

**BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)****May 31, 2019**

Winnipeg, Manitoba

Attendance in person (Winnipeg) and by teleconference: Chief Justice Crampton, Justice Diner (Chair), Justice Shore, Justice Boswell; Sandra Weafer / Deborah Drukarsh / Daniel Latulippe / Diane Dagenais / Gordon Lee / Kimberly Sutcliffe / Edward Burnet / Jocelyne Mui (DOJ); Chantal Desloges / Nadia Sayed / Erin Roth / Laura Best / Michael Battista (CBA), Jack Martin (RLA); Anthony Navaneelan (CARL); Barbara Jo Caruso, Ashley Fisch, Hart Kaminker, David Matas, Adrienne Smith, Lorne Waldman, Peter Edelmann, Marshall Drukarsh, Arghavan Gerami, Mario Bellissimo, Marvin Moses, Hrair Djihanian, Jahangair Valiani, Jennifer Pollock, Ravi Jain, Patrick O'Neil, Andrew Baumberg, Julie Vincent; Regrets: Nilufar Sadeghi (AQAADI).

1. Approval of agenda / minutes [May 9, 2019]

Approved.

Chief Justice Crampton provided an overview of his meeting with the intellectual property bar, including a 3-hour town hall, an afternoon liaison committee meeting, and dinner. This might be considered as a model for the citizenship, immigration and refugee law bar liaison as well, as it would allow more time for in-depth discussion on important issues.

Action: for discussion at next meeting (re: possible town hall).

Other comments:

- Justice Pamel and Justice McHaffie were recently appointed, and there are 3 new prothonotaries in the last year (Alexandra Steele, Sylvie M. Molgat and Angela Furlanetto). With the additional prothonotary capacity, there will be some backup provided for the prothonotaries in Montreal and Vancouver (where there is only one prothonotary).
- For judges, there are two Quebec vacancies and one in Ontario, as well as new positions from recent statutory amendments. From budget 2019, little new major funding was provided other than for relocation of the Montreal office. No funding was provided for a new Case Records Management System, which is critical for modernization.
- There is a redesigned website with new resources for litigants.
- The Rules Committee has not had a formal meeting due to on-going vacancies from the bar on the Committee, but work continues via sub-Committees on drafting projects, and designations have recently been made.
- The Court is coming to the end of its current 5-year strategic plan. It has advanced its objectives in many areas related to modernization and access to justice, including digital audio recording, enhanced video-conferencing, electronic courtrooms, a transition to electronic communications between the judicial administrator and parties, electronic scheduling, and discussions regarding electronic access to court records. At recent court meeting regarding development of the next strategic plan, the Court has tentatively identified the following priorities: (i) access to justice and (ii) strengthening the court as national institution.
- Regarding the access to justice objective a number of ideas are under consideration:
 - Online dispute resolution – there is an open question whether there is any practical scope for this in the immigration law area .
 - The Court is looking at increased use of webcasting, as well as social media platforms.
 - Other access to justice initiatives focus on further reducing time and cost – greater consistency of registry practice across country, and info kiosks at the Registry with resources for litigants.

- Additional streamlining of rules – *should we increase the monetary limit for matters in jurisdiction of prothonotaries?*
- Emphasis on shorter decisions and more oral reasons to get more timely decisions.
- Better service standards for interlocutory matters.
- For the discussion related to strengthening the court as national institution:
 - This includes effort to get better checks and balances in the budget process.
 - Dedicated facilities in judicial precincts – increase visibility is needed.
 - Greater use of class actions. (The Court's jurisdiction in this area may be under-utilized.)
 - Attract diverse candidates for judicial appointments.
 - Funding for expedited translation of decisions.

There are three principal questions:

Are these the right priorities?

What should we be doing better?

Are there any out of the box suggestions?

There will be a public consultation process with a more detailed written summary for review.

2. Modernization

(i) Toronto pilot project (amendment)

Justice Diner: there have been no objections to the one page summary, adding the RAD, or signing onto the pilot project after the initial filing of the originating Notice. The amendment will go ahead.

Action: the revised e-process pilot and one-page summary are to be issued.

(ii) Direction : e-copy of materials

A draft Direction was available to the Committee in the materials circulated with the agenda.

Justice Diner invited feedback. Even if there is no negative feedback, this will not be ready to advance until improvements are made to the e-filing Portal later this year.

Action: Bar to provide feedback, if any, on the draft Direction re e-copies of materials.

(iii) E-filing of Stay motions

Justice Diner: we won't be ready for this until the Fall. Are there issues with filing stay motions electronically?

Chief Justice Crampton noted discussions with the IP Bar regarding functionality allow tabs in electronic documents. Reference to e-filing portal: electronic documents should be searchable (via OCR feature) and tabbed.

Justice Diner: this will be for the modernization group to discuss.

Diane Dagenais: even if the document is e-filed, service must still be in paper, at least for now. The department has a small pilot to test electronic service.

Deborah Drukarsh: there are issues with email capacity and security functionality (dropbox is a U.S.-based cloud service). There are also operational issues given the size of the department.

(iv) Online access to Court documents

Justice Diner read from a circulated proposal of documents for online posting for a test phase:

1. Notice of Application
2. Facta (but not full Application Record)
3. Correspondence with the Court
4. Any post-hearing submissions, costs submissions (of course would be very rare in IMM)
5. Interim and final decisions

The proposal is to have online access for Court files regarding judicial review of visa officer, express entry, and other non-risk decisions – but this would not include refugee / risk-based cases / inland H&C / PRRA.

BJ Caruso: Recommend a working group to develop a position. There was an informal discussion at the executive committee – there were some concerns regarding privacy issues. On the flip side, her group is looking at making information more accessible that is already accessible via the paper record. The group wants to encourage transparency to the general public. For now, the group needs to follow bar protocol regarding policy issues.

Arghavan Gerami: there is a potential chilling effect for a client who knows that the materials for their case are going into an affidavit that will be online and accessible to individuals from their home country. They may be discouraged from providing this information. There is no clear reason to distinguish one type of case from another. There is reference to evidence in the memorandum of fact and law.

Justice Diner: only the notice of application, the memorandum of fact and law, and post-hearing submissions would be posted, but no evidence.

Arghavan Gerami added that there is reference to evidence in the memorandum of fact and law. It will still be clear what the evidence is. It will be of course for a client to know that anything they say will be online.

Diane Dagenais: is there anonymization as well?

Chief Justice Crampton: we are exploring the option of anonymization. If there is confidential information, it can get redacted for a public version. In the Sun Sea and Ocean Lady cases, there was no ability to know who the actual person was. It would be easy enough to draft things anonymously. In many cases, the submissions themselves did not identify the person.

Peter Edelman: we would need to ensure this was not done retroactively, and also to provide a clear framework for going forward so everyone knows what to expect and the procedures to request anonymity.

Chief Justice Crampton: in Australia, the Court applied this type of process only to new files.

Mario Bellissimo expressed concern with pirating / selling of pleadings by people not authorized to practice law. It would also lead to possible review of pleadings to ground a professional negligence claims, meaning one would need to retain counsel to respond to the negligence claims. This is a unique area of law – there are people going to court to get documents simply to blackmail litigants. It would become much more prevalent if documents were online. Easy access to pleadings will lead to unscrupulous practice, undermining practice by good counsel. On the private bar side, it is already an issue with litigants bringing malpractice complaints on a simple comparison of pleadings with someone else's file.

Peter Edelman: it is resource intensive to draft pleadings in an anonymous manner.

Patrick O'Neil: memoranda would need to be separated from the records to avoid the Registry posting other documents online.

Daniel Latulippe: would counsel need to serve two sets of documents, one public and one private? What if there is disagreement between counsel as to what should be kept private? Would the court become involved in the dispute?

Justice Diner noted that the CBA would like to form a working group to develop a position;

Another suggestion: perhaps put all the modernization issues, including online access, the e-process pilot, and other related initiatives, under one umbrella committee. *Volunteers?*

Deborah Drukarsh volunteered, noting that this was the original intention of the e-process sub-committee. Jack Martin agreed.

Justice Diner: it could include the ghost representative issues, due to the overlap.

Mario Bellissimo also volunteered.

Chief Justice Crampton: the media law section of the CBA has very different views on some of these issues, including online access; it is important to include them in the loop. [Postscript: The Chief Justice Crampton had a follow-up discussion with Rick Deardon, a senior partner at Gowlings' Ottawa office.

Mr. Deardon is very involved with a bar media law group and is interested in participating in this initiative.]

3. Ghost representative working group

Justice Diner made reference to Mr. Navaneelan's concerns raised at the last meeting.

Within the working group, concerns were also raised by the Court that the discussion did not include formal representatives of the provincial law societies which are responsible for overseeing practice issues. These issues can be discussed within the new modernization sub-Committee.

4. Stay of deportation motions

Justice Diner made reference to Drafting of Guidelines for the Court process. There are comments from both sides, and a meeting is scheduled next week.

5. Subcommittee for Assistance of Unrepresented Litigants

Michael Battista: we are looking for the Committee to endorse the project – there would be a needs & merit assessment, and then service offered if the assessment is positive.

Chief Justice Crampton: on pro bono, he met with pro bono Saskatchewan – it is important to think beyond Ontario, even if this is where the greatest need is.

Andrew Baumberg: pro bono Quebec is also involved at this stage.

Michael Battista: this is a national initiative, with lawyers involved from coast to coast.

In his discussions with pro bono Ontario, they noted that the previous pro bono initiative was not successful – we need to have more face-to-face contact. Options are needed for space at the Federal Court or elsewhere.

Chief Justice Crampton: in his discussion with pro bono Ontario, it was suggested that it would make more sense to station duty counsel at the IRB; there is not enough traffic at the Federal Court courthouse. Where is the ideal location to reach the largest number of SRL's?

Mario Bellissimo: LAO should be consulted.

Michael Battista: confirmed that LAO was involved.

Justice Diner: there is also a proposal for LAO to be part of this Liaison Committee – for discussion at the Fall meeting.

6. Common list of authorities

Justice Diner noted that Lorne Waldman had offered assistance, and Diane Dagenais had offered three DOJ counsel to assist. Suggestions are welcome – send to Lorne Waldman, who will coordinate.

7. Toronto pilot project - settlement

Justice Diner: there was language proposed by DOJ to revise the framework before expanding the pilot nationally.

Diane Dagenais: “where appropriate” language should be added, given that the Department interpreted the current language very literally regarding the need to discuss settlement with the client in every case. She also suggested that the “respondent” file notice of settlement discussions rather than “parties.”

General comments: it still appears to be too soon, based on the statistics, to roll out the project nationally. It needs another 6 months, as the statistics do not demonstrate the ability for the court to backfill cases, whereas it is a lot of work for DOJ if the court is not seeing the expected gains.

Jack Martin: need more time to discuss the proposed wording (“where appropriate”).

Justice Diner: regarding timing, we are addressing this to create a buffer to allow more backfilling. He agreed it is still premature to expand.

8. Practice Directions – General Comments

Referred to the new modernization sub-Committee.

9. Next Meeting

(i) Fall 2019

Justice Diner: we are looking at different meeting formats – either a separate one-day meeting or a longer teleconference to avoid conflict with the Fall conference timing.