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28th Immigration Law Summit

Practice Tips for Remote Hearings *Justice Alan Diner*

November 27, 2020

Agenda

- The Benefits of Remote Hearings
- Technical Tips
- Advocacy Tips
- Cautions
- Useful Resources
- Appendices



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The Benefits of Remote Hearings

- Accessibility – for applicants, the public and the media
- Timeliness – hearings tend to start on time, and can often end early
- Clarity – participants are generally easier to see and hear than in a courtroom (incl., for assessing witness credibility)
- Efficiency – costs of attendance may be significantly reduced, both for counsel and litigants or other viewers



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Remote Hearings – Technical Tips

- Familiarize yourself with the platform (e.g., Zoom) before the hearing
- Anticipate technical difficulties – have IT help handy
- Use suitable devices with a strong internet connection
- Use microphone headsets for better audio
- Use multiple screens, but beware potential distraction
- Reserve a private, quiet location from which participate



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Remote Hearings – Advocacy Tips (1)

- Provide an outline of your argument
- Speak slowly and clearly
- Tell a story– do not read or regurgitate written submissions
- Use visual aids (e.g., PowerPoint) to guide the Court through complex submissions or evidence, when appropriate



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Remote Hearings – Advocacy Tips (2)

- Assume the judge has read your written submissions
- Answer questions directly, when asked
- Listen to the judge's comments, instructions
- Know your case cold and be flexible in your argument
- Give the judge time to locate and examine documents



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Remote Hearings – Cautions

- Exercise caution when “sharing” your screen
- Turn on/off microphones and cameras as appropriate
- Show respect to parties, the Court, and courtroom decorum
- Rules of procedure and rules of evidence still apply
- Beware of non-verbal communication



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Useful Resources

Hearings:

- [FC Policy Statement on E-Hearings](#)
- [FC Virtual Hearing User Guide for Participants](#)
- [FC Virtual Hearing User Guide for the Public and the Media](#)

E-Filing

- [Information on E-Filing](#)
- [E-Filing Resources](#)



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Appendix A – General Tips for:

1. Written submissions
2. Oral submissions
3. Reviewable errors

1. Written Submissions

1. Never compromise your own credibility/integrity
2. Understand that judges routinely deal with a broad range of different areas of the law
 - A brief overview of how the issues fit into the statutory framework can be helpful, especially for more complicated applications
3. Respect the page limits
4. Use headings and subheadings to organize your arguments

1. Written Submissions

5. Focus your written brief on your strongest issues – and keep those issues to a very small number (3 or 4)
6. Ensure your references to the jurisprudence are up-to-date and on point
7. Ensure the relevant facts are sufficiently described
8. Support your positions with the most reputable, objective sources of evidence
9. Deal directly with the weaknesses in your case

1. Written Submissions

10. Pay careful attention to the standard of review

- If reasonableness, don't plead the JR on a correctness standard
- Support your case with up-to-date jurisprudence
- Ensure that you refer to current jurisprudence, including *Vavilov*
- Ensure that any pre-*Dunsmuir* jurisprudence is still good law

1. Written Submissions

11. Make any reply submissions brief and punchy – avoid repetition with initial submissions
12. Proofread your brief and tailor to your case any material culled from your precedents
13. Avoid last minute motions: avoid surprises and bring interlocutory matters early

2. The Hearing and Oral Arguments

1. Prepare for allocated time; focus on your most important points
2. Know your case cold, so you can deal with the unexpected
3. Pace yourself: Don't speak too quickly
4. Consider providing a road-map at the outset
5. Assume the judge has carefully read your submissions and formed an initial impression of the case

2. The Hearing and Oral Arguments

6. Understand that, to make a difference, oral decisions must do more than regurgitate those submissions – practice the art of advocacy and tell a story.

Don't just read your notes!

7. Avoid reading quotes
8. Be courteous and civil

2. The Hearing and Oral Arguments

9. Pay attention to the judge:

- Listen carefully to what the judge has to recommend about how you may wish to spend your allocated time
- Answer questions directly - the sooner the better
- Move onto other issues if the judge signals s/he has heard enough, or if you are not making headway with the argument

2. The Hearing and Oral Arguments

10. Avoid hyperbole – e.g., “outrageous,” ridiculous”
11. Be aware that your non-verbal reactions are easy to see from the bench – and may be perceived to be unprofessional
12. Where there is a big written record, provide the Court with a compendium of key arguments, evidence and jurisprudence extracts
13. Don't ask for costs unless truly unusual or egregious circumstances

3. 13 Common Reviewable Errors

1. Failure to properly state or apply the appropriate legal test
2. Failure to explain basis for conclusions regarding the legal test and its application
3. Failure to address one or more elements of the legal test, or statutory assessment factors
4. Insufficient explanation for factual or credibility findings
5. Failure to take account of cultural, socio-economic or other potentially relevant differences in making implausibility findings

3. 13 Common Reviewable Errors

6. Failure to ground findings/conclusions in the evidence
7. Failure to “come to grips” with important evidence going the other way
8. Unintelligible decision - problems with reasoning pathway
9. Misapprehension of the evidence
10. Basing important findings on speculation
11. Fettering of discretion
12. Lack of rationale for the decision, or the outcome is unreasonable in the circumstances

3. 13 Common Reviewable Errors

13. Failure to accord procedural fairness:

- Reliance on extrinsic evidence
- Insufficient notice of hearing
- Breach of right to be heard
- Failure to permit submissions to be made
- Denial of right to an accurate interpreter
- Statements/actions reflecting bias
- Denial of right to be represented by counsel

NB: In determining content of duty of fairness, you need to be guided by the factors identified in *Baker v Canada (Minister of Citizenship & Immigration)*, [1999] 2 SCR 817 at paras 21-28, [1999] SCJ No 39.

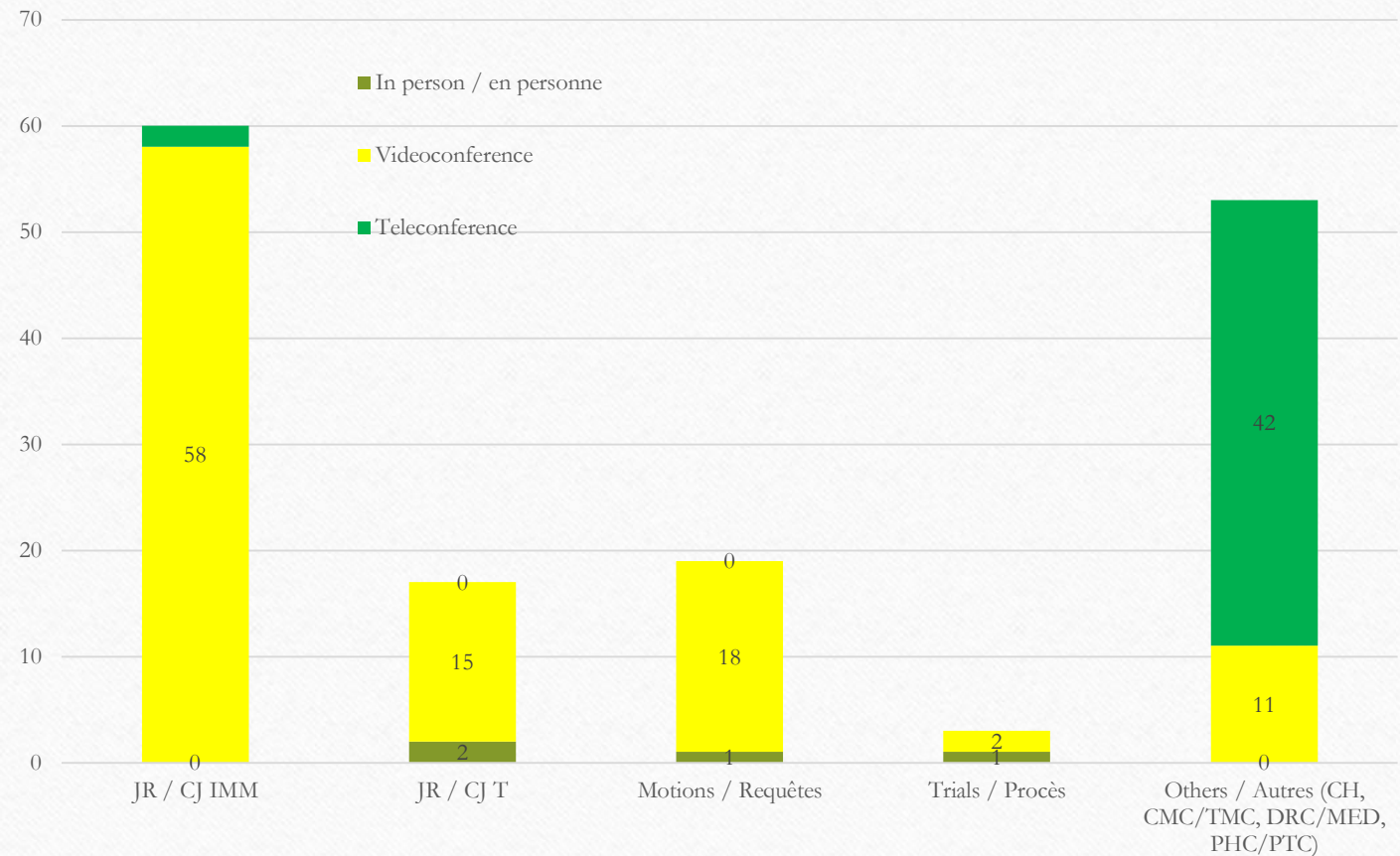


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Appendix B – Immigration Statistics

Current schedule: (December 2020)

- 252 hearings:
 - 60 JR IMM
 - 17 JR T
 - 19 motions
 - 3 trials



Adjourned Matters (mid-March – November)

- Of approx. 630 matters that were adjourned, only:
 - 11 JRs still awaiting a hearing date (Registry to contact parties).
 - 2 motions remain to be scheduled.
 - 3 trials remain to be scheduled.

Proceedings Commenced

Subject Matter	2017	2018	2019	2020*
Aboriginal Law	44	61	52	35
Admiralty	118	120	109	54
Citizenship	220	67	74	39
Crown Litigation	298	486	412	150
Immigration & Refugee	5572	6522	7782	4514
Intellectual Property	345	334	370	208
Judicial Review	656	687	641	326
Other Applications	27	26	53	29
Total	7280	8303	9493	5355

* To 2020-09-28

IMM Workload: (Leaves Down 21% YTD)

Year to Date – Year over Year	LEAVE TOTAL /
2020 (Jan. 1 to Sep. 28)	4514
2019 (Jan. 1 to Sep. 28)	5742
	-1228

IMM Stays – March 13 to September 30

	Stays	Granted		Dismissed		Withdrawn
		Granted	Granted - Interim Basis	Refused to hear	Heard but dismissed	
	24	5	0	0	17	1
Total		5		17		
		20.83%	0.00%	0.00%	70.83%	8.33%
Total %		20.837%		70.83%		

Breakdown of Stay Workload

- The 24 IMM stays were evenly split between stays of removal and stays of release from detention.
- Several additional urgent applications were filed by persons in detention seeking release due to COVID-19 related safety concerns.

IMM Settlement Pilot

Toronto Settlement Pilot Project Update	Toronto SPP files (2019-2020)	Inflated 2018 statistics for an equivalent sample
Judicial reviews scheduled	1155	1155
Settlements	116	112
Discontinuances	177	192
Rate of settlements/discontinuances	25.4%	26.3%
Rate of settlements/discontinuances occurring within two weeks of the hearing	16.0%	39.2%
Percentage of hearing spots backfilled	49.1%	26.3%



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Appendix C - Looking Ahead

Looking ahead (1)

- The Court's workload is continuing to ramp back up
- Huge volume of immigration decisions anticipated in coming months/year
- Additional files currently stuck in system due to unavailability of Certified Tribunal Records in electronic format

Approx. 500 IMM Requests for Leave currently in limbo:

- RPD - 123
- ID – 120
- IAD – 15
- PRRA – 117
- Outside Canada - 138

Looking ahead (2) - IMM Forecast:

IRB Totals for FY 2019-2020

- RPD: 40K
- ID: 8K (detention) + 900 (admissibility)
- IAD: 2.4K
- RAD: 10K

IMM Forecast (RPD, ID, IAD)

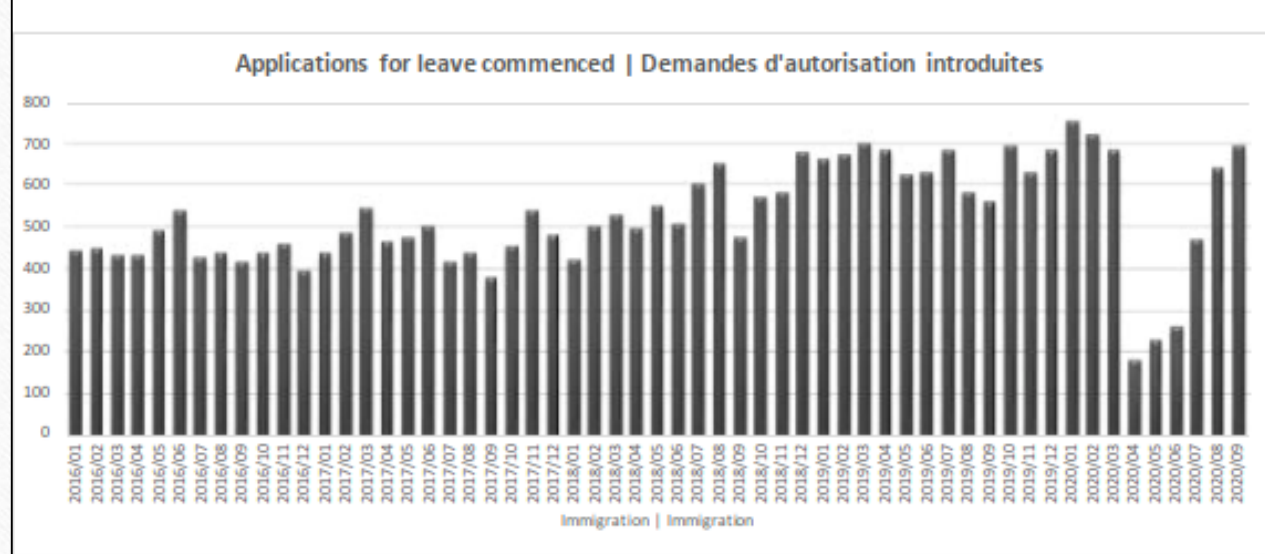
- RPD, ID and IAD files have not been moving forward.
- CTRs are all paper.
- Issues of access to paper records and resources for scanning.

Looking Ahead (3): IMM RAD

- RAD pilot project: 65 dates given so far, plus 35 awaiting a hearing date pending receipt of CTRs (Production Orders issued)
- More broadly, RAD has issued approx. 2000 decisions in the last 16 weeks
- Projecting min. 200 weekly for coming weeks
- In 2019, 26% of negative RAD decisions (1521) were JR'd
 - This suggests that approx. 450 files may be working their way towards us, with at least another 52 per week after that

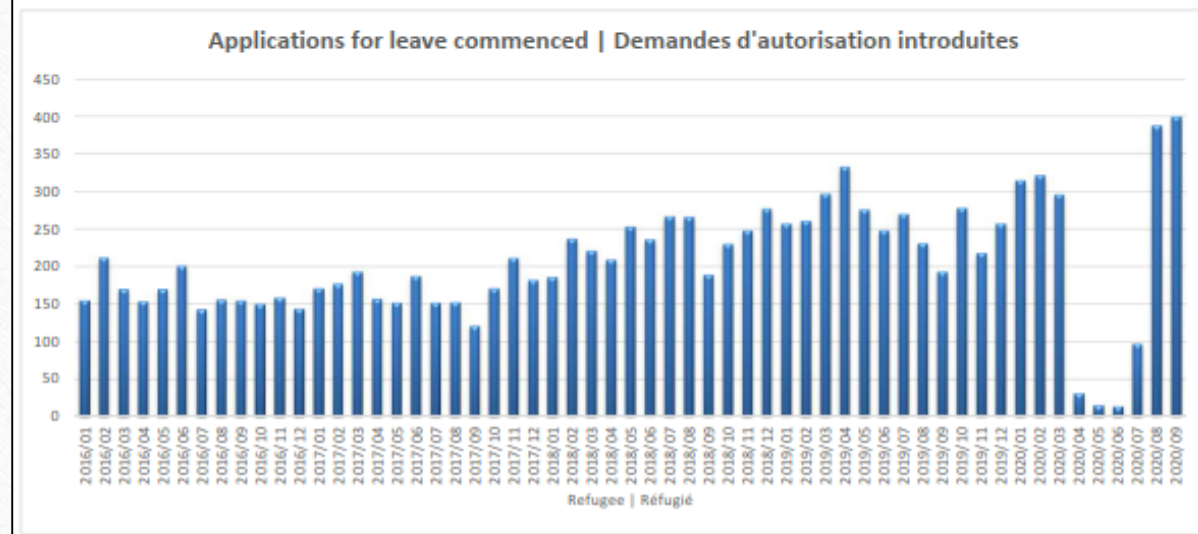
Applications for Leave Commenced

	2016	2017	2018	2019	2020
(01) Jan jan	439	433	417	661	747
(02) Feb fev	446	483	500	668	719
(03) Mar mar	428	543	526	697	678
(04) Apr avr	426	458	493	678	178
(05) May mai	485	470	544	623	225
(06) Jun jun	534	499	506	627	256
(07) Jul jul	423	411	598	682	464
(08) Aug aou	436	435	649	580	635
(09) Sep sep	415	373	469	555	689
(10) Oct oct	433	450	567	692	
(11) Nov nov	455	533	580	626	
(12) Dec dec	392	476	673	682	
Total	5,312	5,564	6,522	7,771	4,591



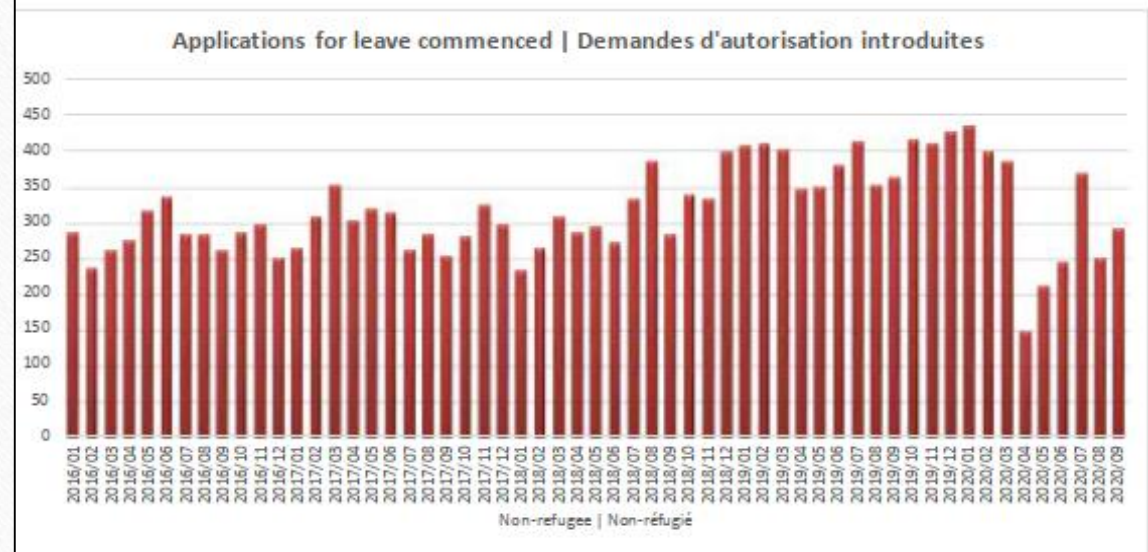
Applications for Leave Commenced: Immigration (Refugee)

	2016	2017	2018	2019	2020
(01) Jan jan	155	171	186	257	315
(02) Feb fev	212	177	237	261	322
(03) Mar mar	170	193	221	297	296
(04) Apr avr	154	157	209	333	31
(05) May mai	170	152	253	276	15
(06) Jun jun	201	187	236	248	14
(07) Jul jul	143	152	267	270	97
(08) Aug aou	156	153	266	231	388
(09) Sep sep	155	121	189	193	400
(10) Oct oct	150	171	230	278	
(11) Nov nov	159	211	248	218	
(12) Dec dec	144	182	277	257	
Total	1,969	2,027	2,819	3,119	1,878



Applications for Leave Commenced: Immigration (Non-Refugee)

	2016	2017	2018	2019	2020
(01) Jan jan	284	262	231	404	432
(02) Feb fev	234	306	263	407	397
(03) Mar mar	258	350	305	400	382
(04) Apr avr	272	301	284	345	147
(05) May mai	315	318	291	347	210
(06) Jun jun	333	312	270	379	242
(07) Jul jul	280	259	331	412	367
(08) Aug aou	280	282	383	349	247
(09) Sep sep	260	252	280	362	289
(10) Oct oct	283	279	337	414	
(11) Nov nov	296	322	332	408	
(12) Dec dec	248	294	396	425	
Total	3,343	3,537	3,703	4,652	2,713



Looking Ahead (4)

- Travel/safety restrictions will continue to present challenges
 - In-person hearings
 - Witnesses
- Funding to assist the entire “eco-system” to transition to a much more digital system will be critical

Looking Ahead (5)

- Some counsel are clearly missing the in-person setting
 - Cross-examination
 - Cues from judge
 - Non-verbal language
 - Opportunities to communicate with co-counsel and opposing counsel



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Appendix D - 2020-2025 Federal Court Strategic Plan

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