Federal Court  Cour fédérale

BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)

November 7, 2017

Toronto, ON

Attendance: Justice Diner (Chair), Chief Justice Crampton, Justice Michel Shore, Justice McDonald, Justice Boswell, Justice Brown, Laura Best / Chantal Desloges (CBA), Marvin Moses (OBA), Jack Martin (RLA), Deborah Drukarsh / Claire la Riche / Daniel Latulippe / Sandra Weafer (DOJ), Nilufar Sadeghi (AQAADI), Anthony Navaneelan / Mitchell Goldberg (CARL), Michael Battista, Adrienne Smith, Mario Bellissimo, David Matas, Sophie Chiasson, Cedric Marin, Daniella Murynka, Patrick O'Neil (Registry), Andrew Baumberg (recording secretary).

1. Welcome / Approval of minutes of June 9, 2017 meeting.

The minutes were adopted.

Justice Diner noted that the Chief Justice circulated the presentation that he had given to the LSUC.

Action: Andrew Baumberg to circulate the PPT to the Committee.

The Chief Justice noted 3 new appointments (Justice Lafrenière, Justice Pentney, and Justice Ahmed), and a further appointment is expected soon. Leading members of the bar are encouraged to apply, especially those who can provide diversity for the Court. Six judges are eligible to elect supernumerary status in the next 2 years, and there is a good case to fill two vacant statutory positions. There is an expectation for increased workload – particularly given actual and projected changes in IMM, citizenship, IP, and national security workload. The IMM caseload is essentially flat in the last year; the overall grant rate on perfected judicial review cases is about 40%. Leave decisions are rendered shortly after perfection of the record, with hearings scheduled within 90 days across the country, and decisions issued on average in six to nine weeks; stay applications are down. When making scheduling requests, please identify cases requiring bilingual judges or more than 90 minutes, and bring confidentiality / anonymity motions by the leave stage. He asked that members of the Bar be receptive to requests for IMM hearings at a law school – often the window of availability is quite narrow, e.g., the beginning or the middle of the term. Certified questions are down compared to last year. Reference was made to the recent Notices to the Profession: more flexibility is available in response to requests from the Bar. As for publication of decisions, all final decisions are being posted on the Court website; for interlocutory Orders (including stay Orders), the Court is looking to make them available to 3rd party publishers such as CANLII. In this regard, the 2015 Notice is to be revised.

2. New Items for Discussion

(i) Schedule in leave granted orders

Action: for the agenda – please add names of the person who raised the item.

Claire le Riche referred to the wording in leave granted Orders – parties can consent to a revised timeline. However, the Department may not want to consent if there is less time to file the further memorandum of argument.

Andrew Baumberg explained that the Court's preference is to have a minimum amount of time with the completed record in advance of the hearing (i.e., at least about 2 weeks).

Justice Diner agreed that everyone is pressed for time.

Mario Bellissimo added that it would be useful to have some delay (e.g., about 5 days) between the filing of the cross-examination transcript and filing of the respondent's further memorandum.

Andrew Baumberg suggests an 'informal motion on consent' in an exceptional case.

The Chief Justice suggested that parties could free up time earlier in the schedule to make time later; also, we should change the reference to the timing for filing the transcript of cross-examinations on affidavits so it would be a step that can be revised. This was an inadvertent oversight.

Action: revision to be circulated in writing to the Committee for comment.

(ii) Summer Recess: July 30 to August 10, 2018
Noted.

(iii) Legal aid
Mitch Goldberg noted that the federal government announced bridge funding for some provinces to cover the remainder of the fiscal year. However, B.C. legal aid recently announced a funding shortfall. It is not clear why the bridge funding was not sufficient to address this problem.
CJ Crampton noted a meeting with the Barreau du Quebec, at which the statistics from Prof. Rehaag were presented showing that the leave grant rate is much lower in Quebec, possibly due to significantly lower legal aid funding. The Bar is trying to encourage increased legal aid funding.
Mitch Goldberg noted that this has been a long-standing issue in Quebec – the legal aid tariff is much lower than in Ontario or B.C.
Daniel Latulippe agreed – the quality of pleadings is an issue. Often it is apparent that a consultant is behind a self-represented litigant.
Justice Diner added that we will continue to monitor the situation.
Mitch Goldberg confirmed that so far, no cuts have been made to legal aid funding for proceedings before the Court. He thanked the Court for its communications with the Barreau.
Marvin Moses also confirmed that there has been a "tightening" of eligibility criteria, but no outright cuts. Sometimes, it takes longer to get a Legal Aid decision on funding. Requests (for extension of time) are sometimes required.
The Chief Justice responded that the Court sometimes sees requests for reconsideration, after the fact, in cases where legal aid was not confirmed in time, and the application was not perfected. He indicated that it is counsel's responsibility to flag the fact that a request has been made for legal aid, at the time the request for Leave is being made. It should be made clear that this may adversely impact upon the applicant's ability to perfect its record within the applicable timelines. We can then set such applications aside for a extra couple of weeks or so before dismissing them for failure to perfect.
Justice Diner concluded by asking that if there are any changes, please let the Court know.

3. Business Arising from Previous Meetings
(i) Informal requests for interlocutory relief
The final Notice was provided in the Annex to the agenda.
Justice Diner noted that this item and item (ii) can be closed.

(ii) Scheduling
The final Notice was provided in Annex C.

(iii) Requirement to discuss settlement – draft paragraph in leave granted Order
CJ Crampton noted that there are a significant number of files dropping off the docket at a stage when the schedule cannot be backfilled, resulting in a waste of Court / Registry resources. The Court is proposing that parties engage in settlement discussions earlier to reduce the number of late settlements. This could be included as a required step in the leave granted Order. *Is there any good reason not to pursue this initiative? Might a small-scale pilot be preferable?*
Claire le Riche provided comments in June to the Court: the Department cannot properly consider settlement until after seeing the certified tribunal record (CTR). It would be possible to discuss settlement within 15 days of seeing the CTR; or within 30 days of Order (this would give at least 9 days). The lawyer needs to get client instructions, and this can take a while – it is sometimes out of our hands. The total number of files that are settled between days 75 and 90 appears to be quite small.
David Matas noted that if the judicial review is of a tribunal, you need an Order; if it is a judicial review of a departmental decision, they can simply agree to re-do the case, and the matter is discontinued, but it is difficult for the Court to know. It would be useful to know why the discontinuance is occurring.
Claire le Riche reiterated that the total percentage of cases settled appears to be quite low. The total

amount should be confirmed.
Justice Shore asked what the settlement rate is for different branches of law. We need to look at the human resources at the Department and law firms, including the Quebec situation. We have to look at the underlying issues to see how to assist parties to settle. There is a need for more discussion with stakeholders – the time-lines may need to be adjusted to be tailored to meet everyone's needs, including to facilitate settlement discussions. He added that there are discussions in government regarding options for restructuring the refugee determination process – if there are changes expected, these need to be considered as well for settlement discussions.
CJ Crampton referred to the department's public comments regarding review of its approach to litigation. However, one of the Department's representatives suggested that it appears that this is primarily for major litigation and lawsuits against the Crown, rather than for judicial review in IMM proceedings. CJ Crampton then shared updated statistics:

	hearings scheduled	**Cases that settled**	**cases found to replace them**	**Number of cases that discontinued / settled in last the 2 weeks**
Toronto	634	212	31	75
Montreal	152	57	1	16
Ottawa	30	16	1	7
Vancouver	110	56	3	14

The problem is not just settlements in the last two weeks, but a little earlier.
Deborah Drukarsh noted that it is not always the Department's fault. It is not unusual that the Applicant's counsel does not have instructions from client, decides not to proceed; etc. These are possible reasons for late settlement from the Applicant's side. Also, until Justice counsel has the record, it does not have material to work with and contact the client, and then we need time to go back and forth; also, it is not always clear why leave granted, or perhaps not enough to lead to clear settlement instructions. One can't provide solid advice to the client based solely on a "leave granted" order. In passing, she made reference to "solicitor" in the draft paragraph – this needs revision to reflect possibility of a self-represented litigant.
Justice Shore suggested a streamlined refugee determination process: have Commissioners who are highly specialized for a specific country. Also, strategic assessment of the IRB / DOJ process was encouraged.
CJ Crampton asked whether the 21-day window for the CTR could be reduced.
Deborah Drukarsh responded that this cannot easily be changed for now; though eventually, when there is an electronic CTR process, it may be possible; at the IRB, the records are still paper-based.
Mario Bellissimo thinks this a good initiative to encourage parties to talk. Perhaps it would be feasible for discussions by the 30-day mark, and by the 35-day mark to complete discussions. He added that reasons for discontinuance should be tracked; also, reasons for settlement should go back to the government decision maker and included in their notes. There is sometimes repeated litigation on the same file.
Michael Battista noted there seemed to be agreement regarding the need for settlement discussions; the key issue relates to timing; perhaps lawyers can talk off-line to agree on timing.
Claire le Riche prefers a practice direction.
Marvin Moses agrees that settlement timing should be tied to CTR availability; if no settlement is reached, he suggests that solicitors "may" advise court – don't want to have to tell the court the reasons.
Patrick O'Neil added that parties will have up to 20 days to advise the Court; does this leave enough time to re-schedule a case?
Bar: how can you ever re-schedule a case given the time-lines?
Justice Diner – the court does sometimes, but rarely.
CJ Crampton agreed that it was easier when the court was behind in scheduling, and double-booking cases; this is less common. The Court has a 'ready list' in the intellectual property area; these can be called on short notice to check availability. The 'earliest' to schedule an IMM matter is 72 days.
Mario Bellissimo agrees with having the settlement discussion requirement in the Order.
CJ Crampton questioned whether a Practice Direction would be as effective as an Order.

Claire le Riche noted that the department needs a week both to review the CTR and get instructions.
CJ Crampton suggested that counsel need to get into the file anyways – this would just require that it be done earlier.
Deborah Drukarsh noted that the proposed process would result in an overall increase in time needed for each file; an earlier review, and then a subsequent review near to the hearing.
Mario Bellissimo suggested a small, regional pilot.
There followed some consideration of Toronto, Montreal, and Vancouver as possible candidates.
Justice Shore again recommended specialization for the four global areas at the IRB.
Justice Diner suggested adoption of M. Battista's suggestion:

> **Action:** meeting with Justice Diner, Claire le Riche, Michael Battista, Patrick O'Neil, and other interested counsel to agree on a pilot proposal.

(iv) Visibility of clocks in hearing rooms
Resolved.

(v) Protocol: allegations against counsel.
Removed from agenda until other issues are raised. The previous protocol and the common law remain.

(vi) JR of decision (VISA): 15 or 60 days?
The Department had a good work-around acceptable to those in the room.

> **Proposal:** bring exceptional case to Andrew Baumberg or Justice Diner.

(vii) Publication of Decisions
Discussed earlier.

(viii) Modernization
a. File Retention schedule.
Andrew Baumberg noted that the feedback from the CBA was received this Summer and will be put to the Court's Executive Committee next week.

b. E-Court working group
Andrew Baumberg noted that the working group met 3 times since the June 7 Committee meeting. It is developing a framework for an e-hearing pilot, which will be submitted to the Committee for review.

(ix) Confidentiality issues
Not discussed.

(x) Motions: stay of release from detention
(xi) Access to counsel for people in detention
Justice Diner noted that nothing has been raised by the bar under these agenda items in 2 years. They can be removed from the agenda.

(xii) Rules Committee Update
Andrew Baumberg noted that the proposed amendments to the *Citizenship, Immigration and Refugee Protection Rules* were published in Part I of the Canada Gazette – comments will be brought to the Rules Committee. As for the Substantive rules amendments, which were published late last year in Part I, feedback from the Immigration and Refugee bar indicates that the Rule 151 / 152 amendments may have an onerous impact on the Bar -- for consideration by the Rules Committee.

4. Next Meeting
For the Spring 2018 meeting, Justice Diner noted a conflict for two members of the Court (for a half-day meeting earlier in the week of the CBA meeting).

> **Proposal:** a 90 minute meeting on **Friday, April 20 in the afternoon,** with a smaller agenda – if there are more agenda items, we can schedule a longer meeting at another time.