers".

Justice Pelletier: the parties need to consider whether they should invest energy in interlocutory battles if the proceeding itself is ultimately doomed to fail. Responding to irregularities will often trigger more proceedings and exchanges, unnecessarily extending the process.

Justice Stratas: if it is bound to fail, the tools already exist in the Rules to deal with it.

Catherine Lawrence: will bring this feedback to DOJ, recognizing the access to justice concern.

Justice Stratas: the Court welcomes feedback, including any impediments to bringing these applications. Suggestions – *other than substantive* – are welcome in this forum. The proper consideration is access to justice by people who have a commitment to seeking justice, rather than collateral issues.

Chief Justice Crampton: access to justice directly involves a consideration of scarce judicial resources. Litigants who are not vexatious have more limited access when vexatious litigants are given free rein. Other Courts have inherent powers to bring motion to declare a party a vexatious litigant. The Federal courts do not. In the absence of the current language at section 40, the court could exercise its plenary powers.

b) Articling students

Chief Justice Noël: we had a joint meeting with the Quebec Bar at which this issue was raised. Under Quebec Rules, articling students are able to perform certain functions in court, but in the Federal Courts, section 11 is restrictive. Absent some amendment, the problem is likely to continue.

Justice Lafrenière described his experience with a hearing in Quebec at which an articling student appeared on judicial review.

Catherine Lawrence: noted that a maître de stage was called to appear in court because an articling student was refused the right to appear.

Associate Chief Justice Gagné: the provincial regulations provide that in Quebec, an articling student can do everything that a lawyer can do. Section 11 refers back to provincial legislation . She has asked her clerk to do a review for each province.

The Secrétaire du Barreau has requested, at least, a consistent approach between the two courts. Regulation of the practice is provincial – in some provinces, articling students may make representations, but in other provinces, they may not. She recommended that the provincial regulations be acknowledged and followed.

Chief Justice Noël recognized that the Courts are trying to build bridges in Quebec, but the current wording of section 11 may require a fix through a legislative amendment. Section 11 currently reads "barrister or advocate". Articling students are neither barristers nor advocates.

Justice Stratas: A legal debate needs to be had. Per Rule 119, students would need leave of the court to appear. There may be a resolution of the issue via a common approach to how discretion will be exercised.

Justice Pelletier expressed concern with an articling student appearing on very serious proceedings.

Associate Chief Justice Gagné: This is not an issue limited to Quebec. Jurisdictions across the country have varying rules.

Catherine Lawrence: the Bar would appreciate clarity on the rule.

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

a) Rules Committee Update

Chief Justice Crampton: there are three new designations, being Daniel Wallace, Daniele Dion, Krista Robertson. The assistance of the CBA in this matter was much appreciated.

Paul Harquail: the Bar is pleased to see these designations.

Andrew Baumberg: the target for the next Rules Committee meeting is October. It is preferable to wait till then to provide a new Rules update to this CBA Liaison Committee.

Chief Justice Crampton: the last review of the Rules was in 2012. With new technology advances, is any streamlining possible? For lawyers who regularly practice in the Federal Courts, the Rules are found to be very efficient. For others, though, the Rules are seen to discourage lawyers.

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

Chief Justice Noël: a working group chaired by Justice Boivin is active, with support from the Department of Justice and the Barreau du Québec. Guiding principles are being prepared and will be reviewed by the Chief Justices for possible publication over the Summer or Fall. The pilot would allow for parties, on consent, to file an action in Federal Court and to proceed pursuant to the Quebec civil code of procedure, subject to any conflicts with the Federal Courts Act. Parties would be required to be represented by members of the Quebec Bar. The matter would be case managed, both at the Federal Court and for appeals to the Federal Court of Appeal. Finally, it was noted that the federal procedure is closer to the common law rules, whereas the civil procedure rules are quite different.

c) Administrative Independence of the Courts

Chief Justice Crampton noted that Daniel Gosselin's presentation highlights why the administrative independence of the Courts is a problem – CAS has gone year after year asking for funds to fulfill its quasi-constitutional responsibility, including to ensure that other branches operate within the law, yet one of these branches has control over funding. Although there is a constitutional framework (sections 54 and 55) that requires a funding Bill by the executive branch, some checks and balances could be developed to provide independent oversight for funding requests by the judiciary. There is a need for additional independence and transparency. The CBA is encouraged to reflect upon what checks and balances could be added to improve the independence of the courts. As an example, a committee with one designate from the courts and one from the government, and a third to be named jointly, could review judicial funding requests and make recommendations, followed by a transparent response from the government.

Chief Justice Noël added that a similar problem exists in many countries.

Chief Justice Crampton: in the U.S., the federal courts go directly to congress for funding. In Australia, there is additional independence for the court's budget.

6) Next Meeting

Follow-up survey.

End of joint meeting

Meeting of Federal Court of Appeal with CBA

Attendance

Federal Court of Appeal: Chief Justice Noël, Justice Pelletier, Justice Dawson, Justice Stratas.

Courts Administration Service: Daniel Gosselin, Amélie Lavictoire, Alain Le Gal, Witold Tymowski.

Members of the Bar:

• Faylene Lunn (Ottawa, 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
• David Taylor (Ottawa, ON)	Aboriginal Law
• Catherine Lawrence (Ottawa, ON)	Department of Justice
• Marc-André O'Rourke	CBA staff lawyer

1) Update from the Federal Court of Appeal

a) Statistics

Chief Justice Noël : the Federal Court of Appeal has seen an increase of 100 pending cases since the same period last year.

b) Changes in the composition of the Court

Chief Justice Noël: The composition of the Federal Court of Appeal is the same as it was 20 years ago. Yet during that time, the Federal Court has almost doubled in size. A request has been made for the financing of an existing judicial position as well as the creation of an additional judicial position. That would bring the Court to 13 judges. There is hope that an appointment will be made before June.

Justice George Locke, formerly of the Federal Court, was appointed to the Federal Court of Appeal in March. He has been sworn in and is already sitting.

c) Notice to the profession of April 15, 2019 (http://www.fca-caf.gc.ca/fca-caf_eng/notices-avis_eng.html): change to form used to request copy of a digital audio recording

Chief Justice Noël: A Notice to the profession was issued on April 15, 2019, with respect to access to digital audio recordings of hearings of the Court. The form used to request a copy of recordings was changed to require applicants to explain the use they intend to make of the recording, particularly where a party or a member of the media wishes to distribute copies of the recording or broadcast it.

d) E-filing update

Amélie Lavictoire : The Court continues to make progress towards the introduction of e-filing. Work is underway to identify the technical requirements as well as identifying the needs of the Court with respect to the format and functionalities required of the electronic documents to be filed.

P. Harquail: The CBA can assist with beta testing or making it known that the Federal Court of Appeal accepts e-filing when the time comes. The use of Twitter to announce the release of important decisions allows for a rapprochement with the Bar by providing timely information coming from the Court. It also serves to control the accuracy of the information circulating on in the media and on social media.

e) Court website redesign

Amélie Lavictoire : The Federal Court of Appeal is redesigning its website and will modernize both the content and the look and feel of the site. Some tools for self-represented litigants will be added. Feedback from the Bar is appreciated with respect to the tools and information needed by the profession.

Practical tools such as checklists, deadline calculators and lists of critical constraints on documents to be filed were identified as useful tools to add to the website.

C. Lawrence: DOJ is willing to provide comments.

2) Representation – Tax Law

Chief Justice Noël: 20 to 25% of the Court's caseload is comprised of tax cases yet this Bench and Bar committee does not have a representative from the tax bar. The CBA is encouraged to prioritize finding a representative from the tax bar to become a member of this Committee.

P. Harquail: There used to be a representative of the Tax Law Section of the CBA on this Committee. However, the current absence of a representative from that section is due to the way in which this Bench and Bar Committee is constituted. The Committee reports up to the National Council of Sections of the CBA. If the National Council does not put forward a representative from the Tax Law Section, the Bench and Bar Committee is left without a representative from the tax bar. The Committee is exploring two options: looking for a solution where the sections represented would be expanded to officially include the tax law section or finding a work around to have an ad hoc representative from the tax bar attend Committee meetings.

3) CBA National Sections & News items

a) *Trans Mountain*: lessons learned / leçons apprises

C. Lawrence: At the last meeting, comments and feedback regarding the Court's case management and release of the Trans Mountain (Tsleil-Waututh et al. v. Canada et al.) were invited. Department of Justice counsel have provided favorable feedback with respect to the expedited timelines imposed through case management as well as the court procedure used for the release of the decision and aimed at helping the public and parties understand the outcome of the case.

Stratas JA: The Court continues to receive feedback about the unconventional but useful procedures used in that case. Trans Mountain and Northern Gateway were experiments that may serve as templates for future cases.

D. Taylor: No feedback has been received from the Aboriginal law bar.

Stratas JA: The Court is interested in feedback from the Indigenous bar and the Department of Justice with respect to the handling of requests for the admission of evidence and whether the Court can case manage such cases differently so as to better serve the public.

b) CBA comments on website redesign

P. Harquail: The CBA can participate in beta testing and provide comments on a proposed website. A call can be sent out to various practice areas for comments and suggestions regarding the website renewal.

c) Update from practice areas

vii) Immigration Law– Erin Roth

Nothing to report.

viii) Environmental, Energy and Resources Law – Joshua Jantzi

Nothing to report.

ix) Administrative Law – Guy Régimbald

Nothing to report. The Section is waiting for the standard of review trilogy of the Supreme Court of Canada to be rendered.

x) Maritime Law – Paul Harquail

The CMLA and AMLA will be holding a joint meeting in Quebec City in June 2019.

There exists an inconsistency in a party's ability to search case files by vessel name on the Federal Court of Appeal's website. Improved search functions and a better nomenclature for the way in which vessel names are entered into the court registry management system would be beneficial. It is important for counsel asked to provide a legal opinion to be able to reliably search the court files by vessel name.

xi) Intellectual Property – Faylene Lunn

IP Day will be held at the end of May, in Ottawa. Prothonotary Morneau is one of the two honourees at the popular Federal Courts Dinner. The IP Section appreciates the time given by the judges of the Court to prepare and participate in the Townhall and IP Day

xii) Aboriginal Law – David Taylor

On June 19th, the Aboriginal Law Section will hold its annual conference in Banff. A follow-up will be done with counsel in the Northern Gateway matter for feedback regarding the Court's case management of that matter.

P. Harquail: Where a judge wants to attend a CBA event or conference, contact should be established with the CBA (Marc-André O'Rourke) because the CBA is able to accommodate requests from judges wishing to attend such events.

Chief Justice Noël closed the meeting by thanking Paul Harquail and all section representatives for their hard work and dedication.

End of meeting