

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

***MINUTES OF MEETING HELD ON
Thursday, January 13, 2011
Teleconference***

Attendees:

Justice Robert Barnes (FC) – Meeting Chair
Justice Michael Phelan (FC)
Justice Yves de Montigny (FC)
Justice Russel W. Zinn (FC)
David Matas (CBA, Winnipeg)
Lorne Waldman (CBA Toronto)
Gordon Maynard (CBA Vancouver)
Kerri Froc (CBA Staff lawyer, Ottawa)
Mario Bellissimo (CBA Toronto)
Mitchell Goldberg (CBA Montreal)
Elaine Doyon (AQAADI)
Sandra Weafer (DOJ Vancouver)
Ms. Diane Dagenais (DOJ Toronto)
Michael Synott (DOJ Montréal)
Andrew Baumberg (Executive Officer, FC, Ottawa)
Dora Caron (Registry, FC, Ottawa)
Anne Edge (Judicial Administration, FC, Ottawa)

Regrets:

Wendy Danson (CBA Edmonton)

1. Welcome, Agenda & Minutes

- (i) Responsibility for Minutes - Mr. Baumberg will take minutes.
- (ii) Review of Minutes for May 14, 2010 - Me Doyon is with AQAADI not CBA.
- (iii) Welcome by the Committee Chair

2. Business Arising from Previous Meetings

(i) Bill C-11

Justice Barnes provided an estimate of 700 stay motions per year. As the backlog of cases works its way through the system, it is expected that this number will increase. **Mr. Matas** provided an update of the discussion from the previous meeting, and then asked, more precisely, how many stay motions are requests for a stay of deportation in the context of a humanitarian & compassionate (H&C) application. **Justice Barnes** noted that the Court does not track the context or the outcome, adding that there are often numerous issues in play. **Ms. Dagenais** stated that the deferral request is often based on the H&C. **Mr. Matas** noted the key

issue is when the judicial review application concerns the refused H&C, because the government is still committed to trying to prevent applicants from applying for an H&C before removal. The Bar feels that it would be useful to have objective statistics.

Mr. Baumberg noted that the underlying issue, and whether a stay is requested, is included in the public, online docket.

Action: The Bar will seek to do a preliminary review of the online docket to see if it is sufficient to provide relevant data. The issue will be reviewed at the next meeting.

A secondary issue was raised with respect to access to Court orders on stay motions. The Bar requested full access to electronic copies of Orders. Mr. Baumberg noted efforts by the Courts Administration Service to provide a comprehensive Case Records Management System with access to the Court file, including Orders, via the online docket page – this is a longer-term technology project. There was also a trial project to provide computer access for ITA certificates in public registry offices.

(ii) Common List of Authorities

Mr. Bellissimo and **Ms. Dagenais** worked on an amended list, which was sent to J. Snider, who approved it.

Action: **Ms. Weafer** will re-send it to **Mr. Baumberg** for implementation.

(iii) List of Certified Questions

The list is up to date.

(iv) Time period allocation in Orders for judicial review

Justice Barnes noted that some leave decisions are issued with a hearing in less than 90 days, though depending on the circumstances, the time-frames are not always set consistently (apparently, though, the time-frame for the tribunal record must always be 21 days). He added that the Court needs to have some flexibility in scheduling these cases on shorter notice. **Ms. Dagenais** noted that when shorter time frames are applied, they often are truncated in a manner that disproportionately prejudices the respondent. **Mr. Bellissimo** added that if there is an opening in the Court's calendar, there might be some consideration by the Court of the type of case the select – some types of cases require less time to prepare. Also, it was suggested that given that the transcript is usually filed at the same time as the facts, no additional time is needed for filing the transcripts. **Mr. Waldman** added that the time allocated for the hearing in some cases is insufficient. There should be some opening for counsel to request longer hearing times. **J. Barnes** noted that counsel can write a letter to be brought to the attention of the judge granting leave, or the judicial administrator thereafter. If required, additional time can be allocated.

Action: **Justice Barnes** suggested that this issue be put on the agenda for the next meeting with judges as well as judicial assistants to address.

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

Justice Barnes noted that there is some concern that the 'fix' that had been suggested at the last meeting – *an amended form 301* – would probably not address the problem. **Mr. Bellissimo** thought that the form should provide both the applicant's address as well as the representative's address *if a fee is charged*. **Justice Barnes** asked who is to police this. **Mr. Bellissimo** responded that if it is clear to Registry staff that there is a pattern of representation by a non-

lawyer, the registry might pursue the matter with the Bar.

There might be additional information on the form to indicate whether the individual is represented by legal counsel. Based on his research, **Mr. Bellissimo** thought that there might be 300-400 applications per year by individuals who are not authorized to practice law. Upon discussion with representatives of the Bar, he noted that they require clear evidence of illegal practice – rather than fraud – which should be addressed by the RCMP. **Mr. Synott** suggested that the CBA contact the Quebec Bar, which is quite active in policing illegal practice. **Mr. Maynard** suggested that if it is apparent to the Court that the rules are not being followed, the onus is on the Court / Registry to act. **Mr. Synott** noted that it is very difficult to reach a conclusion based solely on a repeat address. **Mr. Bellissimo** stated that there appears to be significant exploitation of applicants in this field – it is important to try to find measures to remedy the situation.

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

Justice Barnes asked why we don't see more of these cases. The Bar responded that the legal aid programs do not cover extra costs for a motion for confidentiality. **Justice Barnes** noted, though, that an informal motion, brought by letter on consent, or orally at the hearing, may be sufficient. **Mr. Baumberg** noted that many applicants seem to be under the mistaken impression that the Federal Court hearing is still confidential, as it was before the Immigration and Refugee Board, and sometimes they ask the Court to amend the final decision and remove it from the public website. A member of the Bar added that there is some jurisprudence of the Federal Court of Appeal that the Federal Court has no jurisdiction to amend the decision *ex post facto* to make it confidential – the Court is *functus*. A suggestion was made, though, that the final decision could remain unchanged but be sealed, with an expurgated public version issued.

3. CBA / Department of Justice Items

(i) Article – University of Denver

One member of the Bar noted that there is significant concern among the Bar regarding the significant variance in the rate of granting leave in IMM cases. One suggestion was to have a panel of three judges where there is a question regarding whether or not to grant leave. It may also be useful, from time to time, for the Court to issue reasons at the leave stage, which would address the concern in part. Most importantly, this would be helpful where leave is denied in cases *where the respondent has not filed a reply*, which implies that the respondent does not oppose the application. There is concern by members of the Bar with these types of exceptional cases where they consider there to be a very clear, arguable case, but leave is nonetheless denied. It was noted that there were informal initiatives within the Bar to develop individualized statistics. **Justice Barnes** encouraged the Bar to provide such statistics to **Mr. Baumberg**.

(ii) Global Case Management System (GCMS)

Ms. Weafer provided an update on the government's transition to the Global Case Management System.

(iii) Stay applications without clear removal direction

Mr. Waldman noted that the government controls timing of removal. The Court's policy is not to allow a stay application until there is a direction from the government to the individual to

report for removal. In some cases, though, Canada Border Services advises individuals to leave the country and have a ticket and ready to leave, but there is no actual *direction* to report. This should be a sufficient threshold to warrant a stay application. The applicant should be able to request a stay once the Minister sends a requirement to leave the country by a specific date. **Justice de Montigny** noted that this is more an issue for the Minister to improve its practice, not the Court. If the order to report is issued by the government at the last minute, there is the possibility of an interim stay being issued.

(iv) Reverse order pleadings

As noted by the Chair at a previous meeting, if no reply is filed by the respondent, then the order of pleadings may be reversed. **Justice Zinn** noted that a ‘meaningful’ reply, with specific reference to the facts and issues, is required.

4. Federal Court Items

(i) Leave application: No reply from Department of Justice

Ms. Dagenais and **Ms. Weafer** were surprised to be informed that in quite a number of cases, no reply was filed. **Ms. Weafer** would appreciate a telephone call from the Registry. The Department of Justice will *always* respond, either with a letter or else a formal reply. **Mr. Maynard** asked what the position of the Department is if it responds that it ‘takes no position but reserves the right to file if leave is granted.’ The members of the Court present indicated that they interpret this as consent by the Department.

(ii) Rules Committee

The Rules amendments are on the Court web site Rules page with a link to Canada Gazette.

(iii) Summer Recess

The dates are July 25 to August 5, 2011.

(iv) Address for service – Attorney-General

Request to the Department of Justice to consider posting an address for service to make it clear for litigants.

Action: the Department of Justice representatives will consider this request and provide an update for the next meeting.

5. Varia & Next Meeting

Mr. Synott noted an issue with the Montreal Liaison Committee concerning Citizenship Proceedings – this should be on the agenda for the next meeting. See *Canada v. Select Brand et al.*, FCA, A-255-09 (January 11, 2010), and in particular paragraphs 52 to 57, regarding Rules 317 / Rule 318 and the need to re-file the tribunal record.

The next CBA Continuing Legal Education conference is scheduled for **May 12 - 13, 2011**, in Gatineau. We shall schedule the next meeting of this liaison committee around the schedule of the CLE.