Bench & Bar Liaison Committee Meeting

Friday, December 1, 2017

MINUTES

Attendance
Chief Justice Crampton, Federal Court
Justice Kane, Federal Court
Justice Phelan, Federal Court
Justice Shore, Federal Court (by teleconference)
Prothonotary Aalto, Federal Court (by teleconference)
Daniel Gosselin, Chief Administrator, Courts Administration Service (CAS)
Lise Lafrenière Henrie, Executive Director and General Counsel, Federal Court
Manon Pitre, Registrar, Federal Court
Paul Harquail, CBA Chair and Maritime Law representative
Diane Soroka, Aboriginal Law representative
David Demirkan, Civil litigation representative
Erin Roth, Immigration and Refugee Law representative,
Edwin Kroft, Q.C., Income Tax Law representative
Adam Aptowitzer, Charities and Not for Profit Law Section representative
Josh Jantzi, Environmental, Energy and Resources Law representative
Gillian Carter, Staff Liaison, Canadian Bar Association
Catherine A. Lawrence, Department of Justice (Canada) representative
Recording secretary: Andrew Baumberg, Legal Counsel, Federal Court
Regrets: Justice Heneghan, Justice O'Reilly.

Additional Attendance for Common Agenda Items (joint working lunch)
Chief Justice Marc Noël, Federal Court of Appeal
Justice Dawson, Federal Court of Appeal
Justice Stratas, Federal Court of Appeal
Amélie Lavictoire, Executive Director and General Counsel, Federal Court of Appeal
Witold Tymowski, Legal Counsel and Director, Law Clerk Program, Federal Court of Appeal

1) Opening Remarks

Chief Justice Paul Crampton welcomed new members of the CBA and acknowledged participation by Justice Kane, *unofficial* associate chief judge. He thanked the CBA for its July letter in support of the Courts' funding request and additional checks and balances in the funding process to address judicial independence. Earlier this year, he made three suggestions:

i. A memorandum of understanding between the Courts and the Attorney General similar to that adopted in some provinces;
ii. involvement of the legislative branch in setting the budgets for the judicial branch, along the lines of what existed under previous *minority* governments to review budgets of the nine Officers of Parliament; the pilot was dropped upon return to a *majority* government;
iii. some process similar to the quadrennial commissions, whereby the government must justify any departure from the Commission's recommendations; similarly, for institutional independence, the government should publicly justify refusals to approve the Court's budget.

Paul Harquail noted that the Bar has a strong interest in supporting a model that ensures the courts are able to function properly. Previous discussions regarding the courts' budgets highlighted matters of serious concern to the Bar.

2) Adoption of Agenda & Minutes

No comments on the agenda or minutes.

3) Follow-up Items from last meeting

a) Expedited process for extensions agreed to by both parties – Informal Requests for Interlocutory Relief

Paul Harquail agreed that the final version of the Notice reflects feedback from the Bar and is helpful.

The Chief Justice added that the Court has a reputation for being less flexible than some other Courts, though some members of the bar see this as a good thing. However, the Notice provides additional flexibility for litigants when needed. Feedback is welcome from the CBA regarding use of the Notice.

b) Informal Process: Adjudication by Judge after Mediation

Paul Harquail noted that less formality is part of the Court's strategic plan and welcomes the Court's openness.

The Chief Justice added that some counsel, in areas of concurrent jurisdiction, go to the provincial superior courts because of a perception that the provincial rules are easier. The courts should look again at their Rules in comparison to the provincial rules.

Edwin Kroft noted, though, that in tax matters, if there is an option between provincial / federal courts, lawyers prefer the federal system by far. There is a body of experience in the specialized matter.

The Chief Justice noted the court's efforts to advance a proposed rule allowing a 'Notice of Intent to file' – it is still under consideration.

On this point, Paul Harquail noted that the maritime bar has not yet met to discuss this idea. In some other countries, you can give 'notice of action' so as to get access to a judge to assist the parties: after receiving judicial guidance, this might avoid arrest of a ship.

The Chief Justice added that the Court needs a trigger to take jurisdiction, so that it can then assist to mediate a dispute. Suggestions from the Bar are welcome.

David Demirkan noted that you usually need to start an action before requesting an injunction. He added that he attended a maritime bar seminar with a panel presentation on concurrent jurisdiction: usually, the choice is to go to the Federal Court for maritime law issues. Otherwise, you may be stuck with problematic jurisprudence.

The Chief Justice noted that for intellectual property law, there is a core group of IP judges, and so the IP bar has confidence that they will get someone who is experienced. For maritime law, there are certain types of cases that require specialized maritime law experience – for these, a judge from the core group (Justices Strickland, Southcott, Heneghan, or Harrington) is assigned. For more general cases, such as commercial issues, other judges can be assigned.

Justice Phelan noted issues regarding limitation periods and how the notice of intent might work.

Andrew Baumberg added that this is on the agenda for the Rules Committee.

Paul Harquail suggested a need to focus on the minimal requirements to address provincial limitation of liability statutes.

The Chief Justice proposed this for discussion at next the Rules Committee.

c) Decisions not on Court's website

The Chief Justice noted that the Court did not get sufficient funding for translation. However, the Court is in discussions with CANLII and other commercial publishers to explore ways to provide them bulk access, as other courts do.

Daniel Gosselin added that CAS was successful in getting $4M in program integrity funding for this fiscal year (i.e., a pro rata amount); it remains to be seen whether this will be extended for $10M in the next year. This funding will provide at least some improvement in the timing of translation / posting of decisions.

David Demirkan added that the Official Language Act and access to justice issues must be balanced. However, if there are still problems, a formal access request might provide a solution.

Daniel Gosselin responded that CAS and the Courts are not subject to ATIP. A person does not need to go through the access regime: decisions are on the public record. The reason that we are not posting every decision is due to budget limitations.

Lise Lafrenière Henrie added that the Office of the Commissioner of Official Languages takes the position that, if the Court/CAS posts a decision on its own website, it must be translated, whereas non-governmental organizations can post decisions without translation. Most decisions will be provided to CANLII and other external publishers who want bulk access.

d) Scheduling Practice (Applications)

Erin Roth expressed concern that vacation leave is a valid excuse, but not a prior commitment to attend a hearing before an administrative tribunal. Given the excessive wait time at the IRB, this can be problematic. A litigant may have to wait a very long time for a re-scheduled hearing at the IRB.

The Chief Justice noted the previous discussion regarding precedence of the court over a tribunal. However, the backlog is noted – the issue can be revisited. If there is better information on the table, we will have the basis for a discussion.

Gillian Carter added that a primary concern is the IAD, with a 120 day scheduling time-line. It was noted that they have powers of a court of record. More detailed information is expected from the IRB.

Josh Jantzi noted that for some administrative tribunals (e.g., NEB hearings), they usually won't adjourn for any other Tribunal or Court. Adjourning a proceeding is often not practical. There is no suggestion that the Court should defer to administrative tribunals, but only that the burden seems to fall on counsel to resolve the conflict with no accommodation from either the Court or the Tribunal.

David Demirkan added that often, before other tribunals, one provides additional context for the conflict. One problem with the Federal Court is that you give your availability, and then two months later you get a hearing scheduled, but a lot has changed in the interim. A dynamic scheduling system is needed that reflects changes over time.

The Chief Justice noted that apart from IMM proceedings, both counsel provide their availability, so it is possible to make the scheduling process work. Furthermore, the Court is moving towards an electronic scheduling system which could address the problem identified of changing availability.

Justice Kane added that the availability lists must be evenly distributed, not just with availability at the beginning of the window, but also towards the end.

e) Search syntax (names) in Court index

Andrew noted that this was fixed. The search syntax was altered in April 2017 to search for a character string anywhere in the database field. The Web site search page now also includes a "Caution."

Paul Harquail noted that maritime bar members appear generally to be satisfied with the fix.

4) CBA National Sections & New Points

a) Aboriginal Law

Diane Soroka noted that the Liaison Committee met in October. Work continues to identify short / medium-term goals. Also, there is focus now on identification of indigenous knowledge-keepers who can assist the court in dispute resolution processes.

b) Immigration Law

Erin Roth expressed appreciation for the Court's efforts to increase e-filing, as well as for the practice direction on flexibility / scheduling.

c) Environmental, Energy and Resources Law

Josh Jantzi questioned the timing and manner in which the court deliberates / decides on matters. When the government approves energy projects but a challenge is raised in Federal Court, if the decision is overturned, there may be 10's of millions of dollars spent in the interim. It would be helpful to have an initial oral decision from the bench (even from another city, at a later date) followed by written reasons much later. This would reduce unnecessary expense.

The Chief Justice noted that he has encouraged more reliance on oral decisions.

Justice Kane asked whether an oral decision two weeks later, with reasons to follow, would be helpful.

Josh Jantzi confirmed that this approach would be helpful for litigants in this area.

The Chief Justice recommended that counsel bring this request to the presiding judge.

d) Taxation Law

Edwin Kroft, Q.C. noted that the Bar watches with interest certain decisions of the Court regarding judicial review on novel issues that even the Bar has not seen often. The tax bar is learning more about judicial review.

e) Maritime Law

Paul Harquail raised three issues:

i. **letter re: sister ship arrest** – this is for the joint agenda along with the Federal Court of Appeal

ii. **timing of expert affidavits / reports** – when the plaintiff files a report in chief, there are 30 days for the defence to file evidence in chief; however, rebuttal evidence must be prepared in the same window; it is impractical to make the expert available for cross-examination; discretionary request for extension are sometimes refused; the bar prefers more flexibility; in other courts, there is no lag – the expert reports are due at the same time, with the option for a supplementary report, so no advantage for one party;

The Chief Justice noted that this appears to be a fairness issue; there is discretion, which must be addressed in a judicial manner. Prothonotary Aalto agreed – in exercising its discretion, the Court generally needs to determine whether something unexpected has arisen; this is seen from time to time.

iii. **triggering of jurisdiction** – addressed earlier.

f) Civil Litigation

David Demirkan noted that the civil litigation section meets in Ottawa next week. He noted that in past meeting, he has heard of budget problems for other courts as well as the Federal Court. He agreed that it is difficult for the Courts to speak publicly.

The litigation bar is looking for ideas for webinars – there used to be many federal court topics. A "federal courts 101" would be useful. If the Courts are interested, and a judge, prothonotary, or administrator is available, he can help co-chair the panel.

Edwin Kroft, Q.C. noted a recent tax conference he attended. There was a panel with a TCC and a FCA judge, but no FC judge.

The Chief Justice acknowledged that the Court needs to get an invitation.

David Demirkan noted an upcoming presentation on class actions.

The OBA and national CBA have been using Zoom – low cost conference call technology.

He added that the CBA's Bill C-58 submissions were raised by the privacy & access sections, but could also be reviewed by the litigation section.

The section likes the expedited process for informal motions – he will ask for feedback next week.

Prothonotary Aalto added that the Court is seeing more letters on consent; this is saving time all around -- a great initiative.

David Demirkan noted that the section would appreciate more feedback similar to that given to the IP / IMM bar at their national conference – e.g., views from bench, such as lawyers not filing enough copies.

On the earlier suggestion to have a quick Judgment from the Court, followed by reasons, he noted that he has seen such decisions at one board – a bottom line decision, but then the panel would go back to deliberate and find that there was an error in the bare judgment. Caution is encouraged.

g) General points for discussion

Continuity of Matters before the Court

Paul Harquail: this topic relates to having a judge become seized of a matter. There were concerns raised by the bar regarding the continuity of judges, particularly in the context of self-represented litigants (SRL). When there may be different judges on different matters involving the same litigant, complete and accurate information on the full extent of the matter may not be provided. Might the Court assign a single judge to address all matters?

Prothonotary Aalto responded that a lot of SRL cases end up in case management (CM). The CM judge provides the continuity; if there is a SRL in general sittings, it often is put directly into CM; this addresses some of the concern; however, perhaps there are still many cases outside CM?

Justice Kane suggested that this might be an issue if the SRL is pursuing several different proceedings; it is difficult to know the details in all the different proceedings.

The Chief Justice noted the similar challenge for the court, where different judges might in succession get new issues, with all the same background context to review, from the same litigant.

5) Update: Federal Court

The Chief Justice provided an update. Justices Lafrenière, Pentney, Ahmed, Grammond, and Favel have been appointed recently. A new Prothonotary will replace Justice Lafreniere (Vancouver), and the process has been completed for Montreal, Ottawa and Toronto should a vacancy arise due to retirement, appointment, or new positions. There is potential for many additional judicial appointments over the next 2 years:

- supernumerary elections – five in next two years
- new judge and prothonotary positions created in part due to increased caseload related to:
  - lifting of Visa Restrictions in Mexico, Bulgaria & Romania
  - surge in "irregular arrivals"
  - Bill C-59 (National Security)
  - Bill C-6 (Citizenship)
  - revisions to PMNOC Regulations

Leading members of Bar were encouraged to apply, and the following considerations noted: merit and diversity (gender, racial, ethnic, regional, linguistic).

As for caseload, it is flat in the IMM area. The Court is scheduling IMM JRs within the 90-day window across the country. For other hearing types of 1 to 5 days in duration, there is still availability in the coming months. For hearings of 6 days or more, the Court is scheduling for Spring 2018.

Regarding records retention, Andrew Baumberg reported that the CBA had provided submissions from its Sections to the Court this last Summer, and following review, the Court recently endorses the following retention schedule parameters:

- **7-year retention of documents** for proceedings that were dismissed at leave stage (IMM / citizenship) or abandoned / discontinued (i.e., not adjudicated on the merits)
  - **Exception:** docket, Orders, and minutes of hearings retained in perpetuity
- **15-year retention of documents** in other proceedings
  - **Exception:** docket, Judgments / Orders, and minutes of hearings retained in perpetuity
- **notice (e.g., quarterly):** list of files that will be subject to destruction
  - option for members of the Court / Registry / Bar / public to (a) request a copy of the file; or (b) make submissions justifying extended retention
  - option for small-scale 'sampling' of files for extended retention
- **transition to electronic record:** provides lower-cost and more efficient archiving / access to closed court files – *contingent on solution for the Court Records Management System*

a) E-filing ~ e-trial pilot

- **E-filing:**

Andrew Baumberg noted that an IMM e-process working group is developing a small-scale pilot for a fully (or at least mostly) electronic process for selected IMM proceedings. It is expected to complete its work in early 2018.

- **E-trial pilot**

The Chief Justice made reference to the *Alderville* and *Southwind* electronic trials and planned installation of a prototype e-courtroom in Toronto in early 2018, for evaluation purposes. The Competition Tribunal experience has been that electronic trials are very efficient. In the two trials noted above, the parties themselves paid for software

licencing costs, but overall found there was considerable savings due to the more efficient trial. For future e-trials, the infrastructure will be installed, but software remains an issue.

Daniel Gosselin added that for now, parties may still need to cover some costs to facilitate e-trials.

Catherine Lawrence noted that within the Department, the most recent *Southwind* trial is seen as a model.

Daniel Gosselin also referred to the agreement with the Cyberlab at the University of Montreal to test e-court applications. There are on-going discussions with the Department of Justice and CRA to determine if joint implementation is possible for modernization; also, discussions with central agencies for funding.

- **Thin file project**

Andrew Baumberg noted the recent launch of a thin file project on a pilot basis to limit printing / shipping by the Registry: for members of the Court who opt-in, only documents that are directly relevant to the hearing will be available onsite; others will be scanned and available on stand-by.

b) Enhanced Video-conferencing (case management / short motions) & Video-streaming of Selected Hearings

The Chief Justice noted the increased use of video hearings for certain types of motions and other matters of short duration, but the preference is to ensure that the Court maintains physical presence in regional offices and regularly sits in those offices. Also, a desktop application is being installed to provide better video-conference capacity to the Court.

c) Records retention

Discussed earlier.

d) Registry screening of documents

Andrew Baumberg noted that further work needs to be done on a consultation document for review with the Bar.

e) Notices of discontinuance

The Chief Justice gave an example of case in which there was significant effort by a judge in the proceeding, including most of the drafting of final reasons for judgement, but with a discontinuance filed shortly before the judgment was to be released. Ideally, parties should engage in settlement discussions earlier, as this represents a huge waste of public resources.

Paul Harquail asked what would be appropriate. In one case, in provincial court, he had a call from the Chief Justice, before starting to write the decision, asking: “have there been settlement discussions”?

The Chief Justice asked that parties let the court know if there are settlement discussions post-trial. Although the judge usually has writing time immediately after a hearing, often there is other work that could be done instead.

Justice Kane has received a letter from parties to indicate that they are engaging in discussions.

Diane Soroka noted one case, after the trial, in which the judge said: “you have 7 days to settle; otherwise I will render judgment.”

Edwin Kroft, Q.C. suggested that perhaps judges could advise parties: “I am going to work on this during the following period; if you plan to discuss settlement, tell me by date X.”

Justice Phelan suggested notice to parties that judgment will be rendered by date X unless a notice of discontinuance is filed.

The Chief Justice reiterated the desirability of parties to engage in settlement talks before they draft long pleadings; and then again at one or more points during the pre-trial process.

Edwin Kroft, Q.C. suggested a possible message to the Bar: the Court is seeing an increase in late settlement, and the Bar needs to consider this issue earlier. A formal Notice would be more widely reviewed (than if this message were delivered orally at a conference).

Erin Roth added that there is some suggestion that settlement talks will soon become mandatory for IMM proceedings.

The Chief Justice replied that this is a pilot proposal that was presented to the IMM bar. Settlement talks are dependent on timing of the certified tribunal record being available.

Erin Roth agreed that earlier discussions are preferable.

f) Consent judgment template

The Chief Justice referred to the proposed template, noting that judges can depart from this when appropriate. However, this could assist members of the Bar. He added that some members of the Court prefer to have transparency regarding the nature of the error before agreeing to overturn the underlying decision.

g) Use of initials to protect identity of 3rd parties

The Chief Justice noted the issue regarding use of a third party's initials in reasons, rather than their full name (e.g., witness on record).

Andrew Baumberg also referred to comments in a separate liaison committee by Patricia Kosseim, General Counsel to the Privacy Commissioner: there has been a marked increase in sensitive personal information being published on the internet. She had referred to a 2005 guide by the Canadian Judicial Council, asking whether there were any plans to review and update the guide. [See: Judges' Technology Advisory Committee - Use of Personal Information in Judgments and Recommended Protocol / Comité consultatif sur la technologie - L'usage de renseignements personnels dans les jugements et protocole recommandé] She encouraged review of this guide to ensure that it reflected the reality of the internet age.

h) Bill C-58 Amendments to Access to Information Act

The Chief Justice made reference to the intervention by Suzanne Legault (Information Commissioner): if you want the Bill to require disclosure of judicial information, it should not be at the individual level, but rather at the aggregated level (e.g., if a judge has a trial in a regional office, their travel expenses will be much higher through no fault of their own – the judge is assigned the case by the Chief Justice). He noted that one Parliamentary committee member made this proposal, but it was not endorsed by anyone else, so it did not pass. There are also judicial independence and a security exceptions, but it is the Commissioner for Federal Judicial Affairs, a representative of the executive branch, who makes the determination. Instead, it should be the Chief Justice who can invoke the exception. The Superior Court Judges' Association and the Commissioner made these points at the House Committee, and it then goes to the Senate.

Gillian Carter noted that the CBA (judicial issues sub-committee) made a submission expressing concern regarding the impact on judicial independence. This was submitted to the Parliamentary Committee, the Minister, as well as the Sponsor of the Bill. The CBA will try to make an appearance before the Senate.

The Chief Justice thanked the CBA for their support.

David Demirkan added that this Bill is biggest set of ATI Act amendments with any traction. There has been a lot of consultation by government. His suggestion to the Court: have general counsel (or some other person) step forward to make the Court's concerns known more clearly, either in writing or verbally. This is one of the few times that Information Commissioner is suggesting that *less* info be made available – it is quite exceptional.

The Chief Justice responded that the Court is responsible for hearing judicial review applications related to access to information requests, so it is not in an ideal position to make formal representations regarding the Bill. However, there is real concern regarding possible encroachment on the Chief Justice's mandate to assign a judge if there is a risk of negative publicity around expenses (depending on which judge is assigned).

David Demirkan pointed out that Parliament will not know this.

Justice Kane added, though, that the Parliamentary Committee did not give the impression that it was very receptive to the Superior Court Judges Association submissions. The impression is that judges' travel is a perk, rather than a necessity for an itinerant court.

The Chief Justice noted, as well, that if there is public coverage of a particular judge's travel expenses, no-one will know if, for example, the Court hearing occurs at the same time as a major convention, causing hotel rates to increase.

Justice Phelan noted that the judge himself might not want to take on a case if it means being in the spotlight in an expense controversy. In order to defend / explain why the expenses are justified, the Chief Justice would need to get into the fray of day to day politics.

Daniel Gosselin concluded by noting that the Commissioner is already subject to audit by Auditor-General.

i) Translation of decisions

Addressed earlier.

j) Prothonotaries

The Chief Justice noted that interviews (for new appointments) have been conducted. The process is run through the Office of the Commissioner for Federal Judicial Affairs, which provides responses to individual candidates.

k) Enhanced triaging to identify good candidates for mediation

Not discussed.

Edwin Kroft, Q.C. referred to a rumour of possible cut-backs that might result in closure of one or more remote offices.

The Chief Justice responded that there have been successive cuts over many years, and due to the cumulative budget shortfall, one option under consideration was to sit fewer days. This was mentioned in a media interview this Summer. CAS has had to manage an increasing deficit every year.

Daniel Gosselin added that regional office closures were under consideration, but it would not save much money (hearings would still need to be scheduled, with additional travel costs for a registry office to travel from an office in another city). For now, with recent program integrity funding (confirmed for 2017-18 fiscal year only, for now), closures are not on the table.

The Chief Justice pointed out that someone needs to think seriously about this, having regard to the underlying rationale for the Federal Court as a national institution.

Working Lunch

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

Daniel Gosselin announced the appointment of Chantal Carbonneau (Deputy Chief Administrator, Judicial and Registry Services) in the summer of 2017.

As discussed earlier, CAS is securing in-year funding – most of this will go to Registry services to increase Registry capacity, with some funding for judicial / corporate services, including health and safety issues. It is hoped that $10M of ongoing funding will be confirmed in the next budget exercise. However, this leaves two important items that are still unfunded:

- Case records management system – there are technical reports indicating that these systems will likely not function within 3 years, and specialized staff will likely retire; CAS is trying to advance the file as much as possible in the interim, and it is looking to partner with other organizations to move forward. Funding will be sought again in 2019.
- Translation – there is a plan to return in 2019 with a new budget request

Regarding security screening, there were some early complaints shortly after the initial introduction of screening, but none for quite some time. Most of the equipment has been installed and all cities should have the equipment in place by March 2018 with the exception of Winnipeg and Calgary.

As for e-Court infrastructure, installation is planned in selected courtrooms for evaluation in early 2018.

Regarding Court offices, the new Quebec City location at 150 René Lévesque Blvd East opens December 9th, with its Courtrooms equipped with new technology. The Toronto office needs more space, and so an additional floor (8th) will be secured for 2018 if funding is confirmed, opening in 2020. New locations to house the federal courts in Montreal are still under consideration. The option preferred by Public Works is the construction of a new building in the judicial perimeter. A second option is to renovate the old Palais de Justice (Saulnier building).

Finally, for Hamilton, CAS is exploring the option of opening an office to address the needs of the Tax Court of Canada.

Chief Justice Noël noted that the Chief Justices of the Quebec Superior Court and the Quebec Court of Appeal sought the collaboration of the federal courts in respect of the Saulnier building, namely to commit to occupying this location if a political decision is made to renovate the building to restore it to its former judicial function. The Chief Justices of the Federal Court of Appeal, Federal Court and Court Martial Appeal Court of Canada have expressed their support if the renovation of the Saulnier building were the option selected by government.

7) Follow-up Items from last meeting

a) Court Information Sessions in Collaboration with the Bar

Paul Harquail noted that the idea is to have information sessions with both courts and the bar. The onus is on the bar to extend an invitation to the Courts. The sections should look for every opportunity, with ample notice, to facilitate participation by judges at continuing legal education events. This serves the interests of the Bar and court by raising awareness of the federal courts and their jurisdiction.

8) Court docket search

Andrew Baumberg gave a summary of the issue: the CAS IT discovered that there was excessive demand on its web server, related to docket / index searches. It was determined that automated web 'bots' were repeatedly requesting docket updates on huge numbers of court files. The initial solution was a random 'string' inserted in docket result, but meant that the URL would no longer work, resulting in complaints from lawyers who had 'bookmarked' the URL for a docket to conduct periodic status checks. An alternate solution was to implement a CAPTCHA system, now in place: users must answer a simple math question when re-using a docket URL.

The members of the Bar had no concerns with this proposal.

9) Public access to a Court decision before confirmation of receipt by counsel

Andrew Baumberg noted that the Federal Court Registry waits for lawyers' confirmation of receipt before the decision is sent for publication on the Court web site. However, if the lawyer does not respond for days / weeks, this delays public access (for public/media, but also for litigants interested in a potentially relevant decision from another case).

CJ Noël noted that a practice direction was issued in July 2017 advising that decisions will be posted on the Federal Court of Appeal's website as soon as possible after the Registry has sent a copy of a decision to the solicitors of record and, in any event, no later than two days thereafter. The decision transmittal letter requests confirmation of receipt within 48 hours. Where a party is unrepresented, the decision will not be posted until an acknowledgement of receipt is received by the Registry.

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Chief Justice Crampton noted his agreement with the FCA approach.

The members of the Bar had no concerns with this proposal.

10) CBA Items / Points soulevés par l'ABC

a) Rule 481(2)(e) - Arrest of Sister Ships

Paul Harquail referred to a CBA proposal to amend Rule 481(2)(e) so as to be consistent with section 43(8) of the *Federal Courts Act.*

Andrew Baumberg noted that this had been referred to the Rules Committee, though it has yet to meet.

Justice Dawson proposed that consideration be given to *Westshore Terminals Limited Partnership v. Leo Ocean, S.A.*, 2014 FCA 231 – it is proposed that that decision would seem to address the concerns. For consideration by the Bar.

Regarding the Rules Committee, Justice Stratas added that it had not held a meeting due to lack of quorum – which could be addressed solely by ministerial designations.

b) Rules issue re: Expert Witnesses

Discussed earlier.

11) Rules Committee Update

Feedback on Practice Directions

David Demirkan noted the Federal Court Practice Direction regarding informal motions on consent and asked whether the FCA might consider this as well.

CJ Noël replied that it is always open to a FCA motions judge to proceed on this basis, depending on the circumstances.

Regarding the Federal Court's Aboriginal Law Practice Guidelines, Diane Soroka asked whether similar options might be available at the FCA.

CJ Noël replied that the Court is open to suggestions and would look at the FC Practice Guidelines to identify what if any of those Guidelines could be relevant and useful in proceedings before the FCA. CJ Noël asked whether there was anything in particular from the Guidelines that was being proposed?

Diane Soroka suggested, for example, allowing Elders' evidence?

CJ Noël replied that on appeal, the Court does not normally hear oral evidence.

Diane Soroka added that the Guidelines also address the issue of looking at evidence from the indigenous perspective.

Justice Stratas responded that in the judicial review context, the Rules allow the court to hear oral evidence in an appropriate case. A mechanism for hearing oral evidence on appeal already exists. As for the indigenous perspective, this is a matter for legal submissions by counsel as to how the FCA should treat the evidence. In the last few years, there have been some very large cases (e.g., pipeline cases) in which the Court has used the flexibility provided for in the Rules to move such cases along quickly and efficiently.

Edwin Kroft, Q.C. referred to the Federal Court Notice for informal requests for interlocutory relief and inquired as to whether this is also relevant for FCA proceedings.

CJ Noël asked that the matter be tabled until the next meeting so as to allow the Court to examine the matter further.

David Demirkan pointed out that lack of transparency regarding a Court's approach leads to some counsel being unsure whether they have to follow the strict requirements of the Rules or not. The Federal Court Practice Direction is a very practical and transparent solution.

12) Next Meeting

A date in May / June 2018 to be set in consultation between the Offices of the FCA, FC, and CBA.