

Bench & Bar Liaison Committee Meeting

Friday, November 8, 2019

Ottawa, Ontario

MINUTES

Meeting of Federal Court with CBA

Attendance

Federal Court: Chief Justice Paul Crampton, Justice Michel Shore, Justice Michael Phelan;

Teleconference: Justice Cecily Strickland.

CAS: Daniel Gosselin, Lise Lafrenière Henrie, Andrew Baumberg, Jaro Mazzola, Marie Desrosiers, Zaira Petruf, Isabelle St-Hilaire.

Bar

1. Kamleh Nicola, Chair (Intellectual Property Law)
2. Josh Jantzi (Environment, Energy and Resources Law)
3. Erin Roth (Immigration Law)
4. Guy Régimbald (Administrative Law)
5. Paul Harquail (Attending for Maritime Law on behalf of Vanessa Rochester)
6. John Gailus (Aboriginal Law)
7. Marc-André O'Rourke (CBA staff lawyer)
8. Catherine Lawrence (Department of Justice)

Regrets: Nadia Effendi (Civil Litigation)

1) Opening Remarks

Kamleh Nicola introduced herself as the new Chair for the CBA and thanked the Court for the opportunity to hold this meeting.

2) Adoption of Agenda & Minutes

No comments.

3) Follow-up Items from last meeting

a) Access to documents on the Court web site

Kamleh Nicola: Written submissions are in progress for review per CBA protocol and will be finalized the week of November 25. In the interim, the CBA can discuss some elements and recommendations. She noted that Erin Roth did considerable work on this project.

Erin Roth: there are competing tensions – *open court, privacy, security*. Data is a major global commodity, and information is not always subject to Canadian privacy law. The CBA looked at the Federal Court of Australia, which has a regime that restricts access to court documents. Categorization of documents allows for differential access for parties versus non-parties. However, electronic and paper records are treated the same. For the Federal Court (Canada), a pilot project might assist e.g., a partial launch that could be monitored, allowing the Court to assess the types of documents accessed and the volume.

Chief Justice Crampton noted that he had met with members of the Federal Court of Australia – they generally grant the media access to documents, but it is not clear why they do not grant *default* public access to non-confidential documents. We need to reconcile our policy with *Sierra Club*, and so we

would need to consider carefully any proposal to reduce public access to paper files so as to match any similar reduced access levels for electronic documents.

Kamleh Nicola: regarding possible restrictions, online access raises new issues that do not exist for paper documents. There is a need to balance the possible increases in requests for confidentiality due to an online access regime.

Chief Justice Crampton agreed with the need for a balanced approach, but expressed concern regarding possible anonymization requests for IMM proceedings as a matter of course. These cases represent the majority of the Court's caseload, which would then have limited access. The Court cannot be seen to become a type of "star chamber." One option might be to seal a portion of an IMM file that contains sensitive information, but with the remainder of the file being accessible.

Justice Phelan: is there any way to prevent alteration of electronic documents available online?

Josh Jantzi: for written documents, there are ways to have digital locks.

Chief Justice Crampton: is it possible to establish national internet boundaries for access to the Court website?

Andrew Baumberg: there are ways around website access controls based on geographic boundaries.

Kamleh Nicola: a cloud-based restriction might be feasible.

Catherine Lawrence: are there statistics regarding who is accessing public documents?

Andrew Baumberg: we don't track this info.

Daniel Gosselin: going forward, it might be possible.

Lise Lafrenière Henrie noted that there is concern regarding online tracking.

Chief Justice Crampton: we could start a pilot for access by counsel, which is probably the bulk of the requests. There should be some public access for these proceedings.

Guy Régimbald: in Quebec, instead of a full name, there are initials for many proceedings.

Justice Shore: given the protection issues involved in immigration proceedings, we need to have special measures and expert advice.

Chief Justice Crampton: the Court is inclined to have a phased-in approach, initially providing access only to Court decisions/directions, etc., and parties' submissions, but not evidence, which might be included at a later stage. This would already be a significant step forward, and may be sufficient for the time being in terms of the open court principle.

Lise Lafrenière Henrie: even without names, there is often sufficient information to identify a person.

Erin Roth: the key concern is misuse of online information by groups that are capable of data mining.

Kamleh Nicola: there are numerous practice issues relating to safeguards to minimize risks to data.

b) Court web site re-design

Paul Harquail: there was positive feedback, though with one concern related to the search function.

Andrew Baumberg: there was a bug in the search tool for the new website that was fixed earlier this Summer.

Chief Justice Crampton: we are moving to address comments regarding issues with the new website

Kamleh Nicola: the intellectual property number is not always accurate. Sometimes, a prior number is entered rather than the patent being asserted. Also, can we include the trade-marks?

Andrew Baumberg: this is available on the website search tool.

Lise Lafrenière Henrie: perhaps a guide could be prepared for review with the IP committee.

Josh Jantzi: suggested that a contact at the Court be designated for the bar, who could advise of issues.

c) Consent judgment template

Paul Harquail: in general, the bar has no issues, though there is ongoing debate in the IMM section.

Erin Roth: the Department of Justice asked for more time to assess the settlement project.

Chief Justice Crampton provided background on the IMM settlement pilot project. By next year, we should see even further improved numbers for backfilling rates (scheduling of a replacement hearing when a case settles).

Catherine Lawrence: it may simply be growing pains in the early days of the settlement pilot – the department is still looking to see how to mitigate the extra work necessitated by the pilot.

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

A Notice to the Profession (which adopts the Class Action Protocol) was circulated at the meeting.

Chief Justice Crampton noted the ancillary jurisdiction issue, which could provide an avenue to overcome the principal existing obstacle to making national claims in the Court.

Guy Régimbald: there is also a *first to file* rule in many provinces, though a recent Quebec Superior Court decision held that a subsequent Federal Court class action could still continue.

Chief Justice Crampton: on carriage, if counsel files in Federal Court, then they would get carriage across the country.

Josh Jantzi: there is no united view regarding section 50.1 *Federal Courts Act* on the mandatory stay.

Chief Justice Crampton: there are many underutilized areas of Federal Court jurisdiction, including class actions.

4) Update: Federal Court

Chief Justice Crampton circulated copies of a detailed PPT deck, highlighting the following items orally:

a) Strategic Plan

Any comments on the Court's consultation regarding its new strategic plan should be provided in the next couple weeks.

Kamleh Nicola: we thought that we were out of time, but will provide some comments that have been submitted. Many of the comments are reflective of what is already in the current framework.

Lise Lafrenière Henrie: unofficial comments could be submitted in the coming weeks, with a more official, public version later.

b) Courts and Registry Management System

Funding has now been approved. An RFP is to be launched in 1Q 2020

c) Judicial Appointments / Vacancies

- Associate Chief Justice Jocelyne Gagné (12/12/18)
- Justice Peter Pamel (03/05/19)
- Justice Nicholas McHaffie (03/05/19)
- Justice Janet Fuhrer (27/06/19)
- Prothonotary Sylvie Molgat (21/11/18)
- Prothonotary Angela Furlanetto (07/03/19)
- Justice Harrington retired in April of this year.
- Vacancies: 2 in Quebec, 1 in Ontario, 1 judge and 1 prothonotary position from Budget 2018, 3 positions from Budget 2019

d) Scheduling

- IMM JRs are generally being scheduled within 90 days – sometimes slightly longer in Toronto & Calgary
- For 1-2 day hearings, we are scheduling in early 2020
- For 3-5 day hearings, we are scheduling into the late Spring and increasingly into the Fall, with some availability earlier in the year
- For longer trials, we are scheduling in the Fall of 2020, although for NOCs we are now into 2021

e) Varia

Chief Justice Crampton: the Court is working on a consolidation of its practice guidelines and notices – suggestions are welcome.

5) CBA National Sections

a) Immigration Law

Erin Roth: the Bar looks forward to getting the Practice Guidelines finalized to clarify the time-lines for stay motions.

Justice Strickland: we are not looking to revise the Rules, but we are looking to revise the draft Guidelines.

Erin Roth: there is a perception of unequal treatment between the private and public bar counsel regarding knowledge of who the judge is. It is possible in some cases for the Respondent to file their further memorandum with full knowledge of who will hear the case, whereas the Applicant must file their materials before the name of the judge is disclosed.

Andrew Baumberg: there is a Notice that allows disclosure of the name of the judge, but it was issued without consideration of this particular issue.

Chief Justice Crampton: it is still possible to review / revise the draft Notice.

b) Environmental, Energy and Resources Law

Josh Jantzi: there are many environmental review cases that will come to the Court under the new regime. It would be helpful to have clearer direction regarding what is a clear case for a motion to strike.

In provincial Superior Court, the pro bono law organizations arrange for amicus counsel to make live duty counsel appearances. If the Court is seeing challenges for self-represented litigants, would the Court want a pro bono counsel program available from the Bar? Pro Bono Law has been successful in the provincial courts.

Chief Justice Crampton: the problem is that there is not sufficient volume in many offices to warrant a duty counsel option. A legal assistance program was recently launched in Toronto, with about 20 lawyers who have volunteered to participate.

Lise Lafrenière Henrie: we are also launching outreach offices at the registry that will provide resources for SRL's. There will also be a dedicated counter for public questions.

Josh Jantzi: the registry could also call upon amicus to assist, even if the SRL does not make a request.

Justice Phelan: for matters that have a leave requirement, the leave judge could perhaps address this. However, it is more difficult in cases that are not formally screened within the Court.

c) Administrative Law

Guy Régimbald: the Bar is waiting for the trilogy from the Supreme Court of Canada.

d) Maritime Law

Paul Harquail: the CBA is offering a webinar on November 28 touching on practice before the Federal Court. The CBA website provides information about the program.

For major spills that result in high volume claims, it might be useful to review how other courts have addressed practice issues.

The Comité maritime international has its meeting in Montreal in 2021. Paul Harquail will circulate meeting dates once confirmed.

e) Intellectual Property

Kamleh Nicola: nothing new to report.

Chief Justice Crampton: we have not yet had a single NOC going forward to trial under the new regulations.

Kamleh Nicola: many clients are hesitant to go forward, even though the proceedings are going ahead in the U.S., for example.

f) Aboriginal Law

John Gailus: the Liaison Committee met last week on October 31. He is encouraged by the Court's efforts on technology.

The UN Declaration Act passed 2nd reading last week. Federally, there is a similar Bill that may be revised under the new government.

g) Department of Justice

Catherine Lawrence: nothing new to report. There was a follow-up since the last meeting to discuss options for Department to take advantage of the Court's e-filing platform.

Chief Justice Crampton: encourages the Department to embrace e-trials.

Daniel Gosselin: we will have ten e-courtrooms by end of year.

Catherine Lawrence: there is an interest in e-hearings even for judicial review applications, probably an underutilized area.

Justice Shore encouraged the bar to promote the option for hearings at law faculties – some people are declining these proposals.

Meeting of Federal Court of Appeal & Federal Court with CBA

Additional participants

Federal Court of Appeal: Chief Justice Marc Noël, Justice Denis Pelletier, Justice David Stratas, Amélie Lavictoire, Witold Tymowski, Alain Le Gal.

1) Adoption of Agenda & Minutes

Kamleh Nicola thanked Paul Harquail for his work over the years as Chair of the Committee. Chief Justice Noël and Chief Justice Crampton endorsed her remarks and thanked Mr. Harquail for his leadership and support.

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

Daniel Gosselin noted that CRMS funding was approved: \$52M over 5 years and \$6.7M ongoing. There is already considerable progress: last year, an RFI was launched to secure information about available

products, and a request for proposal (RFP) will be launched in the coming year. We are currently identifying the Courts' requirements. It is hoped that within 3 years, tangible results will start to be achieved, with final results in 5 years. In the first year, we are also starting to digitize some archives.

There is a newly constituted working group looking at options for a national judicial building. Three options being considered: (1) new judicial building (favoured by CAS); (2) West Memorial building, after the SCC vacates the premises; and (3) Library and Archives building.

Fraudulent phone calls: there have been numerous incidents of people being targeted, with third parties spoofing the Courts' telephone numbers. The sources of the calls have been blocked, but some calls have been reported. We are continuing with an investigation and response as appropriate.

Security screening: where feasible, a 'fast line' is made available for counsel. If there is no expedited line, counsel are encouraged to identify themselves as counsel so as to benefit from expedited access.

3) Follow-up Items from last meeting

a) Safeguarding Judicial Independence & Bill C-58

Marc-André O'Rourke: the House accepted the Senate's changes on the Bill, including aggregate disclosure of judicial expenses.

Chief Justice Noël: the initial legislative proposal appeared problematic on judicial independence grounds, but was amended. The Bar's efforts to address this are appreciated.

b) Articling students

Kamleh Nicola requested an update on eligibility to appear.

Chief Justice Noël: reiterated his views (from the last meeting) that a legislative amendment appears necessary. The solution lies in an amendment to the Federal Courts Act. If the Bar in a particular province considers the practice acceptable, then this should be acceptable for the federal courts as well.

Chief Justice Crampton: this might be one item to add to the bar's list. There are two views, either to facilitate the practice applicable in each province or else to have a national standard.

Guy Régimbald: if a student is not in breach of the provincial bar requirements, they should be allowed to appear.

Action: CBA to pursue discussions regarding articling students off-line, establish a position for the CBA and then raise at next meeting.

Chief Justice Noël: on legislative amendments, the FCA has asked for an increase in its complement (from the current complement of 12 judges) to 14 judges. This is necessary to address a consistent increase in its workload.

Kamleh Nicola: Offered the CBA's help to carry the message forward.

Justice Stratas: the last time the complement of the Court changed was 2002. The complexity and quality of the cases has fundamentally changed since that time. Workload issue is a qualitative one, not just a quantitative one.

Chief Justice Noël: The FCA would appreciate receiving advance notice if the CBA takes steps to support the Court's request. The Court will share statistics pertaining to its workload with the CBA.

There followed some discussion regarding the volume and type of cases arising on appeal, and whether a leave requirement might be appropriate to limit the volume.

Chief Justice Noël indicated that the volume coming up to the FCA is legitimate. The Court simply needs to judicial resources to deal with it.

Justice Stratas noted the Global Review process at the Rules Committee, which recommended against a leave requirement for appeals.

Justice Pelletier: It does not benefit access to justice to seek to decrease the number and types of cases coming before the Court.

c) Vexatious litigants

Lise Lafrenière Henrie had a call with Catherine Lawrence and Amélie Lavictoire to discuss this issue recently and proposed a working group to develop strategies and explore best practices adopted by other courts. For example, there are cases where someone is declared vexatious in one court but then simply shifts their focus to another court.

Kamleh Nicola: the CBA will review the proposal for a working group and respond, in due course, regarding representatives from the Bar.

Paul Harquail: there may be practice areas that are not represented today that have an interest.

For follow-up with Marc-André O'Rourke.

Guy Régimbald: are tax cases part of the issue?

Chief Justice Noël: there is no substantial issue of vexatious litigants in the area of tax law at the FCA.

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

a) Gowning

Kamleh Nicola requested the opportunity to clarify the directives permitting counsel to depart from traditional gowning requirements in certain circumstances. A letter will be circulated soon.

Chief Justice Noël noted that the current Notice to the profession on this issue discussed within this committee and its adoption was in response to the consensus achieved then.

Marc-André O'Rourke: just a minor revision is proposed to broaden the scope of the current Notice.

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

a) Rules Committee Update

Chief Justice Noël: the Rules Committee is now at full complement.

Andrew Baumberg: Ministerial designations were completed by mid-Summer. The next meeting of the Rules Committee is November 29. He noted the challenge for the Rules Committee to respond to the CRMS project and the modernization opportunities that it presents.

Chief Justice Crampton: The Rules need to be refined to facilitate the Courts' move towards modernization.

b) Launch of bijuralism pilot project

Chief Justice Noël: bijuralism plays a significant part in substantive law. In legislation, Parliament adopts the relevant substantive law in the province. However, there is a lacuna for procedural law.

The Federal Courts Rules more closely resemble the approach used in common law provinces. The Chief Justices approached the Quebec Bar to consider adopting, on a pilot basis, use of the Quebec Code of civil procedure. A formal pilot project was announced at the beginning of September and should be launched soon. On consent, parties represented by Quebec bar lawyers could opt into the pilot for actions.

c) Scam using the telephone numbers of the Federal Court and Federal Court of Appeal

Daniel Gosselin addressed this earlier.

d) 50th anniversary

Lise Lafrenière Henrie: 2021 marks the 50th anniversary of creation of the Federal Court of Canada. Two main initiatives are planned:

- Book launch – the book is currently being drafted by Ian Greene (York University), Peter McCormick (University Lethbridge), Craig Forcese (University of Ottawa) Martine Valois (Université de Montréal).;
- June 9-11 events in Ottawa – book launch and 2 day colloquium, including international participation

6) Next Meeting

To be confirmed following consultation with Andrew Baumberg for the Federal Court and Amélie Lavictoire for the Federal Court of Appeal regarding the availability of the members of the Courts.

Meeting of Federal Court of Appeal with CBA / Réunion de la Cour d'appel fédérale avec l'ABC

1) Update from the Federal Court of Appeal / Mise à jour de la part de la Cour d'appel fédérale

a) Statistics / Statistiques

- Chief Justice Noël presented the current statistics pertaining to the workload of the Federal Court of Appeal.

b) Changes in the composition of the Court since the last meeting / Changements dans la composition de la Cour depuis la dernière réunion

- Chief Justice Noël: the Court is currently short one judge with Justice Gauthier becoming supernumerary. In June, the Court welcomed Justice Mactavish who was elevated from the Federal Court.

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

- Amélie Lavictoire: Scheduled to start in-house testing mid-November, with launch in January 2020. E-filing will be optional in the Federal Court of Appeal, with possibility of making it mandatory once the e-filing system is more robust. Unlike the Federal Court, a paper copy will be required, except for correspondence. However, there will be some flexibility as to when that paper copy is to be filed. It will not need to be filed at the same time as electronic copy. Cut off times for filing will follow the approach of the Federal Court. The Federal Court of Appeal will impose certain requirements on the electronic documents filed (i.e ability to search, indexing etc.). Further information will be provided to parties via the website. Courtrooms will also require investment to accommodate e-trials and e-hearings.
- Daniel Gosselin: CAS will shortly have 10 courtrooms that will be capable of supporting e-hearing.

d) Update on Court web site re-design / Mise à jour quant à la refonte du site Web de la Cour

- Amélie Lavictoire: Project has been delayed until 2020 due to lack of resources.

- Paul Harquail: Need to make sure that search feature works correctly in order to find relevant information, particularly the docket search.

e) Common lists of authorities / Listes communes de jurisprudence

- Amélie Lavictoire: the Federal Court of Appeal had only one common lists of authorities on its website. That list was in Intellectual Property and had not been updated since 2013. The Federal Court of Appeal has many areas of jurisdiction for which it does not have a liaison committee that could assist with updating these lists, nor does the Court have the resources to create or update these lists itself. As a result, the Court made the decision to remove the single list of authorities from its website.
- Chief Justice Noël: The problem is that if the lists are is not refreshed, they quickly become outdated and their use becomes questionable. The impression is that common lists are not used by counsel appearing before the Federal Court of Appeal.
- Amélie Lavictoire: As we move towards e-filing, the issue of filing printed versions of decisions will be less. There is also the concern that an outdated list of common authorities may be misleading, especially to self-represented litigants.

2) CBA National Sections Updates / Mises à jour des sections nationales de l'ABC

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

- Nothing to report

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

- Joshua Jantzi: Members have asked for guidance about moving to strike out proceedings on judicial review. Is there guidance about whether previous case law on the issue would allow to strike proceedings on judicial review?
- Justice Stratas: The answer is already in the jurisprudence. The Court is increasingly willing to entertain motions to strike in the area of judicial review, and making more aggressive use of Rule 74 (that allows a document to be sent to the Court to see if it should be removed from the court file). See also *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, [2013 FCA 250](#).
- Justice Pelletier: There is a cost-benefit analysis to be made as to the cost and time involved with challenging such a file at the Federal Court because there is a possibility of the case being appealed to the Federal Court of Appeal and being sent back to the Federal Court. Sometimes, counsel may find it preferable to go to the merits immediately.

iii) Administrative Law / droit administratif

- Guy Régimbald: The Admin Law Section is looking forward to the trilogy coming out.

iv) Maritime Law / Droit maritime

- Paul Harquail: Maritime law section will be hosting webinar on Nov. 28, 2019 which will cover practice points relating to the Federal Court Rules. The Comité Maritime

International will be holding its annual colloquium in December 2021 in Montreal. Mr. Harquail will inform the Courts once the dates have been finalized.

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v) Intellectual Property / Propriété intellectuelle

- Kamleh Nicola: Nothing to report

vi) Aboriginal Law / Droit autochtone

- John Gallus: The members of the Section are encouraged by court's adoption of new procedural mechanisms and special methods of service and filing materials.
- B.C.is in the process of enshrining into law the Universal Declaration of the Rights of Indigenous Peoples. The Bill is at second reading. There are expectations that the federal government will similarly present a bill to adopt the UN Declaration. This may have an impact on the work of the FCA.

- Justice Stratas: In the second judicial review dealing with the TransMountain pipeline, the Court tried new procedural mechanisms and greater reliance on electronic materials. If the case is over by the next meeting, the Court would be curious to obtain feedback on these new procedures. This may be useful for planning future cases and identifying what and how to improve.

- Catherine Lawrence: Where the new procedures on consultation and collaboration with the parties or Court-imposed?

- Justice Stratas: Court proposed ideas and sought input from parties, then issued an order.

- **ACTION ITEM:** Joshua Jantzi to consult with parties from the Trans-Mountain hearings in order to provide anonymized feedback regarding Court procedures in that case.

Closing remarks:

Chief Justice Noël congratulated Kamleh Nicola on her new role as Chair and extended thanks to Paul Harquail for his stewardship of the Committee over the past few years.