

**FEDERAL COURT BENCH AND BAR LIAISON COMMITTEE
(IMMIGRATION & REFUGEE LAW)**

MINUTES OF MEETING
January 24, 2012

Attendees:

Chief Justice Crampton (FC)
Justice Robert Barnes (FC) – Committee Chair
Justice Yves de Montigny (FC)
Justice Michael Phelan (FC)
David Matas (CBA, Winnipeg)
Tamra Thomson (CBA Staff lawyer, Ottawa)
Mario Bellissimo (CBA Toronto)
Mitchell Goldberg (CBA Montreal)
Sandra Weafer (DOJ Vancouver)
Diane Dagenais (DOJ Toronto)
Michael Synnott (DOJ Montréal)
Lorne Waldman (CBA Toronto)
Wendy Danson (CBA Edmonton)
Audrey Macklin (University of Toronto)
Daniel Gosselin (Chief Administrator, CAS, Ottawa)
Andrew Baumberg (Executive Legal Officer, FC, Ottawa)
Sylvia Mackenzie (Legal Counsel, FC, Ottawa)
Manon Pitre (Registrar, FC, Ottawa)
Dora Caron (Senior Registry Officer, FC, Ottawa)
Anne Edge (Office of the Judicial Administrator)
Regrets: Marie-Hélène Giroux (AQAADI), Gordon Maynard (CBA Vancouver)

1. Welcome, Agenda & Minutes

Preliminary issue re attendance

Short discussion re participation by a journalist from Lawyers Weekly.
There was some concern re participation of media on call, that it might prevent full and frank discussion.

(i) Responsibility for Minutes

A. Baumberg shall take a minute of the meeting.

(ii) Review of Minutes for May 13, 2011

Minutes were approved, subject to the following changes:

- 3ii – this was an initiative of Citizenship and Immigration Canada, not the Department of Justice
- 3iii – addition of Chief Justice Crampton and Canada Border Services Agency to the list of participants

(iii) Welcome – Committee Chair: Update – Court statistics.

Justice Barnes welcomed new participants at the meeting. He noted that there were a total of 9842 IMM proceedings in 2011, up 2000 since last year, the highest total since 2003 / 2004. December saw 1119 cases, almost double the monthly average from the previous year. He noted some groups of files initiated recently, such as mandamus applications.

2. Business Arising from Previous Meetings

(i) Bill C-11

Mr. Waldman indicated that he had heard that legislative amendments were expected, including removal of the interview process and some items not directly related to C-11.

(ii) Common List of Authorities

The list has been updated, including a new volume 3.

Mr. Matas asked about the possibility of posting old authorities. It was proposed that the Bar compile a list for submission to the Court to get them posted on the Court web site. Mr. Matas agreed to lead this work. This will be discussed at the next meeting.

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

Mr. Bellissimo noted that the Bar has on-going discussions with the IRB re inclusion in their decisions of information about appeal options. The other suggestion is for there to be changes to the forms to include the applicant's address. This is left with the Court to discuss with the Rules Committee.

Justice Barnes noted the Court's pro bono initiative, though there is little take-up by litigants. This can also be included, perhaps, in discussions with the IRB.

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

Mr. Baumberg summarized a research paper concerning the practice in other jurisdictions.

Mr. Matas noted the challenge with searching for cases if there are no personal identifiers. Can the leave form be changed to include an option for a specific request for anonymization?

Mr. Goldberg recommended simplification of the process for requesting confidentiality.

Mr. Waldman noted that publicity in itself can heighten the risk. However, it is often difficult to anticipate the level of risk. In any event, it should be simpler to request confidentiality.

Mr. Baumberg noted that use of initials in the style of cause is a very minimal restriction on access to the Court – it is not a closed hearing or sealed file. It could probably be done via Practice Note if the Court agreed with the proposal. He noted that he gets about 1 request per month from a litigant who was surprised to find personal details in a Court decision (whether or not the decision is available via internet search engines).

Mr. Synnott recommended that this go back to the Bar for discussion.

Mr. Bellissimo will bring this to the CBA executive for development of a consensus position to be put to the Court.

Mr. Waldman noted that the key issue is the name of the applicant, particularly where the decision can be searched online.

Chief Justice Crampton noted that a similar issue has arisen in another context (competition law), where documents are filed on a courtesy basis. There has been considerable effort to try to frame the issue, and materials are nearly complete. He welcomes a very clear formulation, as narrow as possible, from the Bar regarding confidentiality.

Ms. Dagenais noted the importance of providing notice, in individual cases, regarding the issue of confidentiality.

Ms. Weafer noted that confidentiality requests should include a detailed explanation, not simply a bare request.

Justice Barnes noted that this can perhaps be discussed at the Kelowna meeting.

(v) Study – University of Denver / Osgoode Hall

Justice Barnes provided an update on the issue, noting a recent meeting with Professor Rehaag and an upcoming Court discussion in February on the leave process and a general education seminar on immigration issues in October. He noted there are various proposals on the table, most of which require significant resources (that are currently not available).

Mr. Matas proposed providing reasons in some but not all cases. Another option might be to allow for leave to be argued in open court, but again not in all cases. He noted that this has occurred already.

Mr. Waldman just filed a leave application with complex facts and legal arguments – he considered the possibility of requesting an oral hearing at the leave stage. Though this should only be used for particularly complicated cases.

Chief Justice Crampton noted that the Court reviews approximately 90 leave applications per week (though often some are deferred to a subsequent week) – there are insufficient judges to hear a large proportion via an oral hearing.

Ms. Macklin proposed the possibility of a second judge hearing negative decisions.

Justice Barnes noted that this suggestion, on a rough estimate, would require approximately 2 more judges.

Chief Justice Crampton noted from the meeting with Professor Rehaag that it was agreed: we should not target any particular rate of acceptances of leave applications. The Court will be meeting to discuss the leave process, with an expectation that, even without any effort to encourage individual judges to change their position, there might be some convergence.

Ms. Macklin proposed doing a short pilot assessment of the 2-judge proposal, rather than a permanent initiative. The purpose of this pilot would be to determine the degree to which the variance in decision-making is affecting the outcomes.

Justice Barnes noted that one key factor arising from the studies seems to be the quality of legal representation. Some counsel noted that their leave granted rates at the Court were better than the average, though also noted that their grant rate varied depending on the judge involved.

Mr. Matas suggested the possibility of looking at only a small number of cases, with criteria established.

Mr. Bellissimo thought a pilot would be useful – he noted that there is a handful of cases each year that surprise him when refused at the leave stage. A pilot should not be restricted to refugee cases.

Justice Phelan noted that a pilot project might be seen to be unfair for those cases not included in the sample. He was concerned that running such a test may not address the issue.

Ms. Macklin recommended that we don't make the perfect the enemy of the good.

Justice Barnes questioned the value of providing reasons if there is no appeal. Although a 2-judge panel or removal of the leave requirement were attractive options, they would require additional judicial appointments.

Chief Justice Crampton raised a further question regarding the variance within the Federal Court as compared to the variance within other Courts. At present, the Court recognizes that this is something that it needs to address, though without clarity as to whether this is a larger problem than faced by other Courts.

Ms. Macklin noted that no other Court requires leave at the first instance of judicial review. She raised the proposal of articulating more clearly the test for granting leave and the manner in which it should be applied.

Chief Justice Crampton noted this being developed for the Court meeting.

Ms. Macklin noted the US process for getting input on such criteria.

Chief Justice Crampton welcomed input from the Bar, including a précis on the state of the law.

Justice Barnes also noted the possibility of a 3-member panel on the issue, to provide written reasons for guidance.

Chief Justice Crampton noted that the Court, in discussions with Professor Rehaag, considered variance in the Court's leave rate at both extremes of the scale. It is considering a number of options, including limiting the number of leave applications heard by newly-appointed judges. The key goal is to try to establish consensus around the leave test and to reduce the wide variance.

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

Justice Barnes noted that he hadn't seen any further files without a reply. There were no examples of this problem from members of the Committee.

(vii) Address for service – Attorney-General

The address should be on the website shortly. It has been approved in principle and is now at the web group stage.

(viii) Visa officer files (15 or 60 days?)

Ms. Dagenais noted that as the legislation stands, this remains an issue. Litigators have been instructed not to oppose requests for extension, subject to the discretion of the Court.

3. CBA / Department of Justice Items

(i) Citizenship appeals (certified record by tribunal)

Justice Barnes noted that the Quebec Bar has requested that the citizenship process follow the same approach as in IMM proceedings, so as to avoid the need for an additional affidavit setting out the tribunal record. Upon preliminary discussion within the Court, it was suggested that requiring the affidavit *might* clarify the record.

Ms. Goldberg noted that there seemed a huge duplication of effort, with multiple copies of the same documents.

Mr. Synnott noted that in the past, counsel regularly referred to the tribunal record, and the process worked well; but since the case of *Select Brand*, the process is cumbersome. There is no more reason to require an affidavit in citizenship cases than in IMM cases, where a certified copy of the record is also available. He had understood, based on correspondence from the Court, that the Rules Committee is looking at Rules 309 and 310.

Justice Barnes will revisit the matter with the Rules Committee.

4. Federal Court Items

(i) Court Update

Justice Barnes noted Chief Justice Crampton was appointed December 15, 2011; Chief Justice Lutfy assumed supernumerary status effective September 30, 2011; J. Campbell assumed supernumerary status January 1, 2011; J. Gauthier was appointed to the Federal Court of Appeal in October 2011; and Justice Gleason sworn-in January 20, 2012.

(ii) Format of document on paper (R65 et al)

Justice Barnes noted that the Registry expressed concern with Court records, which are sometimes poorly bound by parties and difficult to handle. The Court is also looking at an issue with the length of legal memoranda.

Ms. Dagenais noted that there is some inconsistency with the Registry practice re required binding of documents.

Ms. Pitre noted that the Registry will be developing a proposal for interpretation of the Rule (“permanent binding”), recommending no more than 200 pages per group.

(iii) Summer Recess

The dates for 2012 are July 30 – August 10.

5. Varia & Next Meeting

Mr. Gosselin noted that by 2015 / 2016 a new Case Records Management System will be complete, with full e-filing capability. Furthermore, he advised the Bar of the government’s requirement that CAS provide 5% and 10% budget reduction proposals. Any cuts will have an impact on the Court services available. The government is expected to make an announcement in the coming month.

Next meeting: at CBA CLE in Kelowna. A time will be selected that is most convenient for the most members of the Committee.