

**BENCH AND BAR LIAISON COMMITTEE (IMMIGRATION & REFUGEE LAW)**

December 2, 2013

MINUTES

Attendance: Chief Justice, Justice Barnes, Justice de Montigny, David Yi, Manon Pitre, Dora Caron, Anne Edge, Sylvia Mackenzie, Sandra Weafer, Wendy Danson, Deborah Drukarsh, Marvin Moses, Mario Bellissimo, Michel Synnott, Kerri Froc, Aris Daghighian, Andrew Baumberg (recording secretary)

1. Agenda & Minutes**(i) Welcome – Committee Chair**

Justice Barnes provided a statistics overview.

Refugee leave applications are down considerably from the last two years -- approximately 3500 files so far. Completed files exceed new files. Similarly on the non-refugee side, the number of new applications has decreased and is approximately 3000 files so far.

Chief Justice Crampton noted that there are approximately 7400 applications (year to date), with some 12000 last year. There were 550 stays (year to date) last year and only 321 this year. With the backlog from last year, the Court is still behind in its scheduling of IMM judicial review applications for the Toronto office. The other offices are generally heard in a timely manner, with some delay in Montreal and Ottawa.

Justice Barnes noted that the downward trend is likely resulting from the change in VISA requirements for some countries. **Justice de Montigny** added that the Refugee Appeal Division (RAD) is likely having some effect.

Marvin Moses noted that the refugee *claim* rate has gone down considerably in the new system, and the approval rate has also gone down. **Mario Bellissimo** added that the main issue will be whether the RAD issues reasons. It is very early to be able to understand the trends, with so many changes. Many clients are staying put or are not accessing the Court. **Marvin Moses** noted that the most recent report from the IRB showed 400 cases (RAD), with 40% rejected due to no jurisdiction. Some people are filing an appeal with the RAD *and* a judicial review application with the Court due to lack of clarity regarding the RAD's jurisdiction.

Deborah Drukarsh is starting to see more of a balance now between jurisdictional issues and other substantive legal questions at the RAD.

(ii) Responsibility for Minutes

Andrew Baumberg.

(iii) Review of Minutes for January 11, 2013

Approved subject to one change re (v) Study – Osgoode Hall.

Page 3 - Some members of the rules committee did not support the proposal to create a list of criteria for interpretation of the leave test.

CJ Crampton also noted that it was decided not to proceed with the route of the non-exercise of jurisdiction (re citizenship appeals). There has been a suggestion for a citizenship judge to bring a reference (see, for example, the case of *Huang*).

2. Federal Court Items

(i) Protocol re Allegations Against Former Counsel in Application for Judicial Review

Justice Barnes thanked the members of the Bar for their assistance, and noted that the Court has reviewed the submissions, with the key issue revolving around the level of formality of the process. The Court favours a more formal process to ensure that such allegations are not raised too lightly.

Justice Barnes reviewed changes to the draft protocol and read through the Court's proposed version, which will be circulated to the Bar for further comment in writing.

Mario Bellissimo suggested the language of the Act: "authorized representative" rather than "counsel."

Sandra Weafer asked whether the process would apply to allegations against a consultant.

Justice Barnes noted that the primary focus is with respect to legal counsel, but it is not clear why it would not cover the situation of an immigration consultant. However, he noted that members of the Bar have obligations towards other members of the Bar. The situation might be different for consultants, though the underlying issue of fairness remains.

Justice de Montigny thinks that the underlying logic of the protocol applies with respect to all situations.

Mario Bellissimo agrees – the principle is not limited to lawyers.

Wendy Danson noted that the original draft was submitted only on behalf of the CBA, rather than for immigration consultants.

Justice Barnes indicated that the revised draft would be circulated soon and then, if possible, published early in the new year.

(ii) Perspective of the Bar re effect of legislative and legal aid changes on Court practice

Marvin Moses noted that several colleagues are taking a private retainer, or clients are told that legal aid would not cover the leave application until a legal opinion is done. Some claimants do not want to initiate any Court proceeding unless covered by legal aid. If the party covers the cost at the leave stage, then legal aid will not take over costs later, even if the Court grants leave. This may have some impact on the number of applications, or result in more applications for extension.

Deborah Drukarsh has not seen an increase in motions for extension of time.

Mario Bellissimo and Marvin Moses both indicated that it is very difficult for the Court to take any formal role in relation to the legal aid issue.

(iii) Summer recess

This was approved for the weeks of July 28 and August 4.

Michel Synnott noted that the Quebec construction holiday is from July 21 to August 2. There is a one-week overlap.

(iv) Last-minute settlements

The **Chief Justice** noted that there are still a large number of last-minute settlements, though it is not clear to the Court why this is happening. He requested additional notice to allow for more flexibility to reallocate judicial resources.

Anne Edge indicated that the Court needs at least 2 weeks notice in order to be able to re-schedule the judge to hear another case. It usually occurs in Toronto, and occasionally in Montreal.

Sandra Weafer and Deborah Drukarsh noted that after the last meeting, they reiterated with counsel in their offices the importance of avoiding last-minute settlements, where possible. However, sometimes there are on-going discussions that simply do not resolve until the last minute.

(v) Fast-track pilot project

Justice Barnes noted that there have been only a few so far.

Chief Justice Crampton added that Justice O'Reilly heard one (with a 20-minute hearing) and rendered the decision within a couple days, and Justice Manson similarly issued a decision the day after a recent hearing. It is not clear why there are so few cases being pursued under this initiative.

Mario Bellissimo noted that many individuals still do not know about this program. He will send out another notice on a national list-serve, with 60% in Ontario. **Marvin Moses** can send out a regional notice for Ontario.

Marvin Moses suggested a special heading for the Notice under the Notices to the Profession page of the Federal Court web site. An update re last minute settlements, and backfilling cases, could also be added to the web site.

(vi) Pro se litigants (strengthening relationship with pro bono groups across Canada)

Justice Barnes noted that the Court's efforts to provide support for self-represented litigants continue, though its primary interest is to support representation by legal counsel.

Roula Eatrides has compiled lists of pro bono associations for every region across the country. The Court is planning to host this on its web site and provide hand-outs at each local office.

The **Chief Justice** notes that the Court provides information but does not direct litigants to specific counsel. He added that the previous proposal of "duty counsel" was found not to raise sufficient business at the Courthouse. It might be more useful at the IRB.

The suggestion re unbundling of litigation has not yet been raised with the Rules Committee, but it can be raised there for consideration.

Justice Barnes noted that this might permit narrower retainer agreements to allow counsel to be retained only for a specific part of the application process.

The **Chief Justice** will review the proposal with Justice Hughes, Chair of the Rules Committee.

(vii) Rules Committee Update

Andrew Baumberg provided a report.

- 3 new members have been appointed to the Committee, including Chantal Desloges representing the immigration and refugee law bar

- the Committee is developing draft amendments to address the issues raised by this committee re "ghost representatives"

- for this amendment, members of the Bar indicated that there is no need for the electronic address of the representative who prepared the application; regarding the amendment, they also indicated that it would be useful to add the name of the representative for all parts of the leave application, not just the initial Application, but also the Application Record; often, complex legal memoranda are filed even though the Applicant is not represented.

One member of the Court indicated that there are some requests for a party to be represented by "a friend." There was some discussion regarding the prevalence of ghost representatives among immigrant communities.

Justice Barnes noted that there is an on-going need for public information.

Justice de Montigny noted that to be effective, the Bar would need to approach specific immigration communities.

Michel Synnott noted that the Montreal office was trying to track down the practice by ghost consultants. It is very time-consuming and challenging to track down such representatives.

(viii) Digital Recording

Justice Barnes noted that the digital recording system is substantially implemented, with copies of recordings available to counsel. The tariff under the Rules is being amended to provide for a \$15 fee for the Registry to provide a copy.

Chief Justice Crampton expects to issue a note internally to advise the Court that the system will be in place across the Board soon.

The microphones are sensitive, but if counsel's microphone is turned off, the system does *not* seem to be able to capture someone's voice via a different microphone in the hearing room.

(ix) Applications ("Foreign skilled worker")

Justice Barnes noted that there was a large class of Toronto proceedings that he managed, with a decision on the merits by Justice Rennie that is now on appeal before the Federal Court of Appeal. There was a similar group from Vancouver and another in Montreal, which are in abeyance pending the appeal.

(x) Applications ("Investor class")

The **Chief Justice** noted that there has been a large number of cases, divided in three groups. When the Court receives this type of trend in cases, with similar fact patterns or issues, it welcomes requests for case management, preferably by counsel jointly. Members of the Bar / Justice are encouraged to identify these trends and bring them to the attention of the Court.

(xi) Suggestions re Federal Courts Act Amendments

The **Chief Justice** noted that there may be an opportunity for the government to amend the Act. The Court is putting together a list of potential amendments and welcomes any suggestions from the Bar. For example, one item under consideration by the Rules Committee is section 40 re vexatious litigants. The CBA will send a note to its members, not just immigration practitioners, for feedback. **For follow-up at next meeting.**

3. CBA / Department of Justice Items

(i) Rule 9 and GCMS /CAIPS notes

Kerri Froc provided an update on behalf of Richard Kurland, suggesting a change to 9(2) to send an electronic copy of the record. A summary of the issue can be circulated in advance of the next meeting for discussion.

(ii) Electronic filing

Roula Eatrides noted that CAS had a contract with LNC to provide e-filing, but LNC decided to end its service. CAS then created its own free e-filing service, but requires a more robust infrastructure to support it.

Chief Justice Crampton noted that eventually the Court will move to an entirely electronic record. He also noted the possibility of moving to e-mail as the default mode of communication with the Court. Often, documents are sent to a civic address that is no longer valid.

4. Business Arising from Previous Meetings

(i) Potential for E-service on Department of Justice (CBA)

Deborah Drukarsh noted that there is a pilot project for the tax portfolio re electronic service, which will involve different offices and firms to test the Department's infrastructure. The immigration and refugee portfolio will likely be the next pilot.

Michel Synnott noted that the pilot will include documents up to 20 MB.

(ii) Common List of Authorities

In the absence of David Matas, this will be put over to the next meeting.

5. Varia & Next Meeting

The next meeting is set for Calgary at the CBA conference, May 8-10, 2014. The agenda for the CBA conference will be sent to the Court this coming week. The meetings for the following years are in Ottawa, Vancouver, and Toronto.

Michel Synnott noted that it is harder to get conference travel approval for government employees. He asks that we try to get adequate teleconference facilities for the next meeting. **Andrew Baumberg** will work with Kerri Froc to have a suitable system booked.