

**BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)****Friday, April 3, 2020 via Zoom Meeting****MINUTES****1. Agenda / minutes [March 5]**

Minutes approved per Diane Dagenais / Daniel Latulippe. Agenda approved.

**2. COVID-19 Pandemic Update****(i) Practice Direction & Order (March 17) and planned amendments**

Chief Justice Crampton thanked the members of the Bar for their assistance as the Court endeavours to make decisions on a timely basis to establish measures in response to the pandemic. A revised Practice Direction & Order is being finalized for issuance soon, including feedback from today's call. The Suspension Period will be likely to be extended until May 15. Depending on provincial announcements, the end date may be revised. In the interim, the Court is exploring options to proceed with some hearings that were adjourned, if the documents are available electronically. These might be scheduled starting the week of April 27.

Of note, Courts across the country have received a letter from Ad Idem asking for clarification regarding the Courts' position related to public access to hearings. Submissions from the Bar are invited regarding possible wider public viewing of hearings.

In Ontario, the Courts are opening up beyond urgent hearings. The Federal Court is looking to proceed with case management hearings if there is consent of both parties.

The suspension period is subject to 3 exceptions, including urgent / exceptional matters, case management, as well as those for which the parties have requested that the hearing proceed, as long as the documents are available electronically and the hearing is less than 90 minutes.

Another option will be available for parties to request that the matter be adjudicated on the written record. A key consideration is the need for electronic copies of documents – the Court does not have access to all printed documents at the Registry, as there is only very limited skeleton staff who are not able to triage documents.

Also under the proposed revision to the Practice Direction, there will be a waiver of filing fees except those under statute, and a preliminary protocol is suggested for submitting confidential documents, as well as for commissioning affidavits remotely.

David Matas: many measures are temporary, but some might be useful beyond the Suspension Period. For initiating documents, the Registry is now serving them, which they do for non-immigration, meaning the whole process can be electronic. Some of these innovations are worth keeping.

Chief Justice Crampton: It has been said that there is both danger and opportunity presented by a "crisis". This situation provides an opportunity to make the court process more efficient.

Daniel Latulippe: would the court be open to filing only a list of authorities?

Justice Diner: this option is available in the Practice Direction. We can revisit this to clarify if needed.

Chief Justice Crampton: in response to a question regarding security for Zoom hearings, he noted that the Court is looking at security options. However, there are also other platforms that provide alternatives that may be more secure.

Justice Shore: recommended more limited reference material / authorities for hearings.

Chief Justice Crampton: if we can get hyperlinks, whether for authorities or country documents, this might provide a more efficient process and less material to scan / e-file.

Banafsheh Sokhansanj: asked for clarification re deemed consent to electronic service.

Andrew Baumberg referred to Rules 141 and 148. Currently, a party must consent to electronic service by the opposing party. Under the proposed Practice Direction, a party would be deemed to consent to electronic service if an electronic address was provided on a document.

Mario Bellissimo: expressed concern that, given the ongoing pandemic, some lawyers may be removed from the record. How will one serve individuals (e.g., someone out of country) if they do not cooperate?

Chief Justice Crampton: will need to take this for further consideration and follow-up.

Justice Diner: we are looking at many issues. Clearly, cooperation from counsel will assist – please continue to submit issues and questions for further discussion. (Postscript: This issue does not yet appear to have come up.)

(ii) Hearings by telephone or video (e.g., Zoom)

Robert Blanshay raised a question regarding the consent model for hearings to proceed. May 15 is optimistic. CBA members are concerned regarding employment / income, and clients want matters heard. The consent model is acceptable for proceedings in writing, but now for parties who want to move forward. What if one party wants to move forward, but not the other? Is it feasible if only one party wants to proceed? If DOJ does not consent, is a motion required? Lawyers want all stops pulled out to create capacity to hear some matters.

Chief Justice Crampton: based on the input from DOJ, if they are not able to connect to the office so they can work remotely and it is not safe for them to go to the office, we cannot force them to do so. A general principle that we are following in the Suspension Period is that we won't force someone to do something that they are not physically or technologically able to do. At the Court, nearly all staff are unable to go to the office. DOJ is not set up to participate today in remote hearings.

Chief Justice Crampton: we are trying to move quickly to deal with as many matters as possible.

Deborah Drukarsh: the most significant challenge for DOJ is lack of access to the physical files. If we can get access to electronic files from one counsel, we could move forward.

Chief Justice Crampton: ideally, unless something is urgent, it will be dealt with on a first in first out basis.

Andrew Baumberg: the court technology group is looking at document exchange options like MS 365.

Banafsheh Sokhansanj: the Court has asked parties not to file, including response on leave applications.

The BC Courts issued directives for taking affidavits by video – this was approved by the law society.

Chief Justice Crampton: there is a section in the amended PD and Order dealing with affidavits.

On the first question, parties are free to file documents electronically. Timelines don't run, but this does not prevent parties from e-filing documents. However, we do not want parties to continue to file paper.

Mario Bellissimo: as the PD now reads, once the Suspension Period is lifted, timelines will resume automatically. Realistically, though, it will be difficult for parties immediately to start up.

Chief Justice Crampton asked Justice Diner to work with bar to establish an appropriate grace period.

Diane Dagenais: we thought that e-filing was discouraged. Are we encouraged to use the e-filing portal?

Chief Justice Crampton: it is delicate. At a time that provinces are announcing lock-downs and discouraging non-essential work, we are open to parties proceeding. Having the document electronically helps the court. More registry officers are developing capacity to work remotely. We will be able to process materials, and this will reduce the backlog.

Caroline Perrier: anything e-filed that is not urgent will not be addressed at the present time. However, requests can be submitted for re-scheduling, settlement requests, matters amenable for adjudication in writing – these should be submitted as soon as possible.

Justice Diner: this is time to look at things like the e-process pilot. We are trying to innovate.

Has anyone looked at the e-process pilot?

Deborah Drukarsh: there are no new tribunal decisions for which counsel could opt in.

Justice Diner: the RAD is still active, and some other divisions might start.

Robert Blanshay: removals are also proceeding.

Justice Diner: we are trying to move stay motions to an e-process framework.

However, the CBSA has not been moving forward with removals the last couple weeks.

Chantal Desloges: does paper filing include fax?

Andrew Baumberg: not all offices have e-fax set up yet. So faxes would be received as paper and then need to be processed by limited skeleton staff.

Robert Blanshay: IRCC is still processing inland claims online. If denied, the decision could be litigated. ID and RAD are still continuing, but CBSA is apparently halting removals.

Diane Dagenais: CBSA Ontario has measures to minimize onsite staff and contact with public. Only a handful of airlines operate out of Pearson – travel restrictions make it difficult to arrange removals, so few will occur in April. CBSA staff are considering COVID-19 vulnerabilities in detention assessment – prioritizing danger to public issues for ongoing detention.

Justice Diner: there are no new removals received since March 16. He noted the Zoom platform: one office used e-filing to file new AFLAJR and the process worked well and the registry was helpful. We have resources to assist. We hear concerns of bar -- the administration of justice cannot stop, and so we are continuing to move forward.

Justice Shore: we are using new technology, but we could also use the telephone to swear someone in.

Justice Diner: for actions and trials, this is being contemplated. This has been available in some administrative tribunals like ID, for example.

Deborah Drukarsh: the VISA offices are closed at the moment.

Arghevan Gerami: is there any discussion to make documents scanned or available to justice counsel? If this process lasts many months, public bar lawyers can easily return to work, whereas private bar offices must reduce staff and will take time to return to regular operations.

Justice Diner: we are looking at OneDrive, DropBox, MS365, though there are security issues that need to be assessed. If feasible, we will take the initiative to facilitate exchange of documents.

Deborah Drukarsh: a pilot is planned to go ahead for exchange of documents electronically. We are all looking at options to move forward for documents filed in paper. We are now receiving some application records electronically. For existing files, if material must be scanned, there are only 3 staff onsite. It is not feasible to get materials to counsel. However, if some firms have documents available electronically, we may be able to proceed.

Chief Justice Crampton: one of the barriers identified for the e-process pilot was the legal aid tariff.

Justice Diner: Correct, and we were pleased to see that there were renewed discussions pre-pandemic to relax those barriers.

Alyssa Mannig: LAO is reviewing the policy, but no decision has been made.

Chief Justice Crampton encouraged members of bar in each province to lead discussions with provincial legal aid offices.

Stephanie Valois: legal aid is a problem – in Quebec, they pay only \$11 for photocopies, all included. We are still negotiating, with everything on hold, and the government will not likely have money to raise tariffs once the pandemic is over.

### (iii) e-ToolKit / Webinar

Justice Diner: we are working with the CBA regarding a possible webinar. Also, Sam Plett circulated a survey in February regarding e-process issues.

Sam Plett: we are in the process of developing a toolkit to help IMM practitioners, or any lawyer, to meet the Rules requirements using technology. e.g., Conversion to PDF.

Initially it will be a Word and .pdf document, to be supplemented by videos and a webinar in due course.

Release has been delayed somewhat given the many changes to procedure. He noted his discussion with Mr. Norquay at LAO, which was concerned about a tariff model that might require disbursement for both paper and digital documents.

We are also planning a webinar to go through e-process options

### (iv) Modernization sub-Committee

Volunteers to send names to Andrew Baumberg.

## **3. Motions: stay of deportation**

Justice Strickland – there have been two rounds of discussions, and we are now requesting further research regarding some of the issues that have been raised. The Working Group in the court will submit a report to the Court for consideration, with a target time-frame of the next few weeks, so that before the

pandemic period comes to an end, a framework will be available.

#### **4. Motions: stay of release from detention**

Justice Diner: there should be a more efficient detention review process within the 30 day limit.

Andrew Baumberg gave background to issue, which was raised at previous meetings a few years ago, but required more work.

Simon Wallace offered to participate in a working group to rationalize the process – no two cases are alike – there are many variables, with unknowns depending on different Justices' preferences.

Re immigration detention: our office (LAO) has redevoted resources for unrepresented IMM detainees in Ontario

Today, there are 16 detention reviews, and this has been similar over the last two weeks. The number of detainees is down, but it is still a large project.

**Action:** Alyssa Manning and Simon Wallace to participate in WG to develop a draft protocol for detention review JR's.

**Action:** Diane Dagenais will propose someone from DOJ for the detention WG.

#### **5. Toronto pilot project - settlement**

Chief Justice Crampton presented the statistics in Annex A of the agenda.

Justice Diner: there is broad support for expansion nationally, though DOJ had some concerns re language of the current framework. However, with all the issues due to the pandemic, we have not received comments yet. We also ask for feedback on phase II of the production order.

Chief Justice Crampton: we are ready to move forward once members of the Bar provide their input.

Diane Dagenais: we need to consult more broadly, but given the pandemic issues, we have been delayed. Once a framework is decided, we shall still need to do training for regions outside Toronto. Although it is acknowledged that this has been successful for the Court, we shall need a grace period.

Justice Diner: we do not plan to expand Phase II for some time. For Phase I, we are simply trying to launch the project nationally once operations return to normal. So, during the pandemic, we want to get feedback on concerns regarding any remaining problematic language in the Notice, as well as timing needed to prepare for the launch.

Daniel Latulippe: it is a difficult time for counsel to take on something new.

**Action:** DOJ to provide feedback on the current Phase I framework so that a national roll-out will, eventually, be feasible.

#### **6. Subcommittee for Assistance of Unrepresented Litigants**

##### **(i) Pro Bono**

Michael Battista: as we speak about response to COVID, any instructions on the court website should be accessible to SRL's, particularly if the Registry is difficult to access.

Justice Diner: feedback is welcomed on the website. We are trying to make it as accessible to all parties as possible.

##### **(ii) Limited Scope Appearance**

Andrew Baumberg gave background – perhaps this needs to be advanced more quickly rather than wait to line up with other more substantive amendments to the Practice Guidelines.

#### **7. Varia - Tabled**

- (i) Blacklining of further memorandum
- (ii) Common list of authorities
- (iii) Immigration and Refugee Law Moot
- (iv) Related Applications

#### **8. Next Meetings**

David Matas / Mario Bellissimo recommended a follow-up meeting in a month.

Confirmed for May 8, 2020, from 1 - 3 pm.