

**FEDERAL COURT – COUR FÉDÉRALE
BENCH AND BAR LIAISON COMMITTEE (IMMIGRATION & REFUGEE LAW)
COMITÉ DE LIAISON ENTRE LA MAGISTRATURE ET LE BARREAU
(DROIT DE L'IMMIGRATION ET DES RÉFUGIÉS)**

Friday, January 11, 2013

Present: Chief Justice Paul Crampton, Justice Barnes (Chair), Justice Phelan, Justice de Montigny, Sylvia Mackenzie, Chantelle Bowers, Keri Froc, Michel Synnott, Sandra Weafer, Deborah Drukarsh, Wendy Danson, David Matas, Mario Bellissimo, Mitchell Goldberg, Dora Caron, Audrey Macklin

1. Agenda & Minutes

(i) Welcome – Committee Chair

(ii) Responsibility for Minutes

Andrew Baumberg to take minutes.

(iii) Review of Minutes for May 4, 2012

Approved.

2. Federal Court Items

(i) Court Update – statistics

Some 12971 IMM proceedings were filed in 2012. This is double the number in 2008. The Court does not have the resources to deal with the significant increase within the previous time-frames. There was some discussion regarding the need to fill existing vacancies.

(ii) Digital recording

Recordings will be made and available on request, with a \$15 tariff being proposed (requires amendment to the Rules). There was concern re re-sale of recordings, though in response, it was noted that copyright can be asserted. Digital recording may be used for case management conferences as well, and members of the Bar noted this will be quite helpful to ensure a recording of the CMC sessions. Finally, it was noted that there has been consultation within the Rules Committee, and draft rules (tariff) will be published for comment in the Canada Gazette.

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

Legal Aid in Ontario is taking steps to get approvals by phone. The IRB caseload volume is down – this follows historic trends. When Bill C-43 comes into force and IRB jurisdiction is limited, we will see increased activity in the Federal Court. In the past, Ontario legal aid might provide coverage for some stay motions, though the confirmation would come too late. The phone approval process may mitigate this problem. The Ontario legal aid rate is being slashed and will come down to Quebec levels – being contested by legal community. LegalAid Alberta will take over front-end of all refugee claims, but with only one counsel each in Edmonton and Calgary. The role for pro bono programs for self-represented litigants will increase as legal aid support decreases. An increase in self-represented litigants will have a significant effect on the Court. In Manitoba, much of the work is done by paralegals funded by WelcomePlace. However, funding is in question. The new refugee system is more labour-intensive.

The rules committee (subcommittee on global review) is looking at the issue of self-represented litigants and hopes to provide further resources to assist these litigants. It was noted, though, that some tools may simply assist ghost representatives for litigants. Justice Barnes noted that the best approach is to get lawyers for litigants, even pro bono.

(iv) Summer recess

July 29 to Aug. 9, 2013

(v) Last-minute settlements

Justice Barnes noted that he conducted a basic survey and found a number of cases where there was an obvious defect in the underlying decision, leading to a late settlement. Is there a way for the Crown to get instructions sooner to get an earlier settlement? Sandra Weafer noted that Department of Justice Vancouver always attempts to get early instructions, though there are many factors, such as delay in getting the tribunal record or position of the applicant.

Justice Barnes asked whether an alternate procedure might be attempted to screen out cases that are likely to succeed and put them on an expedited process, for adjudication or mediation.

Mario Bellissimo responded that this is great idea.

Action: for the Department of Justice to consider and report at next meeting.

(vi) Pro se litigants

Justice Barnes noted that this came up at a recent pro bono conference: re unbundling of litigation. With this development, counsel might be able to play a more limited role, without having to be counsel of record for the full proceeding. However, this must be framed in a rule so there is clarity for counsel and litigants. For example, counsel could get on the record only up to the leave stage, with a limited retainer with the client that could be filed.

Mario Bellissimo responded that this seems a good idea. It provides some flexibility to allow counsel to assist at the leave stage pending determination of the issues without full engagement of the counsel.

This would also promote pro bono counsel becoming involved on a limited basis.

For follow-up at next meeting.

(vii) Rules Committee Update

Chantelle provided a report on the rules sub-committees:

- global review – comments on final report are welcome until the end of the month; the CBA will be responding via the multi-disciplinary committee;
- modernization – goal is to remove obstacles to use of technology; close to pre-publication in Canada Gazette
- substantive amendments – chaired by Justice Rennie, including coverage of confidentiality proposal from CBA
- enforcement – goal is to bring enforcement rules in line with provincial procedure
- procedural – has been sent for governor in council approval

Wendy Danson noted that her term on the Rules Committee came to an end at the last meeting, though she continues on this committee.

Chantelle Bowers noted that the Courts have consulted the CBA for recommendations for new members to the Rules Committee. These have been sent on to the Minister's office.

(viii) Citizenship Appeals

Andrew Baumberg provided an overview of the underlying issue and the need to resolve the differences within the jurisprudence, if possible via legislative amendment or appeal to the Federal Court of Appeal.

David Matas noted that he had heard a presentation by a judge of the Federal Court of Appeal where it was proposed that a Federal Court judge decline jurisdiction so that the Federal Court of Appeal could deal with the legal test.

There was a view that the facts should be clearly requiring resolution of the legal question, rather than allowing this to be simply addressed in obiter.
The bar agreed that this would be helpful.

3. CBA / Department of Justice Items

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

Raised before the meeting by CBA (Lorne Waldman).

Justice Barnes noted that there is an increase in the number of such allegations. In a recent case before Justice Zinn, he required that notice be provided to the counsel whose conduct was alleged to be incompetent to allow for a response. Justice de Montigny thought that it should be up to each judge to decide how to handle the case, without any formal requirement imposed.

David Matas recommended a distinction between professional misconduct and something that results in a breach of the duty of fairness. We should not blur these two issues.

Wendy Danson was consulted on a recent case of this nature. The counsel considered that he was bound by solicitor-client confidentiality and could not respond. Also, it was not clear who would bear the cost of a response by the previous counsel.

Justice Barnes noted that the Court wants both sides of the story.

The Department of Justice will ensure, as a matter of professional courtesy, that previous counsel are aware of the allegation.

The existence of a protocol does not preclude counsel from raising the solicitor-client privilege. Given the time-lines, it is difficult to expect counsel to get through the bar complaint procedure in time for a response before the court. The allegation of incompetence in itself will result in privilege being waived for a *misconduct* proceeding, but not necessarily for *related* proceedings such as those before the Court. Possible show cause hearing? No, because it is raised at the leave stage.

4. Business Arising from Previous Meetings

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

Deborah Drukarsh noted that there is a pilot for e-service scheduled to start in March 2013, limited to the tax law services division with a few firms. Depending on the results, further steps will be taken.

(ii) Common List of Authorities

David Matas noted that there were two issues:

- Common list of authorities
- Pre-internet authorities

A list of pre-internet authorities (approximately 10-12) is being developed by the CBA. For the next meeting.

(iii) Development of Screening Mechanisms for non-lawyers filing Leave Applications

Mario Bellissimo noted that this will be part of the response to the Global Review Report.

(iv) Restriction on Identification of Vulnerable Persons in Federal Court Cases

Chantelle Bowers noted that this was raised by the Rules Committee, and was to be given to Justice Rennie's sub-committee re substantive amendments.

(v) Study – Osgoode Hall

The Chief Justice provided an update of work by the Court to discuss the underlying issue regarding the test for leave, and the goal to reduce the divergence in application of the leave test, within the limits of judicial independence. The issue was proposed to the Rules Committee, though some members of that Committee did not support the proposal to create a list of criteria for interpretation of the leave test, on the basis that the Committee did not have jurisdiction to establish a rule that interprets the Act. Other

proposals are to amend the Rules or issue a Notice to the Profession re content of the leave application, as well as provide for an oral hearing to allow for submissions by counsel and a certified question for subsequent review by the Court of Appeal.

Justice Barnes noted that there was a very useful education session on the leave test at the last Court meeting.

Audrey Macklin welcomed the opportunity to have an exchange regarding the factors to be considered for the leave test.

The Chief Justice noted that this committee would be the focal point for consultation once the Court has materials ready for discussion. For further discussion at next meeting.

(vi) Address for service – Attorney-General

Complete – this is now posted on the Attorney-General's web site.

(vii) Citizenship appeals (certified record by tribunal)

Michel Synnott noted that there has been some progress within the Rules Committee.

Chantelle Bowers pointed out that this is part of the non-controversial amendments, though they do not address the full scope of the request by the citizenship bar. The citizenship bar's request will be further considered by the Rules Committee in due course.

(viii) Court web site (decisions page)

At the last meeting, one member of the bar indicated that there was an issue regarding the decisions not all being in alphabetical order. Andrew Baumberg noted that a brief review of the Court's decisions page did not disclose any errors. If the bar has specific examples, please forward them to the Court.

5. Varia & Next Meeting

The next CBA meeting is in Montreal May 9-11, 2013, at the Mariott Chateau-Champlain.

Proposal for meeting: to be held at the end of the first full day (i.e., Friday, May 10) at end of afternoon session and before the main conference dinner. The Chief Justice and Justice Barnes welcomed the opportunity to be involved in the CBA meeting.

The CJ noted that the Court is moving ahead with a strategic plan, and it would be useful to get feedback from this and other liaison committees this Spring. For the CBA, this can be arranged via Keri Froc.