Federal Court  Cour fédérale

Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings

June 24, 2022 (last amended October 31, 2023)

Preamble

These guidelines are to be interpreted in a manner that seeks to secure the just, most expeditious and least expensive determination of every proceeding on its merits. They are intended to complement and not derogate from the *Federal Courts Rules* [the "*FCR*"]. A judge or Associate Judge [previously referred to as prothonotary] retains the discretion to depart from these guidelines having regard to the particular circumstances of a given case.

Further, these guidelines serve to identify best practices and clarify the Court's expectations related to procedures for Applications under the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* [the "*FCCIRPR*"] related to matters arising under the *Citizenship Act* and the *Immigration and Refugee Protection Act* ["*IRPA*"]. They have been developed in consultation with the Federal Court Citizenship, Immigration, and Refugee Law Bar Liaison Committee [the "Committee"], which provides a forum for dialogue, to review litigation practice and rules, and to discuss potential efficiencies and improvements. Committee minutes are available on the Court web site Liaison Committees page, along with the names of representatives. Comments or suggestions regarding these Guidelines are welcome and may be sent via Committee representatives or to its Secretary at media-fct@fct-cf.gc.ca.

Additional Procedural Resources for Litigants

The Court website provides numerous resources for litigants – see the Representing Yourself sub-menu, which provides procedural time-lines, detailed procedural practice guides, information about Finding Legal Help, and clarification regarding Who May Represent You in Federal Court.

Consolidation

These guidelines consolidate and replace the following:

- Practice Guidelines for Citizenship, Immigration, and Refugee Law Proceedings (November 5, 2018)
- Practice Guidelines – Immigration and Refugee Proceedings: Urgent Stay Motions for Removals from Canada (February 18, 2021)
- Applications for judicial review under the Immigration and Refugee Protection Act and the Citizenship Act: Hearing Time (October 29, 2015)
- Requests for Consent Orders on Applications under the Immigration and Refugee Protection Act (April 18, 2006)
- Scheduling Practice for the Hearing of Applications (October 24, 2018)

- Stay of Release from Detention Protocol (November 30, 2020)
- Settlement Discussions in Proceedings under the Immigration and Refugee Protection Act (December 17, 2021)

Consolidated Practice Guidelines

These Consolidated Practice Guidelines for Citizenship, Immigration and Refugee Protection matters are to be read in conjunction with the consolidated guidelines listed below, which are posted on the Court website (Notices).

In the event of a conflict, the order of precedence to be assigned is as follows:

a. Consolidated Covid-19 Practice Directions;

b. Consolidated Practice Guidelines for Citizenship, Immigration and Refugee Protection matters; and

c. Consolidated General Practice Guidelines.

Open Court Principle – Confidentiality and Anonymity Requests

1. Pursuant to the open court principle, the general rule in Canada is that court hearings are open to the public and may be reported in full. Applications brought under the *FCCIRPR* are therefore normally on the public record, with all documents publicly accessible, even though they are not currently accessible online. Only the Court docket and Reasons for Decision are available via the Court web site. However, pursuant to Rule 151 of the *FCR*, on motion, the Court may order that all or part of the Court record shall be treated as confidential. Furthermore, pursuant to Rule 8.1(2) of the *FCCIRPR*, a party to an application for leave may make a written request, in Form IR-5, that the Court make an order that all documents that are prepared by the Court and that may be made available to the public (for example, the online docket and any decision of the Court in the proceeding) be amended and redacted to the extent necessary to make the party's identity anonymous. The request is determined at the same time, and on the basis of the same materials, as the application for leave.

Filing

2. **Electronic filing**. Documents may be filed electronically via the e-filing portal on the Federal Court web site. Although there is no cost to use the e-filing portal, fees under Tariff A of the *FCR* still apply.

The requirements set out in the Practice Direction (COVID-19) (see latest version on Notices page) regarding page numbering, bookmarks and Optical Character Recognition (OCR) ought to be followed.

3. **Judicial review of visa decisions – Timeline for filing an application (15 or 60 days under paragraph 72(2)(b) of the *IRPA*)**. Applicants should indicate clearly in a cover letter accompanying the notice of application when it is submitted for filing whether the judicial review relates to an "Inland Application" or "Application arising outside Canada" and whether the applicant is in Canada or abroad.

4. **Delays in Legal Aid Funding – Request for Reconsideration of an Order Dismissing an Application for Delay**. The Court sometimes receives motions for reconsideration under Rule 397 (of Orders dismissing leave) in which the Applicant submits that the file had not been perfected due to delayed confirmation of legal aid funding.

   As written and interpreted according to the principles of finality and *res judicata*, Rule 397 does not provide authority to the Court to decide a leave application a second time.

   In cases where a party is waiting for approval of legal aid funding before perfecting an application for leave and judicial review, the onus is on the party, or prospective counsel, to bring this fact to the attention of the Court before the application is dismissed for delay.

   The Court should be notified by letter copying opposing counsel, including evidence of the expected or typical timeline for a decision by the legal aid body. In such circumstances, the Court will consider the letter and, if appropriate, defer dismissal of the application for a short period of time (not exceeding twenty-one (21) days).

Informal requests for interlocutory relief

5. Parties should refer to the Consolidated General Practice Guidelines (posted on the Notices page), which include specific guidelines for submitting informal requests for interlocutory relief. Unless they follow these guidelines, parties are required to submit a formal motion record, pursuant to Part 7 of the *FCR*, for interlocutory requests.

Scheduling

6. **Non-availability prior to the issuance of an order granting leave**. Prior to the issuance of an order granting leave, parties may file, within the timeframe for filing a Rule 13 reply, a joint letter setting out their non-availability in the one hundred and twenty (120) days that follow the last day for filing of a reply for the hearing on the merits. The Judicial Administrator will attempt to accommodate such non-availability. The principal criteria for non-availability are:

a. prior scheduled vacation leave or a previously scheduled hearing before a Superior Court. Note that the Court's schedule will normally take precedence over previously scheduled matters before an administrative tribunal, though if provided notice, the Court will endeavor to schedule around Immigration Appeal Division hearings; and

b. serious illness.

7. **Non-availability following the issuance of an order granting leave**. Within seven (7) days of issuance of the order granting leave, a party may request, by way of letter to the Judicial Administrator copied to all parties, that the scheduled hearing date be adjourned to another date. The letter must:

a. confirm that all parties either consent to the request or do not oppose the request;

b. briefly set out all facts and submissions relevant to the request; and

c. set out the availability of all parties within six (6) weeks of the scheduled date.

8. Scheduling changes outside the timeframes above may be requested by way of motion.

Motions for Stay of Removals from Canada

These guidelines are intended to address two concerns. The first is the failure of some applicants to bring motions for stays of removal as soon as possible. The second is with the form and content of stay motions.

9. **Service, filing and scheduling**. Pursuant to Rule 362(1) *FCR*, motions are to be served and filed at least three days before the date set out in the notice for the hearing of the motion. Pursuant to Rule 362(2), the Court may hear a motion on less than three days' notice if all parties consent or if the moving party satisfies the Court of the urgency of the motion. Rule 35(2) permits informal requests for the scheduling of special hearing time and dates for motions.

10. **Form and content**

a. The notice of motion and the motion record must be in conformity with the *FCR*.

b. Related and relevant prior immigration decisions involving the applicant or his/her immediate family members should be provided by the applicant within their motion record (for example, RPD, RAD, PRRA or H&C decisions and past requests for deferral of removal). If such related decisions are not provided, an explanation must be given for the failure to do so.

c. Each party must clearly address the tripartite test for an injunction (*RJR-MacDonald Inc* v *Canada (Attorney General)*, [1994] 1 SCR 311; *R. v. Canadian Broadcasting Corp*., 2018 SCC 5) in the context of the alleged facts and their own circumstances. Written

submissions must be focused. Irrelevant boilerplate or outdated submissions should be avoided.

d. When bringing a stay, the motion should be considered as a standalone proceeding. The Motion Record should include everything required by the Court to make its decision, and only those portions of the application record or other documents that are necessary to support the motion, such as specific pages of a country condition document. It is not acceptable to simply state, for example, that the country conditions documents are found at pages 100-250 of the motion record.

e. The Motion Record must be succinct and sufficiently condensed. The Court recognizes that each case is distinct and that, on occasion, the circumstances may be such that it may be necessary to include a larger number of documents in the Motion Record to support the motion of a stay of removal. However, situations in which more than one hundred pages of materials may be required to support a motion for stay of removal should be considered to be exceptional.

f. A party's written representations submitted in a stay motion should include pinpoint references to the materials in the Motion Record(s) relied on by that party, including by providing relevant page, paragraph numbers and, if reasonably possible, hyper-links.

g. The Court has seen instances where applicants fail to meaningfully address one or more branches of the tripartite test. This includes instances where applicants simply state that they are relying on the submissions made and materials filed in the underlying application for judicial review. In such circumstances, an accompanying affidavit in the stay motion sometimes attaches as an exhibit the whole of the application record, which is often voluminous. The Court has also seen instances where lengthy and detailed written representations are made which reference a voluminous underlying application record(s) or related proceedings. Such practices do not align with this guideline and are discouraged.

h. The parties should not request the Registry to copy and bring to the Court's attention related files or motions. The Motion Record as filed in the stay motion must speak for itself.

i. The parties should refrain from filing extensive books of authorities in support of a stay. The case law upon which a party relies should be identified in the written representations, which in turn should provide paragraph number citations, hyperlinked if possible. Referenced authorities which are included in the Common List of Authorities found on the Court website shall be deemed to be included in the book of authorities (see: Common List of Authorities for Immigration and Refugee Law and Deferrals and Stays of Removal).

11. The filing of extremely voluminous materials in support of a stay motion or materials that do not address the legal test for a stay is strongly discouraged. Among other things, this may also be contrary to the interests of justice, as it can adversely impact the Court's ability to efficiently conduct the required analysis within the time constraints.

12. **Urgent motions.** The Court recognizes that there are circumstances where an applicant has no alternative but to bring a last minute, or urgent, motion to stay their removal from Canada. Such unavoidable urgent stay motions may be necessary, for example, when a direction to report for removal is issued for an imminent removal date, leaving an applicant with little time to retain and instruct counsel and to bring a stay motion. The Court considers such circumstances to be distinct from those where removal has been anticipated for some time and/or there is sufficient time between the service of a direction to report and the scheduled removal date to permit a stay motion to be set down to be heard on a non-urgent basis. These matters are not inherently urgent because they could be set down to be heard in accordance with Rule 362(1). These may be avoidable last minute stay motions, which are discouraged, as they are not in the interests of justice (see, for example, *Beros v. Canada (Citizenship and Immigration)*, 2019 FC 325; *Khan v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1275 ("*Khan*"); *Ocaya v Canada (Citizenship and Immigration)*, 2019 Canlii 8561 (FC); *Miranda v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1057). Accordingly, the Court may refuse to hear last-minute stay applications where there is no satisfactory explanation for the delay in bringing the matter forward (*Khan* at para 11).

13. In circumstances where a motion for a stay of removal cannot reasonably be brought on at least three days notice, the Court and the respondent shall be alerted, by way of letter from the applicant, of the anticipated urgent motion as soon as the decision to bring a motion is made. That letter shall request a special hearing date pursuant to Rule 35(2), and provide a satisfactory explanation for any delay in bringing on the motion justifying the need for urgency. In addition, the letter must identify the applicant, the date they were informed of their intended removal, the removal date/time, the underlying application for judicial review, the date and time that the motion record will be filed, the proposed hearing dates and times, and any other relevant information. Failure to provide a satisfactory explanation for the need to file a last minute urgent motion may result in the Court declining to hear the matter.

14. Duty counsel for the Department of Justice are typically available only until 9:00 p.m. Accordingly, **urgent motions filed after 9:00 p.m. for removal early the next day** are, in effect, brought on an *ex parte* basis. This practice is strongly discouraged. It should not be expected that the Court will hear such motions in the absence of compelling and unavoidable circumstances. Given the "*ex parte*" practical nature of such motions, an elevated duty of full and frank disclosure will apply.

15. The Court recognizes that applicants sometimes make a **timely request to the Canada Border Services Agency ("CBSA") seeking to have their scheduled removal deferred**, but do not receive a response to their request before they begin to run out of time to access the Court. In such circumstances, an application for judicial review together with a related stay motion premised on an anticipated negative decision will be accepted for filing at all Registries of the Federal Court. Based on past experience, the requested deferral decision is usually received prior to the hearing of the stay motion. However, in recognition of the fact that this may not always occur, it is open to applicants to include, in the underlying application for leave and judicial review and the motion, a summary request for an alternative remedy of *mandamus* in the event that the deferral decision is not issued by CBSA prior to the hearing of the stay motion.

Judicial Review of Decisions by the Immigration Division of the Immigration and Refugee Board related to Detention: Motion for an interim stay of a release Order

This protocol addresses the procedure to be followed where the Minister of Public Safety and Emergency Preparedness ("Minister") intends to seek an order in the Federal Court ("Court") staying an order for release from detention made by the Immigration Division ("ID") of the Immigration and Refugee Board of Canada. In particular, the first part of this protocol addresses the steps when seeking an urgent interim stay of a release order, and the subsequent part addresses the steps when seeking an interlocutory stay of the release order, pending the determination of the Minister's application for leave and for judicial review.

16. **Unrepresented Respondents**. The Court recognizes that Respondents who are unrepresented by counsel may need extra attention and assistance to help ensure a fair, expeditious, and efficient resolution of the proceedings.

17. **Electronic Service and Filing**. If the Respondent is represented by counsel, the parties' documents may be served and filed electronically. Documents for the Court should be filed at the electronic address provided by the Registry.

18. Once a decision is made to bring a motion for an interim stay of release in the Court, counsel for the Minister shall inform the Registry by phone (see telephone listing below) of the pending motion, contact the Respondent's counsel (if represented) as soon as possible, and make best efforts to notify the Respondent (if unrepresented).

a. If an urgent request for an interim stay of release order is brought when the **Registry office is closed** – see After hours telephone listing **[Urgent requests only]**
b. If a request for an interim stay of release order is brought when the **Registry office is open** – see Regular hours telephone listing

19. **Letter**. The Minister shall file at the electronic address provided by the Registry a letter under Rule 35(2) of the *FCR* requesting an urgent interim order staying the ID's release order. The letter shall include relevant facts, explain the grounds for the requested relief and provide a brief summary of the arguments justifying that relief pending the determination of the interlocutory motion for a stay of release. The Minister shall provide the letter to the Respondent's counsel (if any) or the Respondent (if unrepresented).

20. **Respondent's position**. The Respondent's counsel shall inform the Court and the Minister as soon as possible of the Respondent's position on the request for an urgent interim stay of release and, if applicable, their availability for an urgent hearing.

21. **Hearing**. In deciding an opposed request for an interim stay of release, the Court will endeavor to hold a teleconference or videoconference hearing. Where it is not reasonably possible to schedule a hearing on the request for an interim injunction at a mutually convenient time, the Court may decide the matter without a hearing, bearing in mind such factors as the procedural fairness rights owed to both parties, the timing of the Respondent's potential release from detention, whether the Respondent is represented by counsel, and the reachability and availability of the Respondent or counsel (if any).

22. **Audio recording and transcript**. The ID shall provide the Court and the parties' counsel with an audio recording of its proceedings no later than 24 hours following its order for release. The ID shall provide a transcript of the decision portion of its proceedings within 4 business days of its order for release. The Registry of the ID or of the Federal Court will set up a SharePoint folder for circulation of the audio recording and transcript.

23. **Interim stay**. If the Court orders an interim stay of release, the Court will ordinarily set a date for the hearing of the interlocutory motion to stay the release order. The hearing of the interlocutory stay motion will generally be held within 7 days of the order granting the interim stay of release; however, if that is not possible, it will be scheduled as soon as reasonably practicable thereafter. The parties may consent to a different timeline. The parties will be given the opportunity to file motion records.

If, during the interim stay of release stage of this process, the Minister did not serve and file an Application for Leave and for Judicial Review in respect of the release decision being challenged, the Minister shall do so as soon as possible thereafter, and in any event prior to the hearing of the interlocutory motion.

Motion for an interlocutory stay of a release Order pending the resolution of the Application for Leave and for Judicial Review

24. At the request of either party or on its own motion immediately after deciding the interlocutory motion for a stay of release, the Court may decide to vary the time limits prescribed by the *FCCIRPR*.

25. If the Court grants leave in the underlying Application for Leave and for Judicial Review, the Court will provide a date for the hearing and set out the due dates for the parties' additional written submissions and affidavits. If the Court hears the judicial review application prior to the Respondent's next detention review, this would be with a view to judgement being issued, if reasonably possible, before the ID makes a decision at that next detention review.

Protocol for seeking urgent expedited proceedings of Immigration Division detention Orders

This protocol addresses the procedure to be followed where the Immigration Division ("ID") of the Immigration and Refugee Board of Canada makes a detention order and the Applicant (detainee or counsel acting on their behalf) seeks to challenge that order in the Court by way of an urgent expedited judicial review proceeding. Applications for leave and judicial review typically take many months to be adjudicated. When the decisions under review are Immigration Division orders for continued detention, it may be in the interests of justice to permit an application to be fully litigated in a substantially abridged timeline, given the liberty interests at issue.

26. **Expediting Proceeding**. An Applicant seeking to expedite the judicial review of an ID detention order in the Court shall, as soon as possible, inform the Court Registry by phone (see telephone listing below) and the Department of Justice, on behalf of the Minister of Public Safety and Emergency Preparedness ("Minister"), by phone or by email (telephone lists and email addresses are available at the links below), of the pending request.

Federal Court Registry:

a. After hours telephone listing **[Urgent requests only]**
b. Regular hours telephone listing

Department of Justice – Regional Offices

27. The Applicant shall file an Application for Leave and for Judicial Review and serve and file a letter under Rule 35(2) of the *FCR*, requesting an urgent remote conference with the Court. As described below, the Application for Leave and for Judicial Review may be served and filed electronically.

28. The Rule 35(2) letter will include relevant facts, including the date of the detention order and the date of the next ID detention review, and provide a brief summary of the arguments that might justify expediting the judicial review proceeding, addressing factors such as the interests of justice, the procedural fairness rights owed to both parties, the Applicant's diligence in pursuing an urgent judicial review, and the availability of the Applicant for a hearing to be scheduled on an expedited basis. The Applicant's Rule 35(2) letter must also indicate that the Applicant consents, pursuant to section 74(b) of the *IRPA*, to an expedited judicial review hearing.

29. The Minister shall inform the Court and the Applicant as soon as reasonably possible of the Minister's position on the request for an urgent expedited judicial review proceeding and their availability for both the urgent remote conference sought in the Applicant's Rule 35(2) letter and for an urgent hearing of the judicial review should the Court so order. If the Minister does not oppose the request, the Minister also shall expressly consent, pursuant to section 74(b) of the *IRPA*, to an expedited judicial review hearing.

30. The Court will endeavor to hold a remote conference to determine whether to grant the request to expedite the judicial review proceeding. Where it is not possible to schedule a remote conference at a mutually convenient time for the parties (or their respective counsel) and the Court, the Court may decide the matter on the basis of the parties' written submissions.

31. If the Court grants the request for an urgent expedited judicial review proceeding, it may vary the time limits prescribed by the *FCCIRPR*, to grant leave in the underlying Application for Leave and for Judicial Review, or reserve the leave decision for disposition at the time of the expedited judicial review hearing.

32. The Court will provide a date for the judicial review hearing, set out the due dates for the parties' written submissions and affidavits, and make other orders or directions as necessary on any other matter, including the production of a certified tribunal record, that would facilitate the just and expeditious determination of the proceeding. If the Court hears the judicial review application prior to the Applicant's next detention review, this would be with a view to judgment being issued, if possible, before the ID makes a decision at that next detention review.

33. Upon being informed by the Court Registry of an Applicant's urgent request to expedite the judicial review proceeding, within 24 hours the ID will provide the Court and the parties with an audio recording of the ID proceedings,[1] and within four business days the ID will provide a transcript of the decision portion of its proceedings. The Registry of the

[1] While the ID will strive to consistently provide an audio recording within 24 hours, some delays may be possible arising from the current coronavirus pandemic.

ID or of the Federal Court will set up a SharePoint folder for circulation of the audio recording and transcript.

34. **Service and Filing**. To facilitate the efficient and expeditious disposition of the matters addressed herein, the parties' submissions and other communications between and among the parties and the Court may be served and filed electronically. Documents for the Court should be filed via the Court's e-filing portal,2 or in special situations, at the electronic address3 provided by the Registry.

35. **Unrepresented Applicants**. The Court recognizes that Applicants who are unrepresented by counsel may need extra attention and assistance to help ensure a fair, expeditious, and efficient resolution of the proceedings.

Certified questions

36. Pursuant to paragraph 74(d) of the *IRPA*, "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the judge certifies that a serious question of general importance is involved and states the question" [emphasis added]. Parties are expected to make submissions regarding paragraph 74(d) in written submissions filed before the hearing on the merits and/or orally at the hearing. Where a party intends to propose a certified question, opposing counsel shall be notified at least five (5) days prior to the hearing, with a view to reaching a consensus regarding the language of the proposed question.

Hearing

37. **Hearing time**. The default maximum hearing time for an application for judicial review under the *IRPA* or the *Citizenship Act* is ninety (90) minutes.

In its Order granting leave, the Court may schedule a shorter or longer hearing if the circumstances warrant. A party may request additional time as follows:

a. Before leave is granted:

(i) By the applicant: As a cover note to the perfected application for leave (filed under Rule 10 of the *FCCIRPR*);

[2] See Federal Court E-Filing portal: https://www.fct-cf.gc.ca/en/pages/online-access/e-filing#cont

[3] If provided with an e-mail address, note that the maximum Registry e-mail size is 25 MB. However, conversion of attachments into e-mail format adds up to about 30% of the original document size, so an 18 MB attachment will come close to the maximum email size limit. If filing documents by e-mail, it is recommended that larger PDF documents (i.e., over 18 MB) be split into smaller parts before sending. Please consult sections 3.2.1.1 and 6.8 of our E-filing Guide for information on reducing the size of PDF documents: https://www.fctcf.gc.ca/en/pages/online-access/e-filing-resources

(ii) By another party: As a cover note or in the Respondent's Affidavit(s) or Memorandum of Argument (filed under Rule 11 of the *FCCIRPR*);

b. After leave is granted:

(i) If the request is for thirty (30) additional minutes of hearing time or less, by making an informal request in writing, or orally at the beginning of the hearing. This shall be accompanied by an indication as to whether the other party consents to the request;

(ii) If the request is for more than thirty (30) additional minutes of hearing time, by filing a formal motion record as set out in Part 7 of the Rules. This request, if granted, may require an adjournment of the hearing.

Submitting a Motion for Transcript of Tribunal Hearing

38. An Applicant wishing to file a motion requesting that the Court Order the tribunal to produce a transcript of any oral hearing may include this request, including the grounds in support of the request, within their Perfected Application (Rule 10). The Respondent may respond to the request in their Rule 11 Affidavits and Memorandum of Argument.

39. The request shall then be determined on the basis of the same materials as the application for leave.

Settlement discussions in proceedings under IRPA[4]

40. To assist with the efficient resolution of Applications for Leave and Judicial Review brought under section 72 of *IRPA*, the Court has developed procedures to facilitate settlement discussions between parties in appropriate cases.

In cases in which the Court is inclined to grant leave, a production Order will be issued by the Court before the Application for Leave is formally adjudicated. The Order will require the tribunal to provide parties and the Court with a copy of its CTR within 21 days of receipt of the Order. If leave is granted, each party shall, within 15 days of the date of the Order granting leave, consider the possibility of settling the Application, and if both agree that it is appropriate, they shall engage in settlement discussions. If no settlement discussions take place, the Respondent shall file the Notice of Non-Settlement (see optional template in Annex). If settlement discussions take place, the Respondent shall file a statement of the outcome of settlement discussions, and if settlement is reached, the parties shall immediately inform the Court and take necessary steps to discontinue the

[4] Initially launched on a pilot basis only for Toronto proceedings, the Court has endorsed the special procedures to facilitate settlement and expanded them nationally starting on October 4, 2021.

Application or request a Judgment on consent (see below). Settlements, if they are to take place, are encouraged to be finalized within this 15-day 'settlement window.'

41. **Discontinuance (on Consent)**. If parties settle an Application for Judicial Review in respect of a decision by or on behalf of the Minister, it is common practice simply to agree to have the underlying decision re-determined, and discontinue the application before the Court. It is recommended that a Notice (see optional template in Annex) be filed with the Court indicating that the parties discontinue the proceeding based on a settlement. The Notice, along with reasons for consent (which do not need to be filed with the Court), shall be transmitted by a client representative to the relevant office.

42. **Discontinuance (Unilateral)**. In some circumstances, whether following settlement discussions or even prior to such discussions, an Applicant discontinues the Application without having reached any agreement with the Respondent on terms related to the discontinuance. If so, Rule 166 applies: "A party shall file a declaration of settlement or a notice of discontinuance in Form 166 in a proceeding that has been concluded other than by a judgment or discontinuance on consent."

Requests on Consent for Orders on Applications for Judicial Review

43. **Informal Motion for Judgment (on Consent)**. If parties agree to settle an Application for Judicial Review in respect of a decision of the Immigration and Refugee Board, it is common practice for parties, on consent, to bring a motion requesting a Judgment of the Court to set aside the decision of the Board and return the matter for redetermination. Parties may seek leave, by way of Notice (see optional template in Annex), to be relieved from the requirement to bring a formal motion record if the following requirements are met. In particular, the Notice should:

a. confirm that all parties consent to the request;

b. set out the facts relevant to the request;

c. provide the parties' submissions relevant to the request; and

d. include a recital of the exact relief sought (draft consent Judgment).

The facts relevant to the request should include an indication of which of the grounds set forth in s. 18.1(4) of the *Federal Courts Act* applies. Counsel should submit the draft order and consent to the Registry.

44. Generally, the Court will dispose of an application for judicial review in accordance with the draft order and consent without the necessity of an appearance. However, if a judge is of the view that the consent should be further justified, counsel will be notified and given an opportunity to do so. The following procedures should be followed:

a. The judge will direct the Registry to notify counsel of the time and manner in which the justification should be given.

b. If the judge is of the opinion that it is inappropriate to issue an order based on the consent, that judge will hear and determine the application for judicial review on its merits as scheduled or after granting a reasonable adjournment, if required.

45. If counsel are unable to submit a draft order and signed consent in advance of the scheduled hearing date, the following procedures should be followed:

a. Both counsel should appear at the hearing and be prepared to respond to any questions or concerns which the presiding judge may have about the order requested.

b. If the presiding judge is of the opinion that it is inappropriate to issue an order based on the consent and the oral representations of counsel, that judge will hear and determine the application for judicial review on its merits after granting a reasonable adjournment, where appropriate.

Allegations against authorized representatives in Citizenship, Immigration and Refugee Cases before the Federal Court.

46. **Scope of the Protocol**. This Protocol is an update to the original Protocol dated March 7, 2014, on the Federal Court procedure for allegations of ineffective assistance of an authorized representative (professional incompetence, negligence, or other such conduct) against their former authorized representative ("Allegations"), within the context of applications for leave and for judicial review ("Application") under the *IRPA* or the *Citizenship Act*.

47. For the purposes of this Protocol, "authorized representative" means:

a. a lawyer who is a member in good standing of a law society of a province or a notary who is a member in good standing of the Chambre des notaires du Québec;

b. any other member in good standing of a law society of a province or the Chambre des notaires du Québec, including a paralegal; or

c. a member in good standing of the College, as defined in section 2 of the *College of Immigration and Citizenship Consultants Act*, SC 2019, c. 29, s. 292.

48. The purpose of this Protocol is to assist the Court in its adjudication of applications in which Allegations are made, and to ensure a procedurally fair process for the parties involved. Best practices include notifying the former authorized representative of the Allegations in any proceeding before this Court, and if the Allegations move forward, to

keep the former authorized representative updated on the status of the proceeding, including the relevant timelines

49. **Requisite Steps**. Prior to making Allegations against a former authorized representative as a ground for relief in an Application pursuant to the *IRPA*, the applicant's lawyer must be satisfied, by means of personal investigation or inquiries, that there is a clear and reasonable factual foundation in support of the Allegations.

50. The applicant's lawyer must notify the former authorized representative in writing ("**Notice**"), providing a concise summary of the allegations, as well as any supporting evidence. The Notice must advise the former authorized representative of the applicant's intention to rely on the allegations in the Application, and that they may provide a substantive written response ("**Response**") as soon as possible, and in any case, within ten days of receiving the Notice.

51. Along with this Notice, the applicant's lawyer must provide the former authorized representative a signed authorization from the applicant releasing any privilege attached to the former representation (to the extent necessary to respond to the allegations), along with a copy of this Protocol.

52. The applicant's lawyer shall wait to receive and carefully consider the Response from the former authorized representative before filing and serving the application record. The applicant's lawyer shall take into account what would have reasonably been required of a competent representative, given all the circumstances of the case.

53. If after reviewing the Response of the former authorized representative, the applicant's lawyer believes that there may be sufficient merit to the allegations, the applicant's lawyer shall file the application record with the Court including the former authorized representative's Response. Any perfected application which raises Allegations must be served on the former authorized representative and proof of service be provided to the Court. The Application will be served on the respondent in the normal course.

54. Where the applicant's lawyer is investigating the allegations against the former authorized representative, and it becomes apparent that the pursuit of this investigation may delay the perfection of the record beyond the timelines provided for by the *FCCIRPR*, the applicant's lawyer may apply by motion for an extension of time to perfect the record, unless the parties agree to and are granted an informal extension of time.

55. If at any time after filing the Application the applicant's lawyer receives evidence satisfying the applicant's lawyer that the Allegations are without merit, the applicant's lawyer shall take steps to withdraw the Allegations as soon as practicable.

56. If the former authorized representative intends to respond to the Allegations made in the record, they may prepare and submit either:

a. a written reply if that reply interprets and responds to the evidence, without adding factual assertions;

b. an affidavit from a person other than the former authorized representative (inclusive of relevant exhibits, translated where necessary) if factual allegations contesting the Applicant's allegations are made; or

c. an affidavit (inclusive of relevant exhibits translated where necessary) sworn by the former authorized representative if their own factual allegations contest the applicant's allegations;

to the applicant's lawyer and to the respondent's lawyer (contact information to be provided by the applicant's lawyer) within ten days of service of the record or such further time as the Court may direct.

57. The applicant's lawyer must then file the reply from the former authorized representative and/or the affidavit(s) from the former authorized representative or other person with the Court within seven days, or such further time as the Court may direct.

58. In addition, the former authorized representative may seek leave to intervene under Rules 109 and 369 in the Application at the leave stage, to participate in the proceedings and respond to the allegations by way of a motion.

59. If leave to intervene is granted to the former authorized representative, written submissions will be permitted solely on the issue of the ineffective representation alleged against the former authorized representative; and additional time provided to the former authorized representative, the applicant's lawyer and the Respondent to file pleadings.

60. If the applicant's lawyer wishes to respond to the reply and/or affidavits(s) of the former authorized representative (and the former representative has not sought leave), they must file a motion under Rule 369 for an extension of time. If an informal extension of time with respect to the new material received cannot be agreed upon, any relevant evidence shall be included in the record and filed by way of an affidavit.

61. If a complaint has been made to the appropriate provincial or federal governing body, evidence of this must be included.

62. If no response from the former authorized representative is received within ten days of service, and no extension of time has been granted or agreed to between the parties, the applicant's lawyer shall advise the Court and the respondent that no further information from the former authorized representative is being submitted. The Court shall base its

decision on the application material filed by the applicant and respondent, without any further notification to the former authorized representative.

63. **Steps upon Leave Being Granted**. If upon reviewing the materials filed, the Court decides to grant leave, the following procedure will apply:

a. The Court will not specify the name of the former authorized representative.

b. The applicant's lawyer will provide a copy of the Order granting leave and setting the matter down for hearing to the former authorized representative, within five days.

c. If leave has been granted and the former authorized representative deems their further participation in the proceedings necessary, they may make a motion pursuant to Rules 109 and 369 for leave to intervene if they have not already done so at the leave stage.

Mandamus Applications (June 29, 2023 amendment)

64. Rules 5(1)(h), 9 and 10 of the *FCCIRPR* are based on the premise that the Applicant is seeking judicial review of a decision that has already been made by a tribunal. Rule 5(1)(h) indicates that an application for leave "shall set out … whether or not the applicant has received the written reasons of the tribunal." If an application for leave sets out that the applicant has *not* received the written reasons of the tribunal, Rule 9 then indicates that "the Registry shall, without delay, send the tribunal a request in Form IR-3" This form requests the tribunal to send a copy of the decision or order at issue and the written reasons for it, or a notice indicating that no reasons were given or reasons were given but not recorded. The deadline for perfecting the application for leave is 30 days after receiving either the written reasons or the notice under Rule 9(2)(b).

65. However, the Rules do not appear to contemplate the situation where the tribunal has not yet made a decision, and the applicant wishes to file an application seeking an Order of the Court compelling the tribunal to render a decision (an application for *mandamus*). The same is true with respect to Form IR-1. In many cases, the applicant selects the option indicating that the applicant has not received the reasons, but Rule 9 then requires the Registry to send Form IR-3 to the tribunal, causing unwanted delays waiting for the tribunal to confirm that no decision or reasons exist.

66. Therefore, for applications in the nature of *mandamus*, in which the applicant seeks an Order compelling a tribunal to render a decision, the following guidelines are provided.

67. **Rule 5 (1)(h) and Rule 9**. An application for leave shall be in accordance with Form IR-1 and may set out either:

"The Applicant has not received written reasons of the tribunal" [which will trigger the normal Rule 9 process] OR

"The Applicant has not received written reasons of the tribunal and is not seeking such reasons under Rule 9 as no decision has been rendered yet" [which would alert the Registry *not* to initiate the Rule 9 process].

68. Rule 10 Perfecting the Application for Leave. If the Application for Leave indicates "The Applicant has not received written reasons of the tribunal" – The applicant shall perfect the application for leave within 30 days after receiving either the written reasons, or the notice under Rule 9(2)(b), as the case may be.

If the Application for Leave indicates "The Applicant has not received written reasons of the tribunal and is not seeking such reasons under Rule 9 as no decision has been rendered yet" – the applicant shall perfect the application for leave within 30 days after filing the application.

ANNEX

NOTICE #1: NOTICE OF NON-SETTLEMENT

(General Heading – use Form 66)

Pursuant to the Order of the Federal Court granting leave in the within application for judicial review and requiring the parties to consider the possibility of settlement within 15 days of receiving the Order, the parties advise that:

☐ The parties have not agreed to settle the within application for judicial review.

OR

☐ The parties have not completed settlement discussions and will file a further Notice of Settlement Status within 15 days of today's date.

This Notice is being submitted by the Respondent.

_____ _____

Signature **Date**

(Name, address, telephone and fax number of solicitor or party)

NOTICE #2: NOTICE OF DISCONTINUANCE

(General Heading – use Form 66)

(*Complete only if the application for judicial review is being discontinued and the parties are NOT requesting an Order of the Court.*)

(*check only one box*)

☐ The Applicant wholly discontinues this application for judicial review, without any consent agreement, pursuant to Rule 166 of the *Federal Courts Rules*, SOR/98-106.

OR

☐ The parties have agreed to settle this application for judicial review and Discontinue the application. The Applicant requests that the within application be immediately discontinued on consent of the Respondent, without the filing of a Notice of Discontinuance in Form 166. This Notice shall be transmitted by a client representative to the relevant office.

CONFIRMATION OF CONSENT

This Notice is being submitted by or on behalf of the (insert submitting party) (check only one box):

☐ On consent of all parties.

☐ On another basis (*provide details below*):

(If not submitted on consent, a copy of this Notice of Discontinuance must be sent by the submitting party to the other party.)

_____ _____

Signature **Date**

(Name, address, telephone and fax number of solicitor or party)

NOTICE #3: NOTICE OF SETTLEMENT and REQUEST for JUDGMENT ON CONSENT

(General Heading – use Form 66)

(Complete only if the parties have agreed to settle the application for judicial review and are requesting a Judgment of the Court.)

The parties have agreed to settle this application for judicial review and request a Judgment of the Court. The parties agree that the within application be settled for the following reasons. The federal board, commission or other tribunal (check the boxes that apply):

☐ acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

☐ failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

☐ erred in law in making a decision or an order, whether or not the error appears on the face of the record;

☐ based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

☐ acted, or failed to act, by reason of fraud or perjured evidence;

☐ acted in any other way that was contrary to law.

(*Identify any agreed-upon errors in the decision under review and/or breaches of procedural fairness and/or other grounds for settlement*)

As a result, the parties request that the Federal Court issue a Judgment on Consent in the form attached as Schedule "A" to this Notice, without a formal motion record or further correspondence from the parties, having regard to Rule 3 of the *Federal Courts Rules* and, *mutatis mutandis*, the Court's practice regarding informal requests on consent for interlocutory relief The Court may, for any reason, require a formal motion record or further information.

This Request is being submitted by or on behalf of the (*insert submitting party*) on consent of all parties. *(If each party submits the Request separately, a copy must be sent to the other party; or a single joint copy, signed by both parties, may be submitted.)*

_____ _____

Signature **Date**

(Name, address, telephone and fax number of solicitor or party)

SCHEDULE "A"

Date: YYYYMMDD

Docket: IMM-XX-YY

City, Province, (long date format, e.g. November 10, 2018)

PRESENT: The Honourable Mr. Justice XX

BETWEEN:

XXXXXX

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT ON CONSENT

UPON informal motion in writing for Judgment, brought on consent of the parties, dated (*insert date*);

AND UPON considering Rule 3 of the Federal Courts Rules and, *mutatis mutandis*, the Court's practice regarding informal requests on consent for interlocutory relief;

AND UPON reviewing the Notice of Settlement Status filed and the Reasons for Settlement identified therein;

AND UPON noting the parties' agreement that (*insert Reasons for Settlement*);

AND UPON noting the consent of the parties; and

AND UPON being satisfied that [Choose (i) [it is in the interests of justice that the requested relief be granted] OR (ii) [that the Tribunal erred by (*identify the basis for the consent agreement, as set forth in subs. 18.1(4) of the Federal Courts Act*)] OR (iii) [there are grounds to grant the relief sought];

THIS COURT'S JUDGMENT is that this motion and the application for judicial review are granted. The underlying decision (*include date of decision*) is set aside, with the matter to be re-determined by (*identify the decision-maker*).

"XXXX"

Judge