

Bench & Bar Liaison Committee Meeting

November 17, 2023

MINUTES

Meeting of Federal Court with CBA

Attendance:

for the Federal Court: Chief Justice Crampton, Associate Chief Justice Gagné, Justice Fothergill, Justice Walker, Justice Norris

for the CBA/Department of Justice: Jordana Sanft (Chair), Chelsea Nimmo, Colleen Bauman, John Myers, Keltie Lambert, Catherine Lawrence, Julie Terrien

for CAS: Darlene Carreau, Martin Béliveau, Marie Desrosiers, Klara Trudeau, Justine Drouin, Caroline Perrier

Regrets: Justice Manson, Justice Strickland, Justice Favel, Associate Judge Duchesne, Chantal Proulx, Sarah Miller

1) Opening Remarks

2) Adoption of Agenda & Minutes

The members adopted the agenda and minutes.

3) Follow-up items from last meeting

a) Updating the Consolidated Practice Guidelines

General Practice Guidelines: CJ Crampton welcomed comments on the draft circulated. Among other things, the updated guidelines address the shift to more in-person hearings and integrate the elements of the latest Covid Practice Direction. Jordana Sanft discussed paragraph 21 and asked the Court that all counsel on the email consenting to electronic service be included in subsequent communications from the Court, not only the lead counsel listed. The CBA will provide comments shortly.

John Myers commented on paragraph 27 (virtual commissioning) and alternatives to wet signature.

Immigration Guidelines: No comments provided from the CBA. Justice Norris mentioned that the updated guidelines include a procedure for *mandamus* applications and new material regarding allegations of ineffective assistance of counsel.

Case management and PMNOC guidelines: Jordana Sanft indicated that insufficient consultation was made with the IP Bar. Caroline Perrier mentioned that comments were sought generally at the IP Users committee but not specifically on the guidelines. Jordana Sanft commented on the requirement to provide experts reports 4 weeks before trial compared to 2 weeks. She suggested

the practice direction say that the report be deemed under seal, which would alleviate concern and it would not be a deemed undertaking to call the witness.

b) Pilot Project: Online access to Court records

Justice Walker presented that technical issues were being resolved. She further noted that training and education was provided to the registry staff. Limited resources and financing do not allow the program to be expanded further at this time. The next phase of the pilot would be to integrate a subset of immigration files. More work is required in that regard, as there are confidentiality and privacy issues that need to be taken into consideration. Jordana Sanft mentioned that the system is easy to use. However, that there is a delay between the filing and addition of the document online. Another issue is that documents for matters filed before the launch of the pilot are not available.

c) Specialized Chambers of the Court

CJ Crampton mentioned that the Court received favourable feedback. Given the success of the initial pilot project, it was expanded to include an Aboriginal Law chamber. The Immigration Bar requested the creation of an Immigration chamber. The Chief Justice replied that due to the very large number of immigration cases, the whole Court has to share in that workload.

4) Federal Court update

a) Update from the Chief Justice

- i) **Workload and scheduling** – The Court is operating above capacity due to the growing volume of immigration cases (increase of 30% compared to 2022 and 212% compared to 2019).
- ii) **Changes in the Court’s complement** – Appointments of Justices Ngo, Azmudeh and Turley. Four vacancies remained to be backfilled in addition to a position created under budget 2018.
- iii) **Refinements to the presumptive mode of hearing** – This has resulted in an increase of in-person hearings to 29.6% in 2023, compared to 6% in 2022.
- iv) **Technology in the courtrooms** – There is now an increased number of fully electronic courtrooms. Others have the option to use a mobile VC cart for hybrid hearings. Extended monitor screens at counsel tables are being deployed across the country. Jordana Sanft raised an issue with confidential information being displayed on the screens during a hearing. CJ Crampton mentioned this type of logistical issue should be raised in advance at the pre-trial conference.
- v) **Amendments to the *Official Languages Act*** – Final decisions of precedential value will need to be issued simultaneously in both official languages, which will delay the issuance of decisions to parties. The Court may take a liberal interpretation about what is of precedential value. The exception in s. 20(2) will remain. Justice Norris mentioned that parties should specifically address whether they think the exception should apply. The Court requested a translation service standard of 2 weeks but due to resources and funding issues, this will not be met.

b) Draft AI Guidance

There was no time to cover this item.

5) CBA Sections & Other Items

a) Aboriginal Law - Keltie Lambert

The Committee received feedback on land acknowledgements. The statement that was raised is that counsel or parties may want to make a land acknowledgement before a matter is heard by the Court and would appreciate some guidance from the Court how and when it would be best appropriate to do so. CJ Crampton confirmed that counsel may make the usual type of brief land acknowledgement. However, it could raise a concern in a matter where ownership of the land in question is at issue, especially if the land acknowledgement is more detailed. So, all parties need to be mindful of what is at stake in the proceeding. . Communicating between counsel beforehand is encouraged to avoid unfortunate situations in the courtroom.

b) Immigration Law - Wennie Lee (abs.)

No update provided.

c) Administrative, Human Rights, Labour, and Constitutional Law - Colleen Bauman

This section has not had the occasion to review the draft AI guidance and requested an opportunity to comment. CJ Crampton extended the deadline to provide comments.

d) Intellectual Property - Jordana Sanft (Chair/Présidente), John Myers, Chelsea Nimmo

Jordana Sanft raised an issue with conflicts of interests of Associate Judges. CJ Crampton indicated this was an issue from Toronto due to a perfect storm of departures, new appointments and high volume of workload. Klara Trudeau explained that in the specific matters that have been drawn to the Court's attention, it was due to multiple PMNOCs being filed at the same time, in consultation with the Associate Chief Justice and not at the request of the Associate Judges.

e) Department of Justice - Catherine Lawrence

An internal working group was created on vexatious litigants. Among other things, this group will consider the issue of the consent of the attorney general. Within the DOJ, this has been referred to the policy leads for further consideration. A second issue before the working group is increasing the level of transparency on how to get the attorney general's approval. The working group is hoping to implement some changes through the DOJ website.

DOJ will provide comments next week on the AI Guidance and the Consolidated Guidelines.

Meeting of Federal Court of Appeal & Federal Court with CBA

Attendance:

for the Federal Court of Appeal: Justice Stratas, Justice Goyette

for the Federal Court: Chief Justice Crampton, Associate Chief Justice Gagné, Justice Fothergill, Justice Walker, Justice Norris

for the CBA/Department of Justice: Jordana Sanft (Chair), Chelsea Nimmo, Colleen Bauman, John Myers, Keltie Lambert, Catherine Lawrence, Julie Terrien

for CAS: Darlene Carreau, Christine Norrena, Martin Béliveau, Marie Desrosiers, Klara Trudeau, Justine Drouin, Terry Hancock, Caroline Perrier, Witold Tymowski, François Desrosiers

Regrets: Justice Manson, Justice Strickland, Justice Favel, Associate Judge Duchesne, Chantal Proulx, Sarah Miller, Courtney West

1) Adoption of Agenda & Minutes

The members adopted the agenda and minutes

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

Darlene Carreau

Priorities for the four Courts

- a) Continued focus on our 4 areas of priority:
 - i) Investing in our people, making sure that we have talented and skilled employees to support the courts;
 - ii) Improving service excellence within the organization;
 - iii) Modernizing our court facilities; and
 - iv) Digital Courts - technology is levered to enable online and digital Courts.

Challenges

It is an exciting time to be responsible for Court administration because of the opportunity to improve access to justice and better serve litigants. However, it is also challenging to both take advantage of opportunities to improve the Courts, while also maintaining Court operations with current resource constraints and funding levels.

Court facilities

- a) Government of Canada has made some significant investments to aid in improving Court facilities. Two key projects include:
 - i) Additional space at 180 Queen West in Toronto creating much needed additional courtroom space.

- ii) Building a new Montreal judicial complex that will be Crown-owned. Construction will begin in the spring and occupancy is planned for 2027.

Digital Courts

Continued improvement of digital services for the Courts and litigants. Some key projects include:

- a) Stabilizing the FCA, CMAAC and FC legacy systems.
- b) Deploying new automated technological solutions to increase the efficiency of court operations.
- c) Improving e-filing and electronic Pay Now.
- d) Deploying monitors on counsel tables in all courtrooms primarily used by the FC across Canada. Of our 57 public courtrooms, 16 are now full e-courtrooms.

Service Excellence

In line with industry best practices, CAS is also moving forward with a focus on **service excellence**. This increased focus on service discipline will lead to improvements in how CAS works with you - to design and deliver consistent, timely and high-quality judicial services. As an example: CAS collaborated with the Ontario College of Art & Design University (OCAD) to conduct a service review of the FC immigration registry services - to reimagine the delivery of immigration registry services. CAS looks forward to opportunities to engage the Bar via the Courts as it advances this important work.

Darlene Carreau thanked the CBA – Equality sub-committee, the Federal Court Bench and Bar Liaison Committee, and the Immigration Law Section – for highlighting earlier this year the importance of ensuring that all people appearing before the courts have their names pronounced correctly. CAS is committed to ensuring that counsel and litigants are treated fairly and respectfully in all their diversity – to help ensure equal access to justice.

All CAS staff were provided with a wide range of tools, resources, and training on diversity, inclusion, and anti-racism. In addition, training for CAS staff who directly support the Courts evolves to keep pace with changes to Court procedures. When the FCA published its consolidated practice direction with procedural guidance aimed at avoiding the mispronunciation of names during Court proceedings, a new counsel and party slip was created and training was provided to staff nationally and recorded for future use.

The FC is working on an updated consolidated practice direction that will include a provision regarding pronouns and pronunciation of names, which is currently under consultation with the Bar. In the meantime, the recommendations have been shared with Registry employees, who are accommodating the request in practice as it is formalized in a direction.

Official Languages Act Amendments

Bill C-13 received Royal Assent on June 20, 2023, starting the clock on the 1-year implementation window before the coming into force of the provision treating the translation of judicial decisions.

CAS has have faced a historic chronic capacity deficit for translating judicial decisions given its funding levels. CAS currently has a significant backlog of decisions to be translated, revised and published by the Courts

CAS's approach -- through collaboration and leadership -- is to leave no stone unturned and to accelerate all plans & strategies to deliver successfully on the legislative amendments including seeking additional funding, improving our translation and revision processes and piloting artificial indigence for translations.

3) Follow-up Items from last meeting

a) Residency of Judges and Amendment to the *Federal Courts Act*

Julie Terrien

- i) Further to a survey of CBA members, residency came up as a barrier preventing CBA members from applying to become judges.

b) Proposed Amendments to the *Official Languages Act* ([Bill C-13](#))

- i) No updates

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

a) Rules Committee Update

Christine Norrena on behalf of Justice Laskin

- i) Rules Committee is working on drafting the Costs package. Part 1 comments have been received following the pre-publication in Gazette 1. The committee will be working on producing a final draft of the amendments.
- ii) The Committee endorsed the proposal to amend Rules 317 and 318 brought by the Federal Court of Appeal and Federal Court's Labour Law, Human Rights, Privacy and Access Review Liaison Committee. The proposed amendments will move to the drafting phase.

Justice Fothergill

- iii) Global review subcommittee has received comments from Rules Committee members on items of consideration such as class actions, immigration and refugee matters and aboriginal, indigenous matters.

There will be a 90-day consultation period for further input.

Further to the previous review, some consideration will be given on whether Rule 3 should confer a power on justices to intervene on their own motion, to regulate or prohibit conduct that is inconsistent with the principles reflected in that rule.

Areas that merit consideration

- The use of technology
- Removing inactive practices
- The potential for greater simplicity and informality
- Elements from both the Federal Court of Appeal and Federal Court's consolidated practices and guidelines which merit formal incorporation
- Role of Associate Judges regarding case management
- Empowering the Registry to refuse noncompliant documents

Chief Justice Crampton is seeking feedback from the CBA as whether the Rules could be streamlined. He noted that the Court has consistently received feedback that persons who are unfamiliar with the Rules find them to be very intimidating. As a consequence, very few matters are filed in the Federal Courts, when counsel have the option to file in the provincial courts. .

Justice Stratas commends the CBA for initiating a conference on practice and procedure with the Federal Court. Recommends that they have these conferences every 6 months to help demystify the Rules.

b) Update on the Federal Courts' Procedural Bijuralism Pilot Project

Christine Norrena

- i) The pilot project was launched in November 2019.
 - (1) There have been four active files since the launch.
 - (2) There are no current active files involved in the project.
 - (3) The committee seeks to continue the project and raise awareness.
 - (4) The committee is discussing measures for the Department of Justice involving an internal review committee to study the files that fall under the purview of this project. Also, advise counsel so that they would also have a greater awareness of this program.

5) Joint Items for CBA

a) CBA jurisdiction practice and procedure webinar (December 7, 2023)

Julie Terrien

CBA will be hosting the webinar on December 7, 2023. The webinar will cover various topics including:

- Case management
- Informal requests for interlocutory relief
- Federal Court jurisdiction
- Virtual and in-person hearings
- Effective advocacy

b) Guidance on land acknowledgements / Encadrement sur la reconnaissance des territoires

Keltie Lambert-Witten

Request received from counsel seeking clarification on when parties may be able to make or deliver a land acknowledgement in proceedings in the Federal Court Appeal and the Federal Court.

Justice Stratas

It is difficult to provide general guidelines for the FCA. The management of the hearing is at the discretion of the Panel chair. Parties have an allotted time to speak and counsel can exercise their judgment in the use of that time.

Chief Justice Crampton

As previously discussed, through the Federal Court Aboriginal Law Liaison Committee, the Court has assured the Bar and other stakeholders who participate in that committee that they are welcome to make the traditional short, respectful land acknowledgement. This comes with a caveat that opposing parties must be advised if there is any potential for a land acknowledgement to be controversial, given the subject matter of the dispute before the Court. The Court may also feel obliged to intervene if the content goes beyond the traditional short land acknowledgement.

Justice Norris

This may require a protocol for advance notice or form of communication that would alert the Court and parties that a land acknowledgement will be delivered during the hearing.

Justice Stratas

Parties can write a letter to the Registry seeking direction from the Court.

Chief Justice Crampton

This issue has been discussed within the CJC and there was unanimous agreement that judges should not make any land acknowledgement. There appears to be a consistent approach in this regard across the country.

c) Limitations of Protective Orders / Limites des ordonnances de protection

John Myers

This issue relates to the model Protective Order and Confidentiality Order that the Federal Court uses and are posted on their website. Some members of the CBA who represent environmental causes have come forward with concerns regarding Rule 317. Some of the Associate Judges assigned insist that the parties use the model protective order, which can raise difficulties in certain negotiations. The members seek a more flexible approach that would allow them to modify or customize these orders.

They also feel that the terms of the Protective Order can have some unintended consequences. In terms of simultaneous or subsequent access to information requests. They cite from the model Protective Order:

IV. DISCLOSURE AND USE OF INFORMATION AND DOCUMENTS

13. All Confidential Information or Solicitor's Eyes Only Information shall be kept confidential shall be used solely for the purposes of the Proceeding and shall not be disclosed to anyone except in accordance with the terms of this Order.

The constraints of the Protective Order can result in a waiver of the right to use access to information legislation, based on a decision from the Federal Court. They ask that the Court make it clear that in some cases the model protective order used to deal in the discovery phase and actions may not be appropriate for use in judicial review applications.

Justice Stratas

Two items to consider:

- The Rules Committee is proposing changes to Rule 317 that clarify the procedures for people in litigation and third parties to challenge the disclosure or nondisclosure of materials under Rule 317.
- Parties can submit a motion to address confidentiality concerns on disclosures.

Justice Fothergill

- The courtroom and access to information processes are quite distinct and separate processes govern them.
- Judges are not likely to intervene in people's quasi-constitutional right to avail themselves of rights under the access legislation.

d) Interventions: Strict application of the test and short timelines / Interventions: Application stricte du test et courts délais

Chelsea Nimmo

The concerns from the Bar pertain to Rule 109 and the test for leave to intervene. The Federal Court of Appeal has adopted a more stringent test, and there have been recent cases that say it's more stringent than the Supreme Court of Canada.

Concerns:

- The higher standard may impose a higher financial burden for public interest groups because there has to be significant effort in the preparation of the motion materials for the intervention.
- The perception is now so high that valuable interventions may be excluded, or people may not bother trying.
- There is some confusion on the amount of weight interveners need to place on the facts of the case versus broad discussions.
- Rule 109 does not mention the timing around when an intervener should file their motion for leave to intervene.

Justice Stratas

- Rule 109 is a law of the country. This is not the forum to debate jurisprudence.
- Dissatisfaction with jurisprudence should be addressed by using the test in Miller in order to suggest that the test is wrong and needs to be changed. Then seek leave from the Supreme Court to change the jurisprudence.
- Intervenors are asking for a very special right, the right to enter someone else's proceeding and intervenors must understand that there are many other interests that the court is mediating and must first consider the parties' interests.
- Federal Court of Appeal's jurisprudence is clear; intervenors should file their motion early.
- On a positive note, there have been many instances where intervenors have helped the Court and have determined the outcome of the case and done a public service.

Justices Norris and Fothergill offered the point of view of the Federal Court according to which Rule 109 works differently at the Federal Court in terms of what is determined to be helpful for the Court hearing the original judicial review.

- e) Issues with procedural matters: difficulty in getting off the record, short timelines for judicial reviews, costs to impecunious parties / Questions relatives à la procédure : difficultés à intervenir officieusement, délais courts pour les contrôles judiciaires, dépens pour les parties non solvables

Colleen Bauman

Concerns: Counsel seeking to withdraw

- The members are seeking clarification on:
 - Type of evidence needed to support the motion
 - How to deal with solicitor-client privileged materials
 - When to bring forth the motion
 - If done early is a letter format acceptable
 - What information needs to be disclosed
- The members have expressed concerns regarding short time lines pertaining to judicial reviews, how it affects counsel seeking to withdraw and increases the number of self-represented litigants.
- Members from Prisoner's Legal Services raised a concern on cost being awarded against impecunious litigants, particularly against prisoners.

Justice Stratas: although the concerns are not misplaced, it is not the mandate of this forum to change statutes or jurisprudence. Although suggestions can be made to the Rules Committee, this forum's focus is on practices and procedures and how the Court can take steps to make things better for the Bar.

Justice Stratas that they formulate a concrete proposal that can be submitted to the Rules Committee.

Chief Justice Crampton suggests that the CBA establish a framework to look at the Federal Courts Act and discuss whether it can benefit from amendments and come up with suggestions to improve it.

- f) Access to the Federal Court's interlocutory decisions / Accès aux décisions interlocutoires de la Cour fédérale

Jordana Sanft

There is an interest among members of the bar to have more access to interlocutory decisions.

Chief Justice Crampton

The Court will be actively exploring the extent to which it can use the online access project to make more documents available, but they may not be searchable. The Court already exercises discretion to make available decisions that it thinks may be of interest to the bar.

Justice Stratas

Any decision from the FCA that has jurisprudential value is already accessible.

6) Next Meeting

Meeting of Federal Court of Appeal with CBA

Attendance:

for the Federal Court of Appeal: Justice Stratas, Justice Goyette

for the CBA/Department of Justice: Jordana Sanft (Chair), Chelsea Nimmo, Colleen Bauman, John Myers, Keltie Lambert, Catherine Lawrence, Julie Terrien

for CAS: Darlene Carreau, Christine Norrena, Terry Hancock, Witold Tymowski, François Desrosiers

Regrets: Sarah Miller, Courtney West

1) Opening Remarks

2) Update on Court Operations

Justice Stratas

a) Court Operations / Activités de la Cour

- State of the Court is excellent
- Case volume is trending upwards. The number of new proceedings is not where it was pre-pandemic, but it has increased 20% over the previous year.

- Almost all of our hearings are held in person, but the Court remains open to virtual hearings.
- The Court is finding that a number of litigants have not read the Consolidated Practice Direction, particularly on the subject of confidential documents.
 - Precise procedures for confidential documents are set out in the Consolidated Practice Direction. However, the Court welcomes any feedback.
 - The default for filing confidential materials is paper form, because they cannot be taken home easily, or emailed or misdirected.
- The Court asks that the Bar remind its members that the Consolidated Practice Direction should be followed.

b) Changes to the composition of the Court / Changements dans la composition de la Cour

Membership change

Justice Stratas welcomed Justice Goyette to the committee.

Retirements

- Chief Justice Noel
- Justice Pelletier
- Justice Gauthier

Departure

- Justice Rivoalen

Appointments

- Chief Justice de Montigny
- Justice Heckman
- Justice Biringer

The Court currently has 3 vacancies.

c) Court Initiatives / Initiatives de la Cour

- i. Launch of new Federal Court of Appeal website/ Lancement du nouveau site web de la Cour d'appel fédérale

The Court welcomes any feedback on the new FCA website. So far, users have found it easy to use and various devices.

- ii. Virtual access to Federal Court of Appeal hearings/ Accès en ligne aux audiences de la Cour d'appel fédérale

It was introduced primarily as a result of the pandemic, and it will continue.

- iii. Technology improvements / Améliorations technologiques

There are a number of technology improvements internally that are underway that will really make our process more efficient and more effective.

To address the Official Languages Act, the Court is developing an internal policy .

Justice Goyette

Clarification on compendiums

- The Court will work to provide more clarity to the profession as to what is expected in a compendium and/or daybook.
- Feedback from the Bar is welcomed. The Court asks that the Bar assemble all concerns and feedback to be provided to this committee.

Justice Stratas

Vexatious litigants

- The Court has found an explosive growth in the number of problematic self-represented litigants, which has taken a toll on the Registry.
- These problematic litigants are taxing to Court resources.
- The Court will attempt to find a solution to dealing with these litigants and may provide a report at the next meeting.

Catherine Lawrence

The Department of Justice established an internal working group to look at this issue. The issue of subsection 40(2) is being referred to the policy side of the DOJ for consideration. They are also working to improve and streamline the application process.

3) CBA National Sections Updates and New Items

- a) Aboriginal Law / Droit autochtone - Keltie Lambert

Nothing further to add

- b) Immigration Law / Droit de l'immigration - Wennie Lee

Absent, but nothing further was forwarded

- c) Administrative, Human Rights, Labour, and Constitutional Law / Droit administratif, droit de la personne, droit de travail, et droit constitutionnel - Colleen Bauman

Nothing further to add

- d) Intellectual Property / Propriété intellectuelle - Jordana Sanft (Chair/Présidente), John Myers, Chelsea Nimmo

Nothing further to add

- e) Department of Justice / Ministère de la justice - Catherine Lawrence

Nothing further to add

4) Closing Remarks / Mot de cloture

Justice Stratas thanked the Bar for their time and participation.

Jordana Sanft thanked the Court for engaging with the CBA.