Federal Court  Cour fédérale

BENCH AND BAR LIAISON COMMITTEE (IMMIGRATION & REFUGEE LAW)
Friday, May 9, 2014 (Calgary, Alberta)

MINUTES

Attendance: Chief Justice Crampton, Justice Johanne Gauthier, Justice Robert Barnes (Chair), Justice Michael Phelan, Justice Yves de Montigny, Justice Russell Zinn, Wendy Danson, Mitchell Goldberg, Peter Edelmann, Kerri Froc, Deborah Drukarsh, Mario Bellissimo, Nico Breed, Chantal Desloges, Erin Roth, Joanna Mennie, David Berger, François Paradis, Fadi Yachoua, Barbara Jackman, Marshall Drukarsh, Carolyn McCool, Alan Diner, Gary Segal
By teleconference: Michel Synnott, Sandra Weafer, Manon Pitre, Caroline Perrier, Louise-Emilie Leroux, Andrew Baumberg (recording secretary)

1. Agenda & Minutes
(i) Welcome – Committee Chair
Welcome by **Justice Barnes**, who provided a brief overview of caseload statistics. The caseload to date suggests that the total number of cases this year will likely be as significant as previous levels.
Chief Justice Crampton provided additional comments re caseload, noting that there is a large backlog in Toronto, largely a result of vacant positions within the Court. He noted that additional appointments are needed to be able to meet the workload. Offices outside Toronto generally are on track. There may be a slight decline in the caseload related to newly recognized concurrent jurisdiction with provincial courts for habeas corpus (re review of prison transfers) and for Aboriginal band elections. He also mentioned the release of the Court's Strategic Plan recently, available on the Court web site.

Justice Barnes would like to see the Committee consider larger issues that could improve the administration of justice in this area of the law. He gave, as an example, the collaborative work last year on the Protocol re Allegations of Incompetence.

(ii) Responsibility for Minutes
Andrew Baumberg.

(iii) Review of Minutes for December 2, 2013
Approved.

2. Federal Court Items
(i) Perspective of the Bar:
- *effect of legislative and legal aid changes on Court practice*
- *Suggestions re Federal Courts Act Amendments*
- *Last-minute stay motions*

Mitch Goldberg noted that once the refugee claim is denied, some cases don't access the Refugee Appeal Division (there are 6 exceptions) but instead come before the Federal Court. There is no longer a statutory stay, and a lack of clarity regarding how fast CBSA is going to act. Some applicants are waiting a long time (for a positive leave decision), but in the interim the CBSA might still initiate deportation. Also, it is easier to get legal aid if the Court has granted leave. Question: Is it possible to get a letter from the Court to confirm that leave will be granted?
Justice de Montigny gave an example of such a request that he had received.
There was a suggestion from the Bar for an informal list of cases for which leave may be granted.

Chief Justice Crampton thought that this might be a transitory issue that will be resolved once more judges are assigned to the Court and can be assigned to the Toronto office. Other suggestions:

- the judge who considers the leave application could render a stay Order immediately (counsel for the department of justice were not in favour of this option);
- assign and schedule the case right away, but then immediately adjourn;
- repeal the 90-day requirement.

It was noted that even if the case is scheduled and leave is granted, there is still no statutory stay. The Chief Justice indicated that the Court is looking at the issue and may have an update in due course. If there are any suggestions from the Bar, please provide them to the Court.

There was further discussion regarding the need for pro bono representation (no statutory stay, and reduction in legal aid coverage). It was noted by a lawyer that the immigration and refugee board already does a very significant level of pro bono work, much more than other sections of the bar.
Regarding pro bono work, there is not a lot that the Court can do. Members of the Bar were encouraged to contact the Court for any initiatives that require collaboration on pro bono initiatives. In some cases, the Court could contact the pro bono organization, via the Registry, to have proper representation in a case. There was some discussion regarding the possibility of duty counsel, though the workload is probably insufficient. However, if arranged in collaboration with the Bar, the IRB and the Court, there might be sufficient workload to be feasible.
More contact is needed with large firms to get them on-board.
One lawyer noted that there is a review of designated representatives for pro bono that is currently underway in one province.
The Court is available to assist with training programs for pro bono initiatives.

Justice Barnes noted that if the Court had contacts with all the major firms across the country, it might be possible to have the Registry contact the firm directly.
Mario Bellissimo noted complaints within the CBA that this type of approach by-passed smaller immigration offices.
Justice Gauthier suggested that a pro bono information session be organized in each major city.
Chief Justice Crampton offered to participate in promotion of this initiative.

Re Amendments to Federal Courts Act and Rules
Chief Justice Crampton reiterated that this item was simply to invite suggestions.

There was a suggestion that Rule 6 not require motions for an extension before the leave decision is issued. This should be on consent. It takes up Court resources without any benefit. There was general consensus among the bar that this would be a useful change.

Last-minute stay motions
Justice Barnes noted the increase in last-minute stay motions, with various causes.
The private bar noted that there is not much that they can do when the government officer issues a last-minute removal decision. It was also noted that there are ongoing resource problems at the CBSA. Referral decisions are therefore often at the last-minute due to files being addressed only when they become urgent.

The CBSA had received increased resources for removals, but this funding will come to an end soon, possibly leading to reduction in removals. It was also noted that the removal file is often being referred to a small group of removals officers who are not familiar with the individuals. Furthermore, the officer usually has limited authority to defer for longer than a couple weeks.

It was suggested that the Court might assess costs against counsel, though there were numerous contrary

views, given that often the counsel is not to blame for the file being presented to the Court at the last-minute.

Overall, it was noted that counsel's case is not helped by waiting until the last minute.

If the removal notice is late, there is often an interim stay, followed by a hearing for a further stay, thus leading to double the work.

There was further discussion concerning the need to prioritize hearings related to detention. **Justice Barnes** cited a precedent by Justice Rothstein to this effect. This needs to be generally known among the bar and within the Court.

(ii) Rules Committee Update, including Unbundling of legal services

Andrew Baumberg listed the 7 Rules sub-committees (modernization, enforcement of Orders, unbundling of legal services, global review, substantive amendments, miscellaneous amendments, and citizenship rules), and raised the question regarding the ghost representative amendment. During the legislative drafting process, a question was raised within the sub-committee concerning the possible effect of requiring that the Applicant name the person who prepared the Application for Leave and for Judicial Leave, even when that person was not a solicitor. Members of the Bar were invited to provide additional feedback after the meeting.

Justice Gauthier asked for further comments re the unbundling proposal: what services, if any, would require unbundling? Is there a real problem in immigration cases that can be fixed?

Justice Barnes noted that he had initially put the suggestion on this Committee's agenda after a meeting with the Bar concerning pro bono initiatives.

One member of the private bar noted that because the *Application for Leave* stage is distinct from the *Application for Judicial Review* stage, there may be some value in unbundling legal services.

(iii) Bill C-24 (Amendments to Citizenship Act)

Chief Justice Crampton invited feedback from the bar.

There were a comments from the Bar concerning the Bill, noting the possible constitutional issues. The role of citizenship judges will be reduced dramatically; unlike decisions of citizenship judges, decisions of the Governor in Council re discretionary grants of citizenship may have only limited grounds for review.

It was suggested that there would be a large increase in revocation cases. There are some 10,000 cases under review, most of which will likely be revoked under the Ministerial authority, subject to judicial review.

There was concern regarding the 'intent to reside' requirement, which may open up many revocation cases in the future. Finally, there are new types of revocation cases in the proposed amendments to the Act that involve membership in a terrorist organization – these are similar to the security certificate cases. Depending on how they are interpreted, and applied, there may be a significant workload for the Court.

3. CBA / Department of Justice Items

(i) Publication of Court Orders

It was noted that most interlocutory Orders are not available to the private Bar.

Chief Justice Crampton indicated that this is under consideration by the Court's Communications Committee.

One member of the Bar explained that in her experience, some judges will not accept something as a "serious issue" unless a previous judge had already reached a similar conclusion. Some judges have indicated that they do not rely on previous orders. However, there are often very strong similarities between cases. When counsel knows that another judge has just decided a very recent stay application with almost identical facts, it seems appropriate to brings this to the attention of the Court.

One lawyer noted that for a number of stay decisions, the judge refusing stays has issued reasons that were reported. However, for positive decisions, none was reported.

Justice Zinn noted an example of a case where a previous decision did have precedential value.

Justice Gauthier suggested that if a decision is to be reported, the judge should provide the facts.

Insufficient time to complete discussion.

4. Business Arising from Previous Meetings

(i) Fast-track pilot project

There are very few visa officer cases being referred by counsel for this process.

Members of the Bar indicated that few lawyers know about this.

There should be a link at the top of the immigration rules page on the Federal Court web site.

Chief Justice Crampton pointed out that the Notice was circulated to all members of the Bar *twice*.

However, there was a response from the bar that there are too many notices from *within* the CBA – thus, the reminders about the fast-track project were probably simply missed by most practitioners.

Meeting ends at 4 pm Calgary time.

The following agenda items were not addressed due to lack of time:

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

(iii) Common List of Authorities

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

(v) DARS

5. Varia & Next Meeting

(i) IARLJ Conference (October)