Federal Court Cour fédérale

BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)

February 13, 2019

By Teleconference: Justice Diner (Chair), Chief Justice Crampton, Justice Strickland, Justice Brown, Justice Roussel, Justice St-Louis, Justice McDonald, Nilufar Sadeghi (AQAADI), Deborah Drukarsh / Claire le Riche / Daniel Latulippe / Diane Dagenais (DOJ), Claudia Molina, Erin Roth / Chantal Desloges (CBA), Raoul Boulakia / Jack Martin (RLA), Lorne Waldman, Lobat Sadrehashemi / Mitchell Goldberg (CARL), David Matas, Michael Switzer / Denise Heeney (Registry), Nick Woodward, Andrew Baumberg.

1. Approval of agenda
Approved.

Chief Justice Crampton provided an update regarding work in this area.

- statistics for 2018: 17% increase in leave applications filed relative to 2017; 22% relative to 2016
- January 2019 filings are up 53% compared to January 2018
- Some anecdotal evidence that these are attributable to the surge in irregular border crossings
- bulk of these files, though, are probably still working their way through RAD/ RPD
- median time of 3 months to leave decision
- 43% refugee / 57% non-refugee – an increase in proportion of refugee cases compared with 2017
- approximately 28% leave granted rate for perfected cases
- stays – 37% grant rate – stable over last 4 years
- statistics re settlement pilot project
    - 162 production orders
    - 152 tribunal records received
    - average time is 20 days to get CTR
    - 143 leave granted orders
    - 94 notices of non-settlement
    - 19 judgments on consent
    - 9 discontinuances on consent
    - 12 discontinuances not on consent
    - approximately 15% where nothing filed at all
    - average time from production Order to leave granted Order is 37 days
    - average time to reach an outcome (after the leave granted Order is issued) is 15 days
    - judgments on consent are issued on average 67 days from the scheduled hearing date – this is an improvement from the perspective of the Court

Chief Justice Crampton noted the Court's concern with the significant increase in last-minute stay motions, including many that are based on the underlying application record rather than a motion record that can stand on its own.
Also, there still is a large proportion of last-minute discontinuances – some 400 out of 1000 cases for the first 10 months in 2018. Of these, 110 were in the last two weeks before the scheduled hearing date (approximately 27%). As a result, the Court was able to schedule another matter for only 53 out of the 400 hearings that were dropped – this is a significant waste of judicial and registry resources.

2. Stay of deportation motions
Justice Diner reiterated the remarks of the Chief Justice regarding stay motions: many last-minute stay motions as well as a significant increase in the number of motions. There are, of course, complications in the removal process

and for individuals trying to find counsel. Furthermore, in some cases, there has been a large volume of unwarranted material filed (particularly given the number of motions and time to prepare for hearing). There are likely good reasons from some of these developments.

The objective is to have Practice Guidelines for motions related to stay of deportation. The Court has never had detailed rules for these stay motions, other than the general motion rules. If possible, a working group will develop guidelines acceptable to the bar for the issues raised under item 2.(iv) of the agenda: a)Contents of motion; b) Supporting documents; c) Timing; d) Notice; e) Multiple applications.

The Department of Justice representative for the proposed working group is Ms. Hilary Adams, and the other organizations will be invited to name a representative.

Comments from Bar

Lorne Waldman: we are finding outselves in a complicated situation, because the Court will not agree to hear a stay motion unless a removal date is set, yet CBSA controls the removal date and notice of removal, and furthermore, CBSA will not consider a request for deferral of removal until a removal date has been set; assuming counsel makes the deferral request in timely fashion, what can counsel do?

One option is to file an application for judicial review based on a "deemed refusal," and some judges have granted an interim stay, but others have concluded that a 'deemed' decision is not a decision and so is not sufficient to bring an application for judicial review (i.e., there must be an actual decision).

Another option is instead to file an application for *mandamus*, but the application may become moot if there is last-minute decision.

Counsel are therefore filing two applications to cover both possibilities, which is very inefficient, resulting in a lot of extra files for the Registry to process.

Mr. Waldman agreed that it would be useful to come to understanding regarding the amount of material filed on a stay motion; he noted that some colleagues have been chastised by the Court for leaving things out. Some direction would be helpful. If we know a removal is coming, it might make sense to file a preliminary motion based on anticipated removal.

David Matas: a lot of stay motions relate to a challenge to an underlying decision not to defer, and if granted, a stay is tantamount to granting the Application on the merits, but it still goes through the *leave* and *judicial review* process. It would be preferable to deal with the stay motion, leave test, and merits of the judicial review at the same time.

Claire le Riche: a lot of stay motions relate to deferral requests; fewer relate to PRRA or H&C decisions. However, many requests for deferral quite a long time after the person has received notice of the removal order, which is required by statute to be executed as soon a reasonably practical. The difficulties now are a combination of late deferral request and, due to large number of documents, the client has difficulty in making the request quickly.

Most of the issues raised by the private bar can be addressed within the working group.

However, she does not agree that the application for leave and the stay motion should be addressed at same time, because often the stay motion is brought at the last minute, and there would not be enough time for Justice counsel to prepare for the other issues.

Daniel Latulippe: often see cases with a thousand pages of evidence before the deferral officer and then the same evidence before the Court, but specific points are not identified. One suggestion: advance notice by the Applicant's counsel to opposing counsel and to the Court might assist.

Chantal Desloges noted a new trend developing : the Court is refusing to hear stay motions related to deferral requests that have not received a decision. This is of significant concern to the private bar.

Mitch Goldberg: CARL shares the perspective of Mr. Waldman – this is a serious concern.

Justice Strickland commented on the materials filed: several judges have seen cases with huge records – one with 1800 pages, then a 250-page book of authories received the evening before the hearing. Given the number of motions now being filed, t is not feasible to deal with this volume; the stay motion should be able stand on its own and should not need the entire underlying application record, and so counsel need to be specific regarding what they are referring to. There will be situations, through no fault of the applicant, that result in a *true* urgent application, and the Court may then offer leeway, because it would be difficult to get the materials together

quickly. However, when this is not the case, the interests of justice require that motions be circumscribed and more on point. Otherwise, the interests of justice are not served.
Lorne Waldman agrees; this is why guidance from the Court would help. Excerpts might be preferable, but counsel want to ensure they are not perceived to be taken out of context.
Justice Diner: clearly there is support for the creation of a working group to develop draft guidelines. Volunteers?
CARL – Lorne Waldman.
CBA – Chantal Desloges.
RLA – Raoul Boulakia.
AQAADI – Nilufar Sadeghi volunteers for now, subject to review with AQAADI.
Federal Court Law Clerk – Nick Woodward.
DOJ – Hilary Adams

Andrew Baumberg will act as secretary to the Working Group and will coordinate its first meeting.

3. Toronto pilot project - Settlement
Justice Diner: based on early data, the outcomes look positive, but we shall have better data after 6 months. Some early concerns were noted from DOJ.
Claire le Riche: concern regarding the Notice, which includes a set form for requests for consent Orders. At previous Committee meetings, it was agreed that section 18.1 grounds would be listed, but the Notice also indicates that parties are to indicate specific grounds that were agreed. This is breach of solicitor-client privilege. However, it would be acceptable to keep this in as *optional* provision.
Chief Justice Crampton: if it optional, and not completed, the file may come before a judge who expects to see more detailed grounds. If so, it is possible that parties will not get a consent judgment.
Claire le Riche: as currently framed, the pilot may result in more requests for detailed grounds for consent than existed before the pilot. This was not understood by DOJ counsel to be its purpose.
Chief Justice Crampton noted discussion within the Court regarding the pilot project. As a result, more members of the Court have focused on this issue.
J. Strickland: a lot of detail may not be strictly required. Perhaps it is preferable to provide limited detail in the reasons provided to the Court – enough to satisfy the Court but without compromising solicitor client privilege.
Chief Justice Crampton agreed, suggesting a short description of the error but without compromising privilege.
Claire le Riche added that sometimes counsel provide notice under the pilot framework, but the Court then asks for further reasons. It is difficult to address these requests with the client under the proposed time-lines.
Chief Justice Crampton: the consent process is more efficient than the full judicial review application.
Claire le Riche noted that DOJ is identifying section 18.1 grounds in settlement notices. This is more than was provided before.
Chief Justice Crampton gives an example of a judicial review regarding a tribunal decision that ignored evidence. Could this not be identified in the notice of settlement?
Claire le Riche responded that this is one of the section 18.1 grounds.
Diane Dagenais: these settlement requests arise because a judge has already decided leave will be granted. When counsel check off the section 18.1 ground, along with the prospective leave decision, is this not enough to intervene?
Mitch Goldberg: the concern from the private bar is that when decisions are sent back, the decision-maker sometimes renders a 2nd decision that ignores the original problem. They do not have enough information as to why the decision was overturned. It is in the public interest to disclose the detailed grounds for settlement so as to reduce excessive litigation.
Claire leRiche: DOJ did agree, for discontinuances on departmental decisions, to provide reasons to the decision-maker (e.g., VISA).
Justice Diner: there only seems to be small percentage of cases where a section 18.1 ground was listed but not considered sufficient by the Court. We could perhaps go back to the Court to discuss specific wording of any suggested amendment, should there still be then need after further monitoring of the issue .

David Matas: if a settled case goes back to the decision-maker, he provides the decision-maker with all the pleadings so as to clarify the underlying grounds for the consent.
Chief Justice Crampton: can DOJ identify patterns of cases where one or more additional sentence(s) were found to be sufficient to avoid the consent judgement being sent back?
Claire le Riche: there were only 2-3 cases.
Justice Diner: perhaps these can be addressed case by case; otherwise, a minor amendment to the Settlement Notice can be made if necessary.

4. Toronto pilot project - E-Process
Justice Diner noted the very low take-up by the bar. However, this is an important initiative going forward, so the Court does not want to cancel the project. Please reach out to members to encourage use of the pilot. What appear to be the issues of practitioners?
Raoul Boulakia (RLA): most members are small offices / practitioners. There may be a challenge to meet requirements, especially the need to have scanning applications with optical character recognition (OCR) capacity.
Jack Martin: even for with lawyers with equipment, few are capable of OCR, and legal aid does not pay for OCR. Furthermore, the pilot excludes RAD cases, whereas more judicial review applications are from a RAD decision.
Chantal Desloges tried to use e-filing, but for service on DOJ, consent is required. It is faster to go with paper.
Deborah Drukarsh: DOJ agrees to e-service for all e-process pilot requests that fall within the scope of the pilot; there is no resistance from DOJ. Some cases were requested that were out of scope, so refused on this basis.
Chantal Desloges: sometimes the filing size is more than the DOJ email can handle. Oftentimes the file is not assigned to DOJ counsel until later in the process, but this is too late to get consent to e-service.
Deborah Drukarsh: agrees, but notes that all these issues relate to situations that are outside the pilot.
David Matas: in his experience in the Winnipeg Registry, DOJ counsel files consent to e-service along with the Notice of Appearance. He recommends national adoption of these practices by DOJ.
Justice Diner noted that the e-process guidelines are a little long – perhaps this is an obstacle for counsel. Also, there may be cheaper OCR options. He suggests a meeting of the sub-committee to review / address these issues. Please send in any other issues to Andrew Baumberg.

CJ Crampton made some final comments regarding stay motions. Based on his sense of past practice across the Court, if counsel take a long time to file after receiving the notice of removal, it may be less likely that a hearing will be granted where the request is made shortly before removal. However, if the removal notice is late, then an interim may well be granted. If these two extremes can be avoided then many of the problems would be resolved.

5. Next Meetings
(i) Teleconference: May 9 or 16, 2019 (to be confirmed)
(ii) Winnipeg: Friday, May 31, from 5:15 to 6:15 p.m. (Central time)
(iii) Fall 2019 (TBC)

6. Approval of minutes of November 28, 2018 meeting.
Send comments in writing.