# Bench & Bar Liaison Committee Meeting

**November 25, 2022**

# MINUTES

## Meeting of the Federal Court with CBA

**Attendance:**

*for the Federal Court:* Associate Chief Justice Gagné, Justice Manson, Justice Strickland, Justice Norris, Justice Favel, Justice Walker

*for the CBA/Department of Justice*: John Gailus, Joshua Jantzi, Wennie Lee, Sarah Miller, Jordana Sanft, Julie Therrien, Catherine Lawrence

*for CAS*: Darlene Carreau, Chantal Proulx, Manon Pitre, Marie Desrosiers, Klara Trudeau, Caroline Perrier

**Regrets:** Chief Justice Crampton, Justice Fothergill, Associate Judge Aalto, Nadia Efendi, Andrew Baumberg

### 1. Opening Remarks

John Gailus: welcomes the Committee members and introduces himself as the new Chair of the CBA Bench and Bar Liaison Committee.

Associate Chief Justice Gagné: welcomes everyone and indicates that she will cover the Court's update in the Chief Justice's absence. People in the room and those attending virtually introduce themselves.

### 2. Adoption of Agenda and Minutes

Agenda and Minutes (June 10) are approved.

### 3. Follow-up Items from last meeting

**Court Website** - Associate Chief Justice Gagné advises that the project is progressing but is taking longer than anticipated. The launch should be in early 2023. We are not changing the content but rather improving the structure and making it accessible and more user friendly.

**Protocol on pronouns and forms of address** - The Court did not address this yet. Associate Chief Justice Gagné indicates that one of the issues is with the French language where a complete update of the sentence is required rather than just the pronoun in English. The approach is to leave it to each party to use any pronoun that applies to them. Justice Norris indicates that each person should use the pronoun of their choice. Counsel should indicate their preference so it is reflected on the counsel sheet for the registry to correctly refer to them.

Jordana Sanft thanks the Court for their openness on this subject and suggested that at the beginning of a hearing, each person could introduced themselves and indicate how they would like to be addressed. Associate Chief Justice Gagné suggests the initiative could come from counsel to make the request in writing to ensure people are not singled out and uncomfortable in the courtroom. Associate Chief Justice Gagné refers to one of her hearings where the Registry Officer, when introducing counsel, asked them to indicate their preferred form of address. Manon Pitre indicates it may have been a request from one party to have it done that way, however this is not the current practice.

**4. Federal Court Update**

**Update from Associate Chief Justice** - The Court has returned to a full workload and is anticipating an all-time record of filings in Immigration. Other than motions in writing, where we are a bit behind compared to the last years, we see an increase in volume in all matters of the Court.

Jordana Sanft: question about the scheduling of PMNOC trials. Klara Trudeau indicates that many PMNOCs with statutory stays in the same time frame and the same counsel are being scheduled at the same time, which makes them challenging to schedule, but that it should be resolved in the next week of two.

Associate Chief Justice Gagné indicates that not all of our courtrooms are equipped for electronic trials and that if counsel intend to rely on electronic material, it is important to request the appropriate equipment ahead of time.

Appointment of Justice Guy Régimbald.

Change of title of Prothonoraies to Associate Judges.

There are 6 vacant positions. Associate Chief Justice Gagné encourages counsel to apply. There were also many retirements and elections to supernumerary status in the last year.

**Proposed amendments to the *Official Languages Act*** – Associate Chief Justice Gagné provides an update indicating that the Court has budget constraints which could create delays for the translation and issuance of decisions. The amendments to the Act may be adopted in the next month but would only come into force a year after. Darlene Carreau indicates that budget requests have been made, but that it will also involve a change of procedures. CAS is hiring more jurilinguists and is working with the Translation Bureau, which is testing the use of artificial intelligence to issue a first draft faster. Jordana Sanft raises an issue with PMNOC decisions subject to a statutory stay and the impact of delays due to translation. Associate Chief Justice Gagné refers to a solution that was raised at the IP Users Committee meeting which was to issue the public judgment in both languages with reasons to follow shortly after. This would be in the interest of parties and outside parties as well. John Gailus asks how the concept of "precedential value" would be applied. Associate Chief Justice Gagné indicates that judges would identify it before finalizing the decision.

**COVID-19 Practice Direction – Update #9**:

- **Remote & in person hearings** - Hearings in person will be the presumptive mode starting in January for all matters except for all other types of inland applications under the IRPA, applications under the *Citizenship Act* and motions scheduled for two hours or less, including General Sittings. At the beginning of April 2023, all remaining inland applications under the IRPA will be added to the list and scheduled presumptively in person.

  Sarah Miller: there is some confusion as the Court is resuming in person hearings, and points out that there seems to be a lot of flexibility for virtual hearings. Catherine Lawrence indicates that there is 100% support from DOJ to shift back to in person after the slow but successful transition to virtual at the onset of the pandemic.

  Associate Chief Justice Gagné provides statistics on hearings both in person, virtual and hybrid, as well as timeframes for scheduling.

- **Relaxation of safeguards in Court facilities** - We are removing Plexiglas in the courtrooms but maintaining the mask requirement for the moment.

**Pilot Project: Online Access to Court Records** - Justice Walker provides an update of the project launched on September 12. Only matters in the areas of Maritime Law, Aboriginal Law, Intellectual Property Law and Class Actions are included. Justice Walker also indicates that only pleadings and written arguments filed by the parties through e-filing and decisions of the Court are included in the project. About 67 documents have been filed so far, and just over half of them are within the IP area. We are expecting to open the project to other practice areas and other documents in the new year. Feedback from the Bar is welcome.

**Establishment of specialized chambers of the Court (Pilot Project)** - This pilot has been launched in October but the Notice has not been issued yet. There are no changes for counsel as it was already the practice of the Court to assign matters in those areas to experts, the notice however will make it official. The list of judges assigned to each chamber will be included in the Notice.

**Submissions from Junior Counsel** - The Court reflects on how the Pandemic affected advocacy and how junior counsel missed the opportunity to gain experience from appearance in Court. The Court is encouraging senior counsel to allow junior counsel to speak more in Court, as well as articling students if it is allowed in their province. Associate Chief Justice Gagné referred to the Consolidated General Practice Direction.

**5. CBA Section & Other Items**

**Aboriginal Law** - John Gailus refers to very exciting work being accomplished in Aboriginal Law as Canada adopted the UN Declaration on the Rights of Indigenous peoples, the *Federal Child Welfare Act* and the *Impact Assessment Act*.

**Aboriginal Law** - Josh Jantzi indicates that the hybrid flexibility is greatly appreciated, as traveling is difficult for some clients and communities.

**Immigration Law** - Wennie Lee raises an administrative issue with e-filing. The system works well but an issue arises when after filing an ALJR, there is a delay in receiving the link to make the payment, which could result in the payment being processed only the next day. She is

asking that filing be accepted on the date of filing and not the date of payment. Manon Pitre to follow-up regarding delays in payment for e-filed documents.

**Administrative, Human Rights, Labour and Constitutional Law** - Sarah Miller talks about the 2-3h hearing duration cut-off being practical, as it allows a nice balance of in person and virtual hearings.

**Intellectual Property** - Jordana Sanft indicates that appearance in person by default is welcome. However, for shorter motions, it may be better to have them heard remotely when under half a day, especially if counsel need to travel. Associate Chief Justice Gagné indicates that in these circumstances, counsel could request a hybrid hearing. Justice Manson confirms that the Court accommodates counsel's requests when they make sense. Justice Norris points out that the timing of the request is key, and it is important to make it well in advance.

A discussion ensued on how decisions could be released publicly, but parties having a heads-up that it is coming. Parties would then be consulted on redactions, and a few days after, the public reasons would be issued.

**Department of Justice** - Catherine Lawrence inquires how last-minute requests are handled by the Court for a change to the mode of hearing. Associate Chief Justice Gagné indicates it will depend on the type of courtroom counsel were assigned to, and if it is possible to get a hybrid hearing in that same courtroom, as it may be impossible to get another one. The Court may ultimately decide to make the hearing completely remote. Counsel should reach out to the registry as soon as the need for a change is identified. The Court is flexible and will accommodate, if possible, in order to avoid cancelling a hearing.

Catherine Lawrence: DOJ is in Phase 3 of easing restrictions, employees are working in a hybrid environment, and masks are still mandatory where physical distancing is not possible.

**Vexatious litigants** – It was requested in the past that DOJ take a proactive approach. Progress has been made, and there has been a significant reduction in the time to respond to vexatious litigant application requests. Processing time has come down to an average of 13 days.

## 6. Varia

Josh Jantzi: would the Court appreciate assistance from counsel in bringing monitors to assist when there are large documents to review. Associate Chief Justice Gagné indicates that counsel are welcome to bring their own monitors if the courtroom is not properly equipped, as it is more helpful than relying on the laptop screen. We should stay away from printing records. Justice Norris recommends the preparation of a compendium.

# Bench & Bar Liaison Committee Meeting

**November 25, 2022**

# MINUTES

## Meeting of Federal Court of Appeal & Federal Court with CBA

**Additional attendees joining the meeting**

*for the Federal Court of Appeal***:** Chief Justice Noël, Justice Pelletier, Justice Stratas, Justice Laskin

*for CAS***:** Christine Norrena, Adrian Bieniasiewicz, Witold Tymowski, Courtney West, François Desrosiers

**1) Adoption of Agenda & Minutes**

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

Darlene Carreau provided an update with a focus on four key strategic priorities:

**Digital Court –** Plans continue to make an important emphasis on continuously improving and moving forward digitally, including:

- Implementing guest wifi in all of our courtrooms across the country
- Extending and improving the front windows, including an improved payment option in the Federal Court of Appeal online filing system expected to be implemented this spring
- Advancing work to improve the accessibility of all of the Court websites

CAS is also working on longer-term plans, including a digital and cloud strategy for out Court, as well as reviewing current IT capacity, and continue to build capacity in IT as Government of Canada funding becomes available.

Courts and Registry Management System: as a result of some market engagements last spring, and advice received through central agencies and the Government of Canada, CAS has had to close out that iteration of that project. We will move forward with a new plan to build service and digital capacity, as well as a new approach to delivering digital services to out courts.

**National Court and Court Facilities –** CAS received full funding from the Government of Canada to make very significant investments in our court facilities and courtrooms across the country. This includes a new judicial complex that will be holding a court complex, with no other tenants, in Montreal, as well as new facilities in Hamilton, Saskatoon, and Victoria, as well

as expanding and renovating our court facilities in Ottawa, Toronto, Winnipeg and Halifax. As we continue to build these facilities, we will ensure that all of the courtrooms and facilities are modern and that they are fully accessible, and digitally equipped.

CAS has 56 public courtrooms. Not all are equipped in the same way, and not all support a full e-court or hybrid mode of operating, but the plan is to move forward with the full e-court capacity. There are 10 e-courtrooms presently and the IT team is looking across the country to upgrade and enhance other courtrooms as we can. We recognize that this current state of affairs does not fully meet the needs of our courts nor does it fully meet the needs of our litigants, and we are working to ensure the best possible facilities for our courts and our litigants.

**Investing in our people –** focus is on attracting, retaining and developing key staff, including most notably in the Registry. Staff departures have slowed down, but there are still quite a number of staff that are quite new, are being trained, and are doing their best to support. CAS is open to feedback from the Bar if there are any particular areas of focus on training or service improvements.

**Excellence in service –** CAS has maintained an onsite presence during the pandemic, and is continuing to operate in a hybrid mode to best service the Courts and litigants.

**3) Follow-up Items from last meeting**

**Articling students**

Associate Chief Justice Gagné: indicates that this item is on the agenda simply to confirm that the practice directions have been issued

Chief Justice Noël: the notices have been issued by both Courts

Associate Chief Justice Gagné: the Court welcomes representation before the Court by younger lawyers, junior litigators, because during the pandemic they missed opportunities to appear in courtrooms, including articling students when they are allowed by the province to do so.

**Residency of Judges and Amendments to the Federal Courts Act**

John Gailus: discusses the process of getting a resolution to the CBA – this would have required a proposal and a resolution by December 2022 to have in on the CBA's agenda for February 2023. This has not happened and the earliest there would be a resolution is February 2024. The CBA will survey members to see if the residency requirement is really an impediment to them applying for appointments. If a decision is made to go forward, there will be consultation with the Federal Court and the Federal Court of Appeal, and a list of potential options would be set.

Chief Justice Noël: indicates that there are different views on this issue in the Courts. There is a reason for the residency requirement. Before any changes are made it is important to ensure there are good reasons to change it. There could be different rules for the Federal Court and the Federal Court of Appeal.

Justice Pelletier: asks why the residency requirement is an issue for the bar.

John Gailus: the question is whether the residency requirement is creating a disincentive for otherwise qualified candidates.

Associate Chief Justice Gagné: adds that perhaps more candidates would apply if they didn't have to move to Ottawa.

Chief Justice Noël: this has always been the case. The real question is whether it is hampering us in a way that diminishes the Courts' capacity to recruit.

John Gailus: mentions that there is anecdotal evidence that individuals who were subject matter experts who applied to provincial superior courts, rather than apply to the Federal Court.

Justice Pelletier: indicated that this is not particular to the Federal Courts. Even within the provincial system a judge can be assigned to a location.

Jordana Sanft: the issue has come up significantly within the IP bar, not only from a residency perspective, but from a perspective of equity and diversity being represented more broadly on the bench. An additional residence in Ottawa may prevent people from across the country in different demographics and life situations from applying. It may be difficult for people to move their families.

Associate Chief Justice Gagné: the structure of the family has changed.

Chief Justice Noël: eliminate the residency requirement will significantly increase the number of people who will be attracted and will apply. The question that arises is whether the benefit that is thought to be behind people working in one geographic area together is sufficiently unimportant to allow the benefit that you are seeking to bring about.

Justice Manson: the coalescence that was spoken of in Ottawa hasn't existed for the last 10 years, because there is so little Federal Court work in Ottawa. There is no question that it is different at the Court of Appeal. We are in a different world, a virtual world, and that affects whether or not a residency requirement makes any sense anymore.

Joshua Jantzi: some members of the bar have asked us if, the residency requirement has interfered with the business of either court, and if so, how.

Chief Justice Noël: for the FCA, it hasn't. People abide by it.

Associate Chief Justice Gagné: the main issue for the Federal Court is recruitment. We get a lot of applications from Ottawa.

Chief Justice Noël: indicated that he is worried about this issue. It is in the statute, it is a legal requirement. We have to make sure that we abide by existing laws.

John Gailus: this will be on the agenda for the next meeting.

**4) Joint Items for Federal Court of Appeal & Federal Court**

**Proposed amendments to the *Official Languages Act***

Chief Justice Noël: spoke about the proposed amendments as a matter of high concern. Most Federal Court of Appeal decisions are precedential, and almost everything the Court issues would have to come out simultaneously in two official languages. This may have an impact on the Court's ability to continue to hand down judgments in a timely fashion. If the Courts do not get the necessary funding, there may be a significant slowdown in its capacity to release decisions.

John Gailus: one of the things that the CBA and this committee can do is support the Courts in ensuring they have sufficient resources because nobody benefits from delay in translations.

**Pilot Project Procedural Bijuralism**

Chief Justice Noël: it was announced that the pilot project is extended until September 2023. The take up on the project has been disappointing.

Catherine Lawrence: asked whether it be helpful for members to go back to DOJ and CBA for feedback on the pilot project.

Chief Justice Noël: yes.

John Gailus: asked whether the pilot still on.

Chief Justice Noël: yes, it is still active until at least September 2023.

**Rules Committee update**

Christine Norrena: the Committee met on October 21 2022. There is one active drafting project on costs –looking at pre-publication in Canada Gazette I in early 2023.

**Confidential and redacted reasons**

Jordana Sanft: there had been discussion in the IP bar about consistency and timeliness of confidential reasons and judgment. These largely relate to the balance between the public wanting to know the judgment and the reasons, and the parties needing time to discuss redactions. The bar is looking for a practice that people can understand and rely on.

Chief Justice Noël: what is the exact problem? Is there a delay between the time when the judgment is signed and when the reasons are signed?

Jordana Sanft: currently there is not - there is the interest of the public in knowing what's happened in the judgment and decision when the parties know, but also counterpoint of the parties needing the extra time.

Associate Chief Justice Gagné: for example, PMNOC files. You have to issue the decision within a certain timeframe. If there is a delay for redaction before the decision can be issued publicly, the generic involved in that file will know of the validity or the invalidity of the patent before the other generics, and this may give them an advantage. They want to level the playing field.

Justice Stratas: this is a problem that cannot be solved. When there are confidential reasons, the parties have to see the reasons to determine the redactions. They are then armed with the knowledge that no one else has. The best the Courts can do, and this is our standard practice, is to issue a direction with a very short time period. There will of necessity be a period where parties are armed with knowledge that no one else has, and this seems unavoidable.

Jordana Sanft: I agree with the approach. Members have raised the issue of unfairness, I don't have another suggestion.

Associate Chief Justice Gagné: when a confidential decision is issued, there is a recorded entry that says confidential reasons issued. If that entry adds the judgment which is not confidential, it would be known publicly.

Jordana Sanft: that's correct, and in part what the member of the IP bar was raising as an option. I don't think there is a better answer than what has been suggested.

John Gailus: the other issue that was raised was appeal deadlines.

Jordana Sanft: it is the date of judgment.

John Gailus: I can see this issue also arising in the national security context and some immigration files. As long as we have a consistent approach.

Chief Justice Noël: this is sensitive. It is public disclosure, access to justice, people's capacity to understand what is going on before the courts.

**5) Next Meeting**

John Gailus: will check calendars and get back to the group.

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*for the Federal Court of Appeal***:** Chief Justice Noël, Justice Pelletier, Justice Stratas, Justice Laskin.

*for CAS***:** Christine Norrena, François Desrosiers, Witold Tymowski, Adrian Bieniasiewicz, Courtney West.

*for the CBA / Department of Justice***:** John Gailus (CBA Chair), Josh Jantzi, Wennie Lee, Jordana Sanft, Sarah Miller, Julie Terrien, Catherine Lawrence.

### 1) Opening Remarks

### 2) Update on Court Operations

Chief Justice Noël welcomed members of the Committee and congratulated John Gailus as new Chair of the Committee, and also congratulated Justice Régimbald for his appointment. Welcomed new members Wennie Lee, Sarah Miller, Jordana Sanft and thanked them for accepting to serve on the Committee.

**Statistics**

Chief Justice Noël: presents the statistics on FCA court operations. During the 2 full fiscal years when COVID struck, the FCA heard and disposed of an average of 360 cases a year, roughly 80% of its regular production. This puts the FCA at the high end of all appellate courts in Canada to have been able to continue to produce at that rhythm during the pandemic. Thank you to CAS and the Registry for helping achieve this, as well as the legal profession and their capacity to respond to the challenge.

In the current year, there is a bit of a slowdown in cases being commenced before the FCA, largely due to a significant decrease in appeals from the Tax Court.

**Changes to the composition of the Court**

Chief Justice Noël: a new judge on the Court was named from the profession - Nathalie Goyette. She was appointed to the Court on October 24. There are 3 vacant positions left to fill.

**Court initiatives**

**Regulating problematic litigants**

Justice Stratas: indicates that this is a project that the Court is working on in conjunction with the Registry. There has been an increase in the number of problematic litigants. They have not been declared vexatious but take up inordinate amounts of time and use up a lot of Registry resources. We have developed tools based on the plenary powers of the Court to regulate problematic litigants. This is going well, and is of benefit to the Bar because it frees up the Registry to devote its resources to your cases.

**Internal procedures manual**

Justice Stratas: the Court has grown thanks to an increase in complement and we will be working on a manual for judges. This will assist us in being more efficient.

**Upcoming consolidated practice direction and e-filing**

Justice Stratas: at present, there are 41 separate practice directions and notices to the profession for the Federal Court of Appeal. We will consolidate them into one practice direction. This will also take the various notices that were issued during the pandemic about electronic filing and put them all in one place. It will be easier to ascertain the Court's policy on various matters.

Chief Justice Noël: thanks Justice Stratas for this initiative and invites members to provide feedback on the Consolidated Practice Direction when it is issued.

Justice Stratas: target is early February. It will be launched with the FCA e-filing portal.

**Registry Committee report**

Justice Stratas: the Registry Committee discussions include staffing, systems, and technology. The Registry is working to properly organize the back office to receive electronic documents, better procedures and protocols to improve operations. It is also working on viewing electronic documents.

John Gailus: will the internal judges manual be shared with the public?

Justice Stratas: no.

John Gailus: great to see what the Court is doing with respect to problematic litigants. There is a real increase of self-represented litigants.

Justice Stratas: we think our Registry is the best in the country in dealing with unrepresented litigants.

Chief Justice Noël: the biggest change in the last 10 years is the increase in aggressive behaviour. People are more assertive, more deliberate and when they disagree, they disagree with force. We're facing exactly this type of problem in our court proceedings and that's exactly what this is intended to deal with. We need to ensure our system remains accessible to those who make fair use of it.

John Gailus: it also affects counsel.

Justice Stratas: this program is not a substitute for vigilant actions to bring applications to declare people vexatious.

**Public and media access to FCA hearings**

Chief Justice Noël: in September, FCA reverted to in-person hearings being the default proceedings. Since that time, the experience shows that close to 60% of our cases have proceeded in person, close to 40% virtually and approximately 10% in hybrid format. One of the benefits that flowed from virtual hearings is virtual access to hearings. We saw a tremendous uptick in attendance at our hearings. We have the technology to make in-person hearings accessible in real-time the same way we do with virtual hearings. We are going to continue to make sure that our hearings are accessible virtually, whether they take place virtually, or whether they are in person. So far this year, we have close to 2000 people who have attended and continue to attend our hearings. This is a tremendous step forward in making justice apparent to all.

John Gailus: this is on Zoom?

Chief Justice Noël: yes. The FCA website has instructions on how one signs up and joins the hearing. This is for every hearing.

**3) CBA National Sections Updates and New Items**

**Aboriginal Law – John Gailus (Chair)**

These are exciting times in the field of aboriginal law. Canada has agreed to adopt the UN Declaration on the rights of indigenous people. The Supreme Court of Canada will hear important cases.

**Aboriginal Law – Josh Jantzi**

The aboriginal law bar is generally pleased to return to in-person hearings. For indigenous people as litigants, the news will be welcome that Federal Court of Appeal hearings will be accessible by Zoom for the community to attend. This will facilitate attendance for more remote communities.

**Immigration Law – Wennie Lee**

Nothing from Immigration for the FCA at this time.

**Administrative, Human Rights, Labour, and Constitutional Law / Droit administratif, droit de la personne, droit de travail, et droit constitutionnel – Sarah Miller**

No specific feedback. A lot of people will be happy about the ability to see hearings remotely.

**Intellectual Property – Jordana Sanft**

The updates have been informative. Expects members of the section to be quite excited about the initiatives. No specific comments other than those previously raised.

**Department of Justice – Catherine Lawrence**

Department of Justice is in Phase 3 of easing restrictions. Most employees are working in hybrid mode – some are in the office every day, others are at home most of the time. They are well equipped in both modes for counsel to appear either virtually or in person before the Court.

Vexatious litigants: DOJ has streamlined their process to obtain approvals from the Attorney General. An average of 55 days between the receipt of the request and the decision, has been brought down to 13 days.

## 4) Closing Remarks

Chief Justice Noël: thanks the Committee and welcomes the new members again.

John Gailus: we really appreciate the opportunity to sit down with the Federal Court of Appeal. There is great value in having these meetings and being able to share information with you.