FEDERAL COURT BENCH AND BAR LIASON COMMITTEE
(IMMIGRATION & REFUGEE LAW)
MINUTES OF MEETING HELD ON
4 May 2012

Attendees:
Justice Russel W. Zinn (FC) – Meeting Chair
Chief Justice Paul Crampton (FC)
Justice Michael Phelan (FC)
Justice Yves de Montigny (FC)
Justice Judith Snider (FC)
David Matas (Winnipeg)
Lorne Waldman (Toronto)
Tamra Thomson (CBA, Ottawa)
Mario Bellissimo (Toronto)
Mitchell Goldberg (Montréal)
Allistair Hall (Registry, FC, Vancouver)
Chantelle Bowers (FCA, Ottawa)
Luke Morton (DOJ Ottawa)
Marshall Drukarsh (Toronto)
Marvin Moses (Toronto)
Peter Golden (Victoria)
Deanna Okun-Nachoff (Vancouver)
Wendy Danson (Edmonton)
Peter Edelmann (Vancouver)
Michel Synnott (DOJ Montreal) – by teleconference
Sandra Weafer (DOJ Vancouver) – by teleconference
Deborah Drukarsh (DOJ Toronto) – by teleconference
Audrey Macklin (University of Toronto) – by teleconference

1. Welcome, Agenda & Minutes

i. Responsibility for Minutes: Deanna Okun-Nachoff will take minutes.

ii. Review of Minutes from 24 January 2012: Michel Synott has two changes to propose which he will email to Andrew Baumberg.

iii. Welcome by the Committee Chair

2. Federal Court Items

i. Court Update – statistics:

Justice Zinn reported that there have been 4024 immigration proceedings in the last quarter compared to 2875 during this same quarter last year, representing a 40% increase. Of that number, approximately 14% have been in the RPD, with 85% categorized as "other" immigration matters. If current volumes keep up for the remainder of the year, this could lead to record highs. He also noted a surge in removals during the last weeks of the last fiscal year.

Allistair Hall reported a large number of mandamus cases for visa applications from China during this same time period.

Lorne Waldman anticipates that there will likely be a large influx of cases (1,000 or more) that will arise from the budget bill; this in light of the fact that the bill would extinguish a large number of pending FSW cases. **Chief Justice Crampton** reported that plans are already underway to have these case managed. However, he also reported that there are currently three vacancies at the court.

ii. Digital recording

Chief Justice Crampton reported that the court will soon be introducing a digital recording system into courtrooms as part of their modernization initiative, which will also include bandwidth upgrades, etc. It is anticipated that 48digital recording systems will be installed this summer in courtrooms across the country. Once installed, it will become standard that all hearings will be recorded. He emphasized the need to advise the bar about this development, particularly given that the recording equipment is extremely sensitive and may pick-up private conversations not intended for public consumption. Protocols are currently being developed to ensure that recording is turned off during breaks, and also where sensitive material is being discussed. The digital recording will become part of the public record.

David Matas inquired whether this technology will allow for recordings to be converted into written transcripts without transcription. **Chief Justice Crampton** explained that the technology exists, but that voice recognition software is still quite crude, and transcripts would be of very low quality. However, recordings will be sent out for typing where required by the bench or requested by the parties, at a cost.

3. CBA/Department of Justice Items

i. Potential for E-Service on Department of Justice (CBA)

Sandra Weafer reported that this issue is being looked into at the DOJ, but stated that there are no specific updates at this time.

David Matas advised that DOJ is in Winnipeg is accepting E-service on a case-by-case basis, and **Allistair Hall** reported that the same is true in Vancouver, particularly with stay motions.

Justice Snider advised that there is a strong desire from the court to have this issue addressed and urged the DOJ to have a more concrete update by next meeting.

David Matas inquired as to why the court is not defaulting to electronic service, pointing out that there is currently inconsistency. There was a consensus by all the private bar lawyers present that it would be preferable to have all communications from the court by email.

Chantelle Bowers reported that there have already been instructions to the registries regarding electronic communication – namely that they should call counsel to ask whether email service would be preferred. It was also suggested by **Marvin Moses** that the form for requesting leave be amended to include email address for service, as well as

an option to express preference for e-service. **Allistair Hall** indicated that it would be difficult with the registry's current system to consolidate information regarding the e-service preferences of counsel across all matters. However, the CRMS system is currently being developed, and this will be added to the "wish list".

4. Business Arising from Previous Meetings

i. Bills C-11/C-31

Lorne Waldman opined that the budget bill is likely to produce many more leave applications from the RPD, as well as an influx of stays because the regulatory stay provisions are being cut down dramatically. He also anticipates that, given shortened timelines in the refugee determination process, the number of people seeking judicial stays will spike accordingly, particularly given that alternate remedies are being eliminated.

Peter Edelmann suggested that the first major surge is likely to happen on coming into force (i.e. before 29 June 2012), with a second surge by early 2013 on the order of the GIC around designation of foreign nationals.

Chantelle Bowers recommended that this issue be added to the agenda for the Bench and Bar Liaison Committee meeting in June.

ii. Common List of Authorities

Justice Zinn reported that a third volume of common authorities has now been published. He asked David Matas to report his progress on a proposed list of older authorities that might be made available on the website. **David Matas** reported that he has put together a preliminary list, which he will forward to **Tamra Thompson** to circulate to the CBA membership for further input.

iii. Development of Screening Mechanisms for non-lawyers filing leave applications

Chantelle Bowers will add this to the agenda for the 11 May 2012 Rules Committee meeting.

iv. Restriction on identification of vulnerable persons in federal court cases

Mario Bellissimo reported that this issue was brought to the CBA Immigration Section for an opinion by way of a survey. **Tamra Thomson** reported that there is no consensus on this issue from the bar as a whole, but rather an ongoing tension between the bar's desire for open courts and the concern for privacy/security of litigants. She reported that, when the immigration law section was surveyed, two questions were posed to solicit feedback regarding whether members support anonymity for refugee claimants at the judicial review stage, and whether decisions should be redacted to remove any information that would identify the applicant or relative. Within the immigration bar, there was overwhelming consensus that there should be anonymity at the judicial review stage and in the published decision. There were a small number who commented that anonymity should be on request only, though others said that the requirement of a special application for anonymity would add to the cost for impecunious applicants. There were also some comments from those who feared that anonymity could allow those who are

misrepresenting to go undetected (noting those cases where war criminals were identified from IRB and FC decisions). It was also agreed that, if the court goes in the direction of redacting decisions that they leave enough information to preserve the precedential value of the decision. **Tamra Thomson** will forward the survey results to the court to take under advisement.

Justice Snider pointed out that while the IRB is already taking steps to preserve anonymity, the situation is different for the court where things are presumed to be public. To be fully realized at the courts, this initiative would require legislative change. **Justice de Montigny** also pointed out that it would be a serious case management issue if the court attempted to administer this on an *ad hoc* basis.

Chief Justice Crampton reported that he is actively pursuing this issue, but encouraged the CBA to attempt to achieve consensus in the broader CBA. Given the tension between the desire for open courts and the need for anonymity, some degree of consensus on significant areas where protection might be warranted would strengthen the court's position. He indicated that the more narrowly the court can circumscribe the restriction, the better the chance of getting agreement from other sections.

Marshall Drukarsh emphasized that counsel must be careful to warn their clients about the risk that their identity might be ascertained; counsel must also make themselves familiar with the procedures for requesting anonymity.

Mitchell Goldberg indicated that, even if redacting facts is not yet possible, some benefit would arise from simply removing names from the decision.

v. Study – University of Denver/Osgoode Hall

Chief Justice Crampton acknowledged that the issue raised by this study has a fairness dimension. The court has been facilitating access to records for those who wish to do studies; they have established an internal working group to consider/address the issue and introduce measures to address lack of consistency; they have had one round-table internally regarding the test for leave as well as the standards of review from jurisprudence since *Dunsmuir*, and they have also met with Professor Rehaag. The unanswered question is whether the results would be different if Professor Rehaag were to conduct another study in 2013, allowing time for the new measures implemented after the first study to be felt. It is also unclear whether the reported variation in the study would have been significantly narrower if certain outliers were to eliminated. However, the court simply doesn't have the resources to do its own studies.

One significant explanatory factor may be counsel. All the justices present emphasized the importance of the bar's efforts to help address the inconsistency in the quality of representation by better equipping counsel regarding preparation of records. They also stated the court's commitment to present on this topic at future CLEs.

Mario Bellissimo pointed out, however, that our reach may be somewhat limited given that not all practitioners are members of the CBA section.

Chief Justice Crampton also reported that the court is currently developing a list of factors for justices to consider in making leave decisions. He welcomes CBA input on the factors that might be most helpful, and will circulate a draft list for this purpose.

vi. Address for service – Attorney General

Deborah Drukarsh reported that the web link was emailed by Diane Dagenais to Andrew Baumberg and should soon be up and running.

vii. Citizenship appeals (certified record by tribunal)

Chantelle Bowers reported on this issue, which was raised at the Liaison Committee meeting in Montréal in Feb 2011, following the decision in *Canada* v. *Select Brand et al* FCA, A-255-09.

A proposal was advanced to re-word rules 309 and 310 in such a way as to preclude the necessity of including an affidavit when producing the contents of the tribunal record. Proposed changes are now in the Gazette and will come before the Rules Committee soon.

viii. Time period allocation in Orders for judicial review – feedback

Feedback is that the time period allocation is now working efficiently for the bar and DOJ alike. The justices urged that all efforts be made to give the court as much notice as possible on stay cases. **David Matas** recommended that counsel advise CBSA as soon as possible that a stay application has been contemplated, and reported that they have been accommodating these requests by allowing sufficient time to prevent a last minute application. **Mario Bellissimo** reported that the inverse is happening in Toronto, where CBSA has been giving less and less notice.

ix. Varia and Next meeting

Marvin Moses pointed out that the Federal Court website's alphabetical listing of cases is grouped under letter but not alphabetical. This issue was noted by **Chief Justice Crampton**.