Bench & Bar Liaison Committee Meeting
Friday, June 10, 2016 (Ottawa)

MINUTES

Attendance:
Chief Justice Crampton, Federal Court
Justice Shore, Federal Court
Justice O'Reilly, Federal Court
Daniel Gosselin, Chief Administrator, Courts Administration Service
Manon Pitre, Registrar, Federal Court
Paul Harquail, Chair – Maritime Law representative
Michael Crane, member – Immigration and Refugee Law representative
Angela Furlanetto, member, Intellectual Property Law representative
Edwin Kroft, Q.C., member – Income Tax Law representative
Diane Soroka, member – Aboriginal Law representative
David Demirkan, member – Civil litigation representative
Gaylene Schellenberg, Staff Liaison, Canadian Bar Association
Maryse Tremblay, member – Labour, employment, human rights & privacy law representative
Alain Préfontaine, member – Department of Justice (Canada) representative
Recording secretary: Andrew Baumberg, Legal Counsel, Federal Court
Regrets: Justice Heneghan, Justice Phelan, Prothonotary Aalto

1) Opening Remarks
Chief Justice Paul Crampton welcomed members of the Bar.

2) Opening Remarks
Mr. Harquail thanked the Court and CAS for this opportunity to have a dialogue on practice issues. He noted that the CBA members can put forward resolutions for discussion at the CBA annual meeting. If there are Court concerns, they can be considered and put forward by members of this committee.

The Chief Justice noted a couple of items: modernization and additional case management resources. He took the position at the recent Quadrennial Commission that supernumerary status be available for prothonotaries. Moreover, the Court actually needs a total of 7 or even 8 prothonotaries to function efficiently. As for modernization, if members of the Bar would find it helpful to access court records from anywhere in the country, improved e-filing and e-service, and e-trials, this should be considered by the CBA. An on-going e-trial has demonstrated a significant savings in hearing time. Together, these are key access to justice issues, which figure prominently in the Court's strategic plan.

Mr. Harquail responded that these issues were central to the bar's discussion to prepare for this meeting.

3) Adoption of Agenda
Possible varia follow-up from the Chief Justice's presentation.

4) Adoption of Minutes (November 6, 2015)
Approved.

5) Follow-up Items from last meeting
a) Ships' names in Court index
Mr. Baumberg noted that there is an unresolved issue related to the naming of ships in the Court index that requires discussion with the maritime bar: in some cases, the Registry's indexing convention does not reflect the bar's understanding and expectation (some acronyms / call letters that precede the 'name'

of the ship are not entered, even though some maritime practitioners consider these to be part of the name. e.g., "OOCL Britain" is listed in the index as "Britain").

Mr. Harquail noted that there is a maritime law meeting next week – for follow-up discussion. There are many different types of vessels that may have a core name element (e.g., the tanker Rideau, the barge Rideau, the marine vessel Rideau, etc.).

Ms. Pitre noted that the database was created in 1990, with standardized acronyms not included.

Action: for follow-up with the Court and the maritime bar.
Justice Shore suggested a nomenclature list.

b) Retention schedule

Mr. Baumberg noted that the Court struck a working group chaired by Justice Elliott, and at a recent Court meeting, it was agreed that the Court should proceed with reasonable retention periods, with an initial emphasis on files that were not adjudicated on the merits (e.g., withdrawn / abandoned files). A formal Notice would be issued with reference to Rule 23.1 to the bar / media setting out, in detail, those categories of files (including date ranges) that would be subject to destruction.

Ms. Tremblay noted that when Heenan Blaikie closed, she had to maintain files for 7 years. It was a difficult process to review all the client files to determine which to keep. She added that it is important to have some type of notice.

Mr. Demirkan suggested that the problem may be more with legislation on access to information or archives.

All agree in principle with the underlying proposal to destroy files that were abandoned / withdrawn, after a period of approximately two years

CBA & Department of Justice

6) Update – National Sections

a) Aboriginal Law

Ms. Soroka noted that the new Practice Guidelines have now been published. At the last meeting, there was a plan to move on to the next phase of the Committee agenda, with a key item being the question of whether, or how best, to recognize and incorporate indigenous law within the Court.

The Chief Justice noted that this is part of the strategic review of the Committee's vision. We now have a triage in place for all Aboriginal law proceedings. It is important not just to create more space in the Court for Indigenous law, but also to consider the impact of the Truth and Reconciliation Commission on the Court. A related issue arises with the recent Supreme Court decision on federal jurisdiction over Métis, Inuit and non-status Indians. It will be helpful to have a non-adversarial discussion of these and potentially other matters in the Committee to get ahead of specific cases being heard, so that the members of the Court can have the benefit of different perspectives on issues that may be raised. .

Justice Shore referred to the UNDRIP signature, suggesting that there will be tangible consequences for legal practice in many different areas of law, possibly including maritime law, contract law, business law, and others. Three documents were circulated for reference ("UN Declaration helps forge new relationship," Doug Cuthand, May 16, 2016; "Aboriginal Edge: How Aboriginal Peoples and Natural Resource Businesses are Forging a New Competitive Advantage," Canadian Chamber of Commerce, August 2015; "Real Change: Restoring Fairness to Canada's Relationship with Aboriginal Peoples," Justin Trudeau's remarks at the AFN 36th General Assembly, July 7, 2015). He emphasized the need for more mediation – lawyers need to realize the long-term benefits even outside a formal litigation file.

The key word is equilibrium (or balance). It will take creative effort to think 'outside the box.' Finally, he recommended that participants view the online TED talk by Mr. William Ury ("Getting to yes.").

Mr. Baumberg added that at the meeting of the Aboriginal law bar liaison committee, there was a proposal for the Court to consider an inquisitorial hearing model as an optional alternative to the adversarial hearing model. This proposal may be discussed further at the October 12 meeting of the Liaison Committee. He noted a recent discussion with a visiting judge from the German Supreme Court, which uses the inquisitorial model for administrative law proceedings. It would be useful to get feedback from the bar regarding this procedural option.

Chief Justice Crampton added that the Competition Tribunal is also exploring a less formalistic procedure that is similar to an arbitration model. An experienced judge who knows the area of law very well can probably arrive at an adjudicated result, after two or three days, that is very close to what would be produced after a long trial,

Mr. Harquail asked if the Court is open to the mediation judge adjudicating the matter, following an unsuccessfulmediation.

Chief Justice Crampton responded that this can only occur with the consent of the parties.

Mr. Harquail noted that in discussions with clients, often the question is whether there will be finality after a mediation process. If a judge can participate in mediation but still be able to reach a good adjudicated result, this could be quite useful.

Chief Justice Crampton noted that the unpredictable results of settlement discussions, including the extra cost, have been raised a couple times within the Aboriginal law committee as an important obstacle for some parties, who don't want to pay costs for a settlement process and then start over on the litigation track.

Mr. Demirkan noted that oftentimes the parties want to test the waters first in settlement talks before agreeing to be bound by the result.

Chief Justice Crampton noted that usually the judge in an informal adjudicative (as opposed to mediation) process would focus on the legal questions.

Ms. Tremblay added that in labour, it is very common to do mediation. In Ontario, there is often a judge wearing two hats, both as a mediator and adjudicator. In Quebec, there is less comfort with this mixed approach.

The Chief Justice noted that the default position is that the mediating judge would not switch hats to become an adjudicator.

Ms. Tremblay noted that it is unfortunate if the considerable experience on the file developed by the judge mediating the case is lost once it switches to an adjudication model, following an unsuccessful mediation.

b) Immigration Law

Mr. Crane noted a concern that practitioners can't serve the Department electronically. It would be helpful if lawyers could eventually be able to serve the Department in this manner.
Action: for Mr. Préfontaine to provide a report at the next meeting.

c) Intellectual Property

Ms. Furlanetto noted the recent IP users committee meeting, including discussion on 'hot tubbing,' 'chess clock,' claims construction, and better use of the ready list. Other items of interest: (i) increased use of "requests to admit" and (ii) the structure for briefing at trial (including the possibility of a standard for lawyers regarding the content and structure for their memorandum of final argument and their outlines for oral argument).

Chief Justice Crampton noted that there has been some initial discussion regarding "outlines" and "compendia" that will require more review in the IP Committee. 'Blinding of experts' was also raised at the town hall (ie., what are the best practices?) He added that this is relevant to other sections. One question is whether experts should have a factual context or not.

Mr. Harquail suggested the possibility of an agreed statement of facts, with oversight by the Court, that would avoid the possibility of experts becoming biased as a result of information that is given to them..

Ms. Furlanetto responded that there is a need for balance between the risk of bias versus the need for usefulness. Sufficient facts are needed.

d) Taxation Law

Mr. Kroft, Q.C. noted that judicial review of CRA actions is within the Federal Court's jurisdiction (e.g., fairness requests). The bar has not raised any complaints regarding Federal Court procedure. However, the workload may increase: the government is looking for more money, with an increased budget to CRA for audit work. People come to the Federal Court to claim relief from the conduct of CRA officials, who are pushing for more compellability of information. There is also an increase in amnesty requests – if turned down, there may be questions about the legal status of disclosure. Also, there are many issues regarding penalty relief. Furthermore, there is increased taxpayer innovation to bring judicial review to avoid going to the Tax Court. Many tax planners are branching out into tax dispute issues, possibly resulting in additional workload.

e) Maritime Law / Droit maritime

Mr. Harquail noted that the annual section meeting is in a week. There is also a seminar of the CMLA, with Justice Strickland attending. One point of interest is early case management when a ship is arrested. There is a practice in some jurisdictions to assign a case management judge to try to resolve the immediate issues and help manage the case to trial. Another issue of discussion is the right to counsel during transport safety board investigations.

f) Civil Litigation

Mr. Demirkan noted that the CBA is undergoing a 're-think' process to streamline and ensure that it meets the needs of members of the bar.

Ms. Schellenberg added that there would be an effort to include the general membership more regularly rather than simply the 'core group' of about 300 that are often involved now in voting on resolutions.

Chief Justice Crampton raised the issue of cost of annual CBA membership for judicial members – this might be re-considered to encourage increased participation by the judiciary.

Mr. Harquail will raise this with the CBA for discussion. The maritime bar appreciates participation by the judiciary in its events. In his local bar, there was an initiative to get universal membership from the judiciary.

Chief Justice Crampton noted that the Court receives only $500 per judge annually for attendance at conferences that are not specifically approved for funding by the Canadian Judicial Council under s. 41(1) of the Judges Act. This does not go far. Advance notice (at least 4-5 months) from the Bar is very helpful to allow the court to schedule judges to be hearing cases in the same city as a specific conference that has not been the subject of prior approval by the CJC.

Mr. Demirkan noted that the civil litigation section brought a resolution to the mid-Winter meeting regarding courthouse closures. The resolution passed, asking that members of the bar be consulted before any such steps be taken in the future.
Finally, regarding the compendia issue, some people see its utility, but not others. It can be used to help, but if you get a compendia the day before the hearing, it can be counter-productive. If not agreed in advance, it may be used as a tactic to replace an otherwise familiar referencing system at trial.
Chief Justice Crampton noted that members of the Court typically find brief compendia to be helpful.

g) Labour

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

7) Accommodating Maternity in Court Gowning Directives – Resolution 16-02-M

Ms. Furlanetto referred to the Resolution passed by the CBA, asking that the Courts pass a rule or practice direction to address this matter. The Bar is happy to work with the courts.
Justice O'Reilly asked regarding the origin of the gowning requirements. He noted some consideration of the issue when the Court modified its gowns, which should remain in step with the bar's requirements.

8) Addressing the Judicial Officers in Court

Mr. Crane noted that there are still questions within the bar regarding the proper form of address. The practice is very uneven. If the Court really wants the proper forms of address to be used, it may be helpful to review the practice note at the Immigration Law Summit.
Mr. Harquail suggested that the Usher might clarify the form of address when opening the Court.

9) Counsel unavailability when Justice Canada/larger firms involved

Mr. Préfontaine noted that often when DOJ counsel is not available, the Judicial Administrator advises them that they should simply find someone else. This has a significant impact on the Department – a change of counsel imposes a financial burden on the client. It also creates a challenge for counsel to get fully briefed on the file. Overall, it is an access to justice issue, both for the Department and for large firms. In sum, counsel should make every effort to be available, but if not possible, the Department prefers that the Court find a date that is suitable for both parties.
Chief Justice Crampton noted that in some practice areas, counsel indicate that they are not available for any of the dates proposed by the other party. However, if the hearing is delayed to accommodate this position, it creates an access to justice issue for the other party, which must wait. The Court tries to be fair, but needs to balance fairness to the other party, as well as scarce court resources, which often are wasted when an adjournment is requested at the last minute.
Mr. Harquail noted that with recent retirements, there are fewer senior maritime practitioners available. It may not be possible to find a suitable alternative in the same province.
Mr. Demirkan noted that counsel usually block their time far in advance to ensure that they can meet commitments to other courts or clients. It becomes a challenge when the court unilaterally sets the date.
Mr. Crane noted that immigration counsel usually have enough lead time, but there is sometimes a conflict with a hearing before an administrative tribunal, which often accommodates.
Mr. Kroft Q.C. noted that not everyone is fungible.

ACTION: for review and feedback from the Court.

10) Expedited process for extensions agreed to by both parties under Rule 8
Discussed separately.

11) Confidentiality pending decision on motions under Rule 151
Mr. Crane reported, on behalf of a colleague in the Bar, that she was unable to protect the content of her motion record. If there is a best practice for this situation, it would be preferable to make this available to the Bar.
Chief Justice Crampton noted that in *Competition Act* indictments, there is a standard practice for submission of draft material on a sealed basis, until a judge makes a ruling on confidentiality. If the judge rejects the request, then the documents are returned to counsel to the Commissioner of Competition (who typically provides the draft package to the Court on a courtesy basis, several days in advance).
Action: the Court and Registry can review the issue and get back to the Bar.

12) Immigration matters - applicant must file materials before respondent discloses entire file
Mr. Crane reported that in an application for leave in a *mandamus* file, the applicant does not have the ability to get the basic materials via the Court Rules, only via an access to information request.

13) Question about decisions not on Court's website
Mr. Crane noted a final decision with a neutral citation that has not been posted.
Chief Justice Crampton noted that this is a carry-over of the Court's practice to post decisions that were considered precedential but not post decisions that were not considered precedential. Justice O'Reilly added that the Court is planning to post and translate all its final decisions, but is still awaiting funding to be able to translate low priority decisions (such as "recital"-type decisions) as quickly as higher priority decisions. However, there is no change to the process for posting of interlocutory decisions.

THE COURT & CAS
14) Federal Court Update
The Chief Justice circulated an information deck. He noted in particular that the court plans to launch a twitter account and media lock-up process.

15) E-filing
Mr. Baumberg noted that e-filing was first launched by the Court on October 31, 2005. Despite having e-filing for more than a decade, the Court still conducts its business almost entirely in paper, putting extra pressure on the Registry to prepare a full paper version of the file if documents are either e-filed or else filed in a different office (in which case the documents are either shipped or else scanned in one office to be re-printed in another). The Registry printing problem is caused (in part) by the 500-page print exemption in the e-filing notice, which allows parties to e-file documents under 500 pages without filing a paper version -- this simply offloads the print burden from the parties to the Registry. The exemption was initially put in place years ago when there was expectation that the Court would soon move to e-hearings, based on the promised new CRMS, but this is still far from a reality. Some options under consideration:

a) Pilot: shift from paper-based hearings to hybrid hearings, with key documents available in paper but secondary documents available electronically for 'print-on-demand'
b) Pilot: shift from paper-based hearings to fully-electronic hearings
c) the 500-page limit may need to be significantly reduced via an amendment to the E-filing Notice

Mr. Harquail noted that the Bar appreciates this feedback, which allows it to advocate for increased resources for the Courts.

Mr. Gosselin added that CAS has been successful in getting funding for security and basic IT infrastructure, but not for a new Case Records Management system. Even when funding is committed, it would still take about 3 years to implement. He is working with the Department of Justice to identify the savings for the government using a modernized court process. He also is in discussion with Don Cameron and Duncan Fraser from the private bar. He then noted 3 different options regarding cost recovery: full government funding; Treasury Board support for a cost-sharing arrangement, but this would be subject to the *User Fee Act*, or access to the Court filing fees or unused funds in the deposit account; finally, a third-party funding option.

Mr. Harquail suggested a sliding scale for costs where some firms could pay up-front for access to a value-added e-filing system.

16) Rules Committee Update

Mr. Baumberg provided a brief report regarding some of the active sub-Committees:

a. **Limited Scope Appearance -** The amendment would allow counsel to be solicitor of record for a limited appearance without the need to file a motion to be removed.
b. **Implementation (Global Review) -** These include the issue of proportionality and control of abusive practices, which are now entering the drafting phase.
c. **Substantive Amendments -** The proposed amendments address issues such as the time limits for filing an appearance and a defense, format for books of authorities, increasing the monetary limits for prothonotaries' jurisdiction to $100K, confidentiality of documents in pre-trial matters. The proposed amendments are being submitted for publication in Part I of the Canada Gazette.
d. **Costs**

Mr. Baumberg described the initial recommendations discussed at the Committee:

- Two-way costs for actions -- partial vs. substantial indemnification
- No-costs regime for judicial review

Mr. Kroft Q.C. responded that his tax law clients want to get costs if they challenge the CRA on a tax issue. Mr. Demirkan agreed.

Mr. Baumberg noted that the recommendation would extend the current regime already in place for judicial review proceedings in refugee, citizenship, and immigration, though part of the issue relates to the discretion to award costs in "special circumstances." The experience seems to be that this has been interpreted very restrictively.

e. **Enforcement Amendments -** The proposed amendments are being submitted for publication in Part I of the Canada Gazette.

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

Insufficient time -- Mr. Gosselin made his remarks regarding CAS during the afternoon meeting with the Federal Court of Appeal.

18) Discussion of Liaison Committee Mandate

It was noted that there was insufficient time to discuss all the agenda items fully. (The meeting ran from approximately 10:40 a.m. until almost 1:30 p.m., with a short break for lunch.)

19) Next Meeting

Date to be confirmed following consultation between Court / Bar.