

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

November 10, 2015 (Toronto)

MINUTES

Attendance: Chief Justice Paul Crampton, Justice Robert Barnes (Chair), Justice Alan Diner, Deborah Drukarsh, Lori Hendriks, Marvin Moses; **Teleconference:** Justice Russell Zinn, Justice Michel Shore, Lorne Waldman, Michel Synnott, Mario Bellissimo, Eugene Oscapella, Patrick O’Neil, Andrew Baumberg

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

Chief Justice Crampton noted that filings for leave are down 35% from last year: approximately 4800 YTD. The Court has cleared the backlog, except Toronto, which is almost caught up.

The overall workload has increased, though, as the leave granted rate has gone up.

Citizenship revocation files: there are 6 cases in the ‘terrorism’ group and 8 in the ‘misrepresentation’ group. These are all being case-managed by Justice Zinn.

Request to Bar: please advise of any bilingual component to a file as early as possible to ensure that a bilingual judge is assigned.

Also, the Chief Justice referred to the recent Notice regarding hearing length: if you need more than the default 90 minutes, please advise at the leave stage or earliest opportunity.

The Rules are moving forward on the ghost representative proposal and on a new simplified process for an ‘Anonymity’ Order. There is also a proposal for more flexibility in the leave granted order to allow parties to agree on the time-lines for additional steps.

Deborah Drukarsh raised a question regarding the proposed Rule 8.1 for an anonymity order: why is this also available for citizenship?

Andrew Baumberg responded that the Rules change is being made to the Citizenship, Immigration and Refugee Protection Rules, which apply equally to citizenship cases.

Justice Barnes expressed concern that confidentiality issues are not always raised by parties in situations where it should be.

Action: Marvin Moses to raise the issue on the Bar’s IMM listserve

Justice Barnes noted that anonymity orders will not be routinely granted – there will need to be a justification within the file.

Mario Bellissimo suggested that it would be better to include the request within the leave application rather than as a separate request form.

Marvin Moses suggested that it could be similar to an extension request.

There was a question how to flag a confidentiality request pending Rule change?

Justice Barnes suggested a separate paragraph in the leave application, but it is important to highlight the issue to make sure it is not missed.

Patrick O'Neil asked how the Registry should handle the file pending leave?

Andrew Baumberg noted that the new Rule 8.1 is not designed to seal the file, but simply to apply to documents produced by the Court / Registry (i.e., not to documents filed by the parties).

Mario Bellissimo noted another complicating factor: evidence related to confidentiality issues might be new, and so it might not be included in the certified tribunal record. In cases raising confidentiality concerns, parties want to avoid people tracking them down as well as to avoid 'new' people finding out about their history.

(ii) Responsibility for Minutes

Andrew Baumberg.

(iii) Review of Minutes for May 8, 2015

Approved.

2. Business Arising from Previous Meetings

- (i) Practice Notice re hearing length
- (ii) Schedule within 'leave granted' Order
- (iii) Confidentiality issues

These 3 items were raised earlier.

(iv) Access to legal counsel for people in immigration detention

Justice Barnes noted that he had heard anecdotally of informal requests by the Crown, following a release order by the Immigration Division, for immediate stay of release, without notice to the party or counsel. Upon exchange in the Court, it appears that this comes up from time to time. The concerns raised by the Department regarding immediate release may be valid, though there is some concern regarding the process that is being followed.

Deborah Drukarsh noted that typically, these are requests for an interim order until the next day, not for a week. Notice is normally sent to the counsel who previously represented the party, even if it is not clear if they are still counsel of record.

Marvin Moses noted that it is common for CBSA to seek the former counsel of record – as a practice, it should be done.

Michel Synnott added that this issue was discussed with CJ Lutfy years ago. The Department does send a courtesy copy to the person and to the former counsel; the problem is that everything happens very quickly – release is often in an hour or two; it is not always possible to reach the intended recipient for the interim request that results in a delayed release for a day.

Justice Barnes asked if the Immigration Division (ID) is requested to stay its decision for a short time to allow for these requests.

Lorne Waldman suggested that the ID might not be sure it has jurisdiction.

Marvin Moses added that as part of the detention review, the adjudicator often must consider whether there is a danger to the public; this should be contemplated at the original hearing.

Lori Hendriks will look at whether the ID has jurisdiction to stay the decision and the possibility of making submissions at end of the ID's hearing (e.g., if you intend to release the applicant, the Department would like time to make a motion for a stay in the Federal Court).

Justice Barnes suggests that at the Federal Court, it is better to get the parties on the phone rather than go ex parte.

CJ Crampton indicated that the court puts a very high priority on detention cases. The issue was on this Committee's agenda a year ago, and he has asked the Court's judicial administrator to ensure that these cases are put on for judicial review within the 30-day window.

Justice Barnes indicated that he has generally been able to hear a judicial review application (related to detention review decisions) on the merits in 2-3 weeks.

CJ Crampton indicated that the Court is now at full complement and able to respond to these short time-frame request. For stay motions, there are judges on duty 24/7.

There was a question how many people were in IMM detention (answer: 1000's). The level of legal representation was also discussed: at 48 hrs, few are represented, but at 7 days, the representation rate goes up considerably.

Mario Bellissimo added that if the person needs a bond, this may be an issue. Often, close family members are not able to act as a bond person as they may be seen to be complicit.

Marvin Moses added that in Ontario, legal aid goes through the jails. Toronto Bail also assists, but its spots fill up quickly.

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

No update.

(vi) Practice Notice re: Publication of Court Orders

Covered at today's LSUC conference.

CJ Crampton noted that this issue first came up in the Immigration and the Intellectual Property liaison committees, with the Bar asking for greater clarity as to when a decision gets a neutral citation and when not. The Notice was issued in response, but has provoked considerable discussion and debate. Judgments will still be issued in the same way: if styled as Judgment with Reasons or an Order with Reasons, it will have a neutral citation.

One option is to post bare Judgments but without a neutral citation, with the option for members of the Bar to suggest that a decision be assigned a neutral citation. He had hoped that one outcome would be simply for the Department of Justice to discontinue using non-published

decisions, but this is not happening: he acknowledged that some decisions appear to be relevant on precedential grounds. There will be another discussion within the Court regarding the Notice. He added that one private bar lawyer at the conference was in favour of the Court's recent Notice – it meant fewer cases to read.

Marvin Moses noted that the vast majority of counsel were in favour of seeing all the cases. Often in the past, the Department of Justice would cite an unpublished case, and private bar counsel would be hard-pressed to respond to it without having a copy.

CJ Crampton responded that it may be better to give everything a neutral cite but still keep the distinction between a Judgment with Reasons and one without Reasons.

Lori Hendriks gave the example of new situations where a group of stay decision are all decided one way – this appears to be persuasive.

Deborah Drukarsh noted a few court files where a file number was cited but there is no record of the file on the Court web site. This will be sent on to the Court for information.

(vii) Identification of counsel by law society number in application

This issue is related to the 'Ghost representative' amendment to the Rules.

3. Federal Court Items

(i) Committee's Working Priorities in 2015-16

Members of the bar are encouraged to make suggestions for big-picture items that warrant discussion. The Court does not often receive such suggestions.

Deborah Drukarsh asked about the security protocol changing.

CJ Crampton noted that no-one wants to go through screening lines, but there is a valid public security issue. Feedback from the Bar is requested. On the priorities issue, he welcomed suggestions that are 'outside the box' to help the court process work better.

Justice Diner noted that the paper burden (e.g., service of documents) is one area that needs to be addressed, for both public and private bar.

CJ Crampton noted that there is a funding request to the government for a major modernization initiative – this is an access to justice issue.

(ii) Informal ex parte motions re: stay of release from detention

Discussed earlier.

(iii) Habeas corpus: *Chaudhary v. Canada*

Lorne Waldman expects that the Superior Court will remain the exception, but it is needed in special cases.

For example, he has had 3 successive judicial review applications by the same individual in detention. This is not an effective remedy.

(iv) Summer recess 2016

July 25 to August 5.

(v) Retention schedule

CJ Crampton questioned whether there is any reason to keep withdrawn / abandoned files that never were seen by the Court?

Action: the Court to circulate a note for discussion purposes.

Lori Hendriks noted that the Department has a 12-year litigation file destruction schedule, with exceptions for higher-profile cases (e.g., war crimes files).

Marvin Moses added that in private practice, the norm is 7 years, but with increasingly long retention recommendations.

4. CBA / Department of Justice Items

- (i) Electronic filing: '500-page limit'
- (ii) Introduction of video evidence in a judicial review application
- (iii) Access to documents in a file that has been ordered confidential

The members of the Bar who had raised these issues were not present at the meeting.

5. Rules Committee Update

Andrew Baumberg simply reminded the Committee that the Discussion Paper (Review of the Rules on Costs) had been circulated for public comment, with a November 23 deadline for comment. [following the Liaison meeting, the deadline was extended to January 8, 2016]

6. Varia & Next Meeting

It was noted that this LSUC Immigration Law Summit happens every year in Toronto – it is a good opportunity to have an annual late fall meeting.

The CBA conference is scheduled for April 7 to 9th in Vancouver. The preference is for a Committee meeting at least an hour and a half long.

Action: for consideration by CBA conference planning committee.