Federal Court Cour fédérale

BENCH AND BAR LIAISON COMMITTEE (IMMIGRATION & REFUGEE LAW)
January 6, 2015 Teleconference

MINUTES

Attendance: Chief Justice Paul Crampton, Justice Robert Barnes (Chair), Justice Michel Shore, Justice Michael Phelan, Justice Yves de Montigny, Justice Russell Zinn, Justice Diner, Wendy Danson, Kerri Froc, Deborah Drukarsh, Mario Bellissimo, Chantal Desloges, Marshall Drukarsh, Michel Synnott, Sandra Weafer, Michael Crane, David Matas, Lorne Waldman, Mitch Goldberg, Anita Merai-Schwartz, Manon Pitre, Caroline Perrier, Sylvia Mackenzie, Judy Charles, Patrick O'Neil, Chantelle Bowers, Andrew Baumberg (recording secretary)

1. Agenda & Minutes

(i) Welcome – Committee Chair

Justice Barnes provided a statistics overview: 8410 IMM hearings, up slightly from last year, down from the peak in 2012. There is an almost full complement for the Court, with one additional position missing (Justice Hansen went to supernumerary status recently).

Chief Justice Crampton noted the backlog in Toronto, with the Court putting significant resources to address the issue. The Court is down to a 3.5-month backlog, compared with almost 10 months a year ago. There is a legacy backlog at the IRB, though it is not clear when these will be addressed at that level and then possibly be raised on judicial review before the Federal Court. It was noted that the leave granted rate was slightly higher in the last year – it might relate in part to legislative changes.

David Matas noted that there would be a reduction in refugee hearings due to the new Refugee Appeal Division.

(ii) Responsibility for Minutes

Andrew Baumberg.

(iii) Review of Minutes for May 9, 2014

Approved - no comments.

2. Federal Court Items

(i) Ad hoc Committee Participation by IRB, CBSA, and/or CIC counsel

Andrew Baumberg noted that this issue was raised in response to a call from a legal counsel involved in an administrative tribunal working group (who was also a member of the IRB).

Mitch Goldberg recommended a representative from the Canadian Council of Refugees re confidentiality, which is an issue of concern.

Deborah Drukarsh noted that DOJ has a concern with 'clients' joining the Committee. The IRB is a little different, as an arm's length body. She agrees that in some situations it would be helpful to have the views of other bodies – they would need to have clear notice of the issue for which their input is sought.

Justice Barnes suggested that when a member suggests an agenda item, they include recommendations as to any other group whose input might be useful.

(ii) Effect of legislative and legal aid changes on Court practice

Michael Crane noted that in the past, Legal Aid would fund leave application pending review for funding of a judicial review application. Now, the solicitor gets reimbursed only if Legal Aid agrees to fund the leave application. This may be leading to delays in applications. Counsel will usually err on the side of caution if they think the case merits being filed, even if Legal Aid does not guarantee payment.

Mitch Goldberg noted that CARL launched a challenge to the designated country of origin framework. The hearing is in February 2015.

Chief Justice Crampton noted that the citizenship procedure came into effect in August. There have been about 100 applications filed in the Court.
Chantal Desloges noted that members of the Bar find that the time-lines under the new citizenship leave regime (judicial review) are too short. Rule 7 extensions might be needed. Citizenship applicants are typically self-represented, and so the record is not usually very good.
Chantelle Bowers noted that the issue is on the Rules Committee watch list.

(iii) Last-minute stay motions
Justice Barnes noted that this is a regular issue.
Chief Justice Crampton noted that there were a number of cases last Summer when the applicant was given very short notice, resulting in tight deadlines to bring stay motions and for the respondent's reply. This could be improved if extra time was given for the removal period. He added that often an interim stay would be ordered so as to provide all parties additional time to prepare.
Justice Barnes suggested that this is not ideal for the CBSA either.
Deborah Drukarsh noted that the message has already been conveyed to the CBSA. However, she warned against a presumption that the applicant is completely taken by surprise. There are situations when the applicant has changed counsel without informing new counsel of the background, or made more than one request for a stay or some other situation.

(iv) Access to legal counsel for people in immigration detention
Justice Barnes noted that this is a matter that is more widely reported in the media – there appear to be large numbers of people in detention, and it is not clear whether they are applying for judicial review. He noted that the Court makes an effort to provide timely dates.
Lorne Waldman noted the challenge of filing an application, which is moot after 30 days due to the next detention review. He has tried to move for an expedited proceeding, but it is not always clear whether leave will be granted in this very narrow window. It might be useful to have a standardized procedure for these applications, possibly with an oral hearing for the leave stage, and then the judicial review at the same time if leave is granted. There might be about 20 a year.
Chief Justice Crampton noted that the weekly duty judge could possibly take this on.
Lorne Waldman noted there is a challenge to get legal aid, as well as difficulty simply to get access to the clients. They are about 2 hours from Toronto. Access to counsel is a very serious problem.
<u>ACTION</u>: Justice Barnes suggested that Lorne Waldman / Deborah Drukarsh develop a protocol.
Justice Shore noted it would be useful to get notice if self-represented litigants are in detention.
Mitch Goldberg said that legal aid in Quebec is similarly very limited. Legal Aid must sign the mandates, but if they are not going to the detention centers, then this will have an impact on detainees getting access to counsel.
Deborah Drukarsh said that there is provision at the Toronto detention centre for the refugee law office to be present at the detention centre 3 days a week. However, the person is not a lawyer. There does not appear to be any duty counsel at the more remote detention facility.
Justice Barnes was concerned with the detention review if there is insufficient access to counsel.
Chief Justice Crampton noted that these matters are addressed by the duty judge, who looks at the leave request and then, if granting leave, will schedule the hearing within the 30 day window.
Deborah Drukarsh noted that this does happen, but the issue often is whether the decision will be rendered before the next detention review.

(v) Court practice re hearing length
Justice Diner noted that the Order is set for 2 hours, but the Court schedule provides only 90 minutes. The Order should clearly indicate 90 minutes, and if more time is needed, counsel can ask for extra time.
Chief Justice Crampton noted that in most files, the first hearing is done within 90 minutes or less, allowing additional time to prepare for the second hearing in the morning. The problem is that some counsel prepare for a 2-hour hearing, and so the counsel for the second hearing must wait. So, it is recommended to use the 90 minute time-frame. However, there is concern from the judicial

administrator that this might result in more requests for adjournment.
Michael Crane asked whether a practice direction should set out the time allocation during the hearing.
Deborah Drukarsh agreed that some hearings, if set for 2 hours, suggest to counsel that the Court expects more, even if the extra time is not actually needed.
Justice de Montigny suggested that the Court and counsel simply be flexible to allow for an extra 15 to 30 minutes if needed, without needing a motion for adjournment / extension.
Justice Diner suggested that for exceptional cases, parties would specifically ask for extra time.
Justice Barnes suggested that there be a special request included in a cover letter along with the application for leave to flag the exceptional cases so that they are scheduled accordingly, possibly with only one hearing in the morning.
Justice Shore noted that the leave judge could also raise such an issue on his or her own initiative.
ACTION: Court to review hearing time allocation within leave granted Orders.

(vi) Timing of settlement talks
Justice Barnes noted that this item is a holdover from the last meeting.
Chief Justice Crampton noted that if something settles in the last 2 weeks, the judicial resources are effectively lost, as it is not possible to schedule a different matter to replace it. He encouraged the Department of Justice to speak with its clients regarding consideration of settlement.
Justice Shore noted that if an applicant has left the country and withdrawn a mandate from counsel, they should advise the Court right away.
ACTION: Chantal Desloges will circulate a note to the bar to encourage timely consideration of settlement.
Justice Barnes suggested counsel send a letter to Justice proposing settlement of strong cases.
Sandra Weafer has sometimes received such requests, even before the applicant files a record.
Justice Barnes noted that this might possibly be an item for a Continuing Legal Education conference.
Mitch Goldberg welcomed the approach from Sandra Weafer – is this a national practice?
Mario Bellissimo noted that for most of his requests, the answer from DOJ is: “File your record.”
Sandra Weafer said that early settlements occur only for the strongest of cases.
Justice Shore suggested an alternative approach to litigation; most counsel are trained to use an adversarial approach.

(vii) Rule 9 requests
Andrew Baumberg provided some background to the issue: changes to the Rules and an increase from 20% to 40% in R9 requests since 2011.
David Matas noted that the Registry makes the request, but if the request is not answered, there is sometimes a follow-up, sometimes not. He would prefer to have control over the issue himself.
Mitch Goldberg raised the concern that lawyers on Quebec Legal Aid would have a problem adding this on to an existing workload.
Michael Crane said that it would be preferable to have a central address for decision-makers. E.g, for port of entry decisions, it is not always clear who to write to. The onus should be on CBSA and CIC as to where to send such requests.
Manon Pitre noted that part of the problem is that even after a first letter is sent, there is the need for a BF and a second letter due to non-compliance.
Sanda Weafer suggested that DOJ could perhaps get a CC and follow-up itself.
Mitch Goldberg added that there used to be a Client Services fax number through which CBSA or CIC could provide reasons. This office was cut about a year ago. This may be a contributing factor in the R9 requests. The decision comes out as a form letter but without reasons. Counsel has no idea why.
Mario Bellissimo noted that CIC requires an access request to get the reasons on your own file.
Justice Barnes recommended that DOJ speak with its clients to encourage them to provide reasons at the outset rather than only on request.
Deborah Drukarsh noted that there are mixed practices across the country, with some offices not

sending reasons due to limited resources.
Mitch Goldberg noted that the reasons exist, so it is not an issue of having to draft new reasons.
Michael Crane noted that PRRA reasons say they are CC'd to counsel, but this is not actually done. One way to accommodate Registry concern re copying counsel: counsel can check the online docket.
Justice Shore suggested a 24-hour help line to assist with getting reasons. In some stay cases, the Court must issue an interim stay due to the lack of reasons.
Mario Bellissimo noted that if it takes the Registry a few tries to get reasons, it would likely take counsel twice as much effort.
Mitch Goldberg noted that CBSA and CIC often do not even reply to counsel's requests.
Chantal Desloges acknowledged that there may be some R9 requests that are filed as a tactical option to buy more time. She will send a note to discourage this tactic.

(viii) Confidentiality issues
Justice Barnes referred to the Globe and Mail article published recently regarding a Romanian web site that posts court decisions and then charges individuals a fee to remove it. He also referred to a Canadian Judicial Counsel discussion paper on access to court records.
David Matas noted a couple issues: there are both confidentiality and privacy issues. He said that the website trolls web pages that are not caught by Google and then post them. In Europe, there has been successful litigation. It is not just an issue re confidentiality (which should be dealt with by motion), as there are legitimate privacy concerns as well, which also need to be addressed separately.
Mario Bellissimo agrees. The CBA should canvas the privacy law sections to promote legislation that could address these things. He referred to some practices in the US that are of some concern.
Justice Barnes noted that in Australia, they anonymize refugee cases.
Mitch Goldberg noted that there is a cost issue for filing for confidentiality.
Andrew Baumberg noted that the Rules Committee was receptive to a proposal for a simplified procedure to file a motion for confidentiality.
Justice Barnes noted that the Court can address confidentiality issues on its own initiative if the issue appears on the record.
Chief Justice Crampton suggested that a protocol should allow for this issue to be addressed where warranted but not applicable to every case.
Justice de Montigny suggested that along with submissions on certification of a question, counsel could be asked for submissions on confidentiality / privacy issues.
Justice Zinn noted that he had to deal with this in a case with issues of sexual assault in the factual matrix – neither public nor private counsel had addressed the issue in their submissions.
Justice Barnes noted that counsel and the court need to be more assertive on this issue.
Justice Shore suggested that a simplified procedure might be needed.
Chantelle Bowers noted that the CBA has had this issue on the national Bar liaison agenda. They have different views, including the Media Law Section which promotes a more public access to decisions.

(ix) Court seminar
Justice Barnes invited suggestions for possible topics or speakers, which could perhaps include the topic of confidentiality / privacy (and submissions at the end of the hearing).
Mitch Goldberg: standard of review of Refugee Appeal Division.
Re revocation of citizenship: **Justice Shore** suggested a Committee be struck with David Matas, the Department of Justice, and the Court to develop a simplified process for proceedings in this area that may arise under amendments to the *Citizenship Act*.

3. CBA / Department of Justice Items
(i) Publication of Court Orders
Justice Barnes noted that this is a recurring issue.
Chief Justice Crampton indicated that the Court is looking at this internally with respect to the release of different types of Orders. Orders that are released as 'endorsements' (ie, a series of "whereas" clauses

followed by the conclusion) do not have precedential value, particularly given the lack of a factual foundation set out in the Order.
Mario Bellissimo asked regarding final speaking Orders that have some factual foundation.
Chief Justice Crampton responded that the Court first needs to clarify its position with respect to precedential versus non-precedential decisions. The Court is trying to get shorter oral or written decisions out more quickly for access to justice reasons. He hopes to release something in a few months.
Justice Barnes noted that there appears to be no shortage of jurisprudence.
Chief Justice Crampton noted the overabundance of jurisprudence. It does not seem to be helpful to add cases of little precedential value to this body of cases.
Justice de Montigny noted that this appears to be an issue mostly with respect to stay motions, for which counsel think it helpful to submit related stay decisions.
Chief Justice Crampton noted that these often need to be issued quickly, preferably the day before the removal so that the individual does not get their decision the day they are being deported. However, if the decision is going to be used as a precedent, the Court will take more time with it.

(ii) Schedule within 'leave granted' Order
Andrew Baumberg provided some background and suggested that extra time could possibly be found from another period within the 90-day window set out in the leave granted Order.
Deborah Drukarsh noted that there were about 20 cases for which the Respondent had only about 7 days to prepare the reply. It would be preferable to have at least 8 business days for a reply.
ACTION: Mario Bellissimo will work with Andrew Baumberg and Deborah Drukarsh to try to find a solution.

(iii) How to fix minor errors in record
It was noted that the Rules provide for a procedure. A letter on consent would probably be sufficient.
Justice Barnes added that this can also be raised at the hearing.
Michel Synnott confirmed that Justice counsel usually just send a letter if it is a minor.

(iv) Hearing Time for Joined Files
Justice Barnes noted these are often heard together, with hearing time collapsed if it is the same issue.

(v) Guidelines for joined or related files
Justice Barnes noted that this depends on the circumstances.
Justice Shore recommended that if there are multiple members of the same family with hearings, they should be heard by the same judge.

(vi) Information session on Court procedure
This can be addressed via AQAADI.
ACTION: Andrew Baumberg to follow-up with Claudia Molina to see what might be arranged via AQAADI.

(vii) Introduction of audio / video evidence
Andrew Baumberg noted that this was raised at the Rules Committee: the RAD relies on the audio recording from the RPD. The private Bar indicates that this is a significant burden for the applicant; however, IRB Legal Services has replied that they have no obligation to prepare a transcript.
Chantal Desloges noted that the Bar put a report to the Rules Committee.
Justice Barnes noted that the Court needs a transcript, and that in one case, Justice Kane issued a direction to the RAD to prepare a transcript.
Chantelle Bowers noted that the Rules Committee was looking for more guidance on this issue.
David Matas had asked for legal aid coverage for a transcript, which was accepted in Manitoba.

(viii) Access to certified questions

Andrew Baumberg noted that the list is up to date and he is developing an internal mechanism to ensure that someone is covering to keep it up to date.

4. Business Arising from Previous Meetings

(i) Fast-track pilot project

Chief Justice Crampton noted that there is still little uptake on this pilot, despite numerous efforts to promote it. Unless there is significant increase, it cannot be justified.

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

Deborah Drukarsh does not have any update, though at the last meeting she noted there was a small pilot. She also reiterated the request for a pilot to allow an alternate format for filing books of authorities.

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

Chief Justice Crampton noted that there has been a significant drop in such allegations now that the protocol is in place.

5. Rules Committee Update, including *Citizenship Act*

There are now 8 project areas:

1. **Modernization** (to remove obstacles to use of technology) – ready to be published in Part II (a subsequent subset is still in progress re Immigration and Refugee Protection Rules);
2. **Citizenship** (judicial review) – ready to be published in Part II - to keep up to date with Bill C-24 amendments (minor revisions are still required to the Rules re C-24 amendments that are not yet in force) – in the interim, a Notice to the Profession was issued August 1, 2014;
3. **Substantive amendments** (including immigration and refugee law bar suggestion re ghost representatives as well as a proposal to address some issues re confidentiality requests);
4. **Enforcement amendments;**
5. **Miscellaneous amendments** – non-controversial issues;
6. **Global review implementation** – focus on issues such as proportionality (Global review report is online);
7. **Unbundling of legal services** – relates to limited scope representation – see discussion paper on web site for comment;
8. **costs** –a new sub-Committee created at the November 2014 Rules meeting – to conduct a review of the current costs regime and make recommendations;

6. Varia & Next Meeting

Proposed meeting on the CBA conference Friday afternoon (May 8, 2015) for 90 minutes between the final conference session and the dinner.

Justice Shore reiterated his earlier recommendation for a meeting between the Court, the Department of Justice, and David Matas regarding the procedure for anticipated rogatory commissions for citizenship revocation cases.