



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

**March 5, 2020**

**MINUTES**

**Attendance in person (Toronto) and by teleconference:** Chief Justice Crampton, Associate Chief Justice Gagné, Justice Diner (Chair), Justice McDonald, Justice St-Louis, Justice Roussel, Justice Boswell; Rana Khan (UNHCR); Deborah Drukarsh / Daniel Latulippe / Diane Dagenais / Banafsheh Sokhansanj / Gordon Lee (DOJ); Erin Roth / Erica Olmstead / Wennie Lee / Michael Battista (CBA); Jack Martin (RLA); Anthony Navaneelan (CARL); Guillaume Cliche-Rivard (AQAADI); Cheryl Robinson (RLO), David Matas, Mario Bellissimo, Bryant Greenbaum, Matthew Chan, Patrick O'Neil, Fatiha Khayou, Klara Trudeau, Michael Switzer, Klara Trudeau, Andrew Baumberg. Karen Chen and Zoe Sebastien (University of Toronto law students).

**1. Agenda / minutes [October 16]**

Minutes – approved by Battista, Drukarsh.

Chief Justice Crampton provided an update:

- last year, the number of proceedings commenced was up 19% from the previous year
- this year, the number is up only 10% compared to last year
- additional judge positions created in Budget 2019 and Budget 2018 will only be filled when we demonstrate need to the government
- leave grant rate: approximately 38% of perfected files in 2019, up from 37% in 2018. For total proceedings filed, the grant rate has been around 20% for some years
- 42% grant rate for judicial review applications for 2019, 43% in 2018, and 47% in 2017
- The stay grant rate was 38% in 2019 – up slightly from 37% in 2018, and 35% in 2017; there was a 70% jump in total number of stays
- Of the 770 stays: 131 withdrawn, 31% granted, 6% refused to be heard (e.g., when brought at very last minute)
- Settlements – the rate went up about 3% percent, so not a huge impact on outcomes. The major impact is when the settlements are occurring – before the pilot project, almost 40% of settlements were occurring in the last two weeks; most are now being settled early – backfill rate is now at 48%: the pilot project is working, resulting in much more efficient use of resources
- members of the Bar were thanked for comments on the strategic plan
- the Strategic Plan would be finalized by now but for the ongoing review of the online access issue – the Bar was thanked for its submissions; a separate submission was received from Ad Idem, an association of media lawyers; the Privacy Commissioner also would like to make submissions by end of March; the position of the IP and admiralty bars is that there should be more access to documents, with the onus on the party to bring a motion for confidentiality
- the IMM bar would like submissions to be confidential, whereas the Court proposal would see a phased approach with submissions available so that the public could understand the issues, and the Court could write reasons that leave out sensitive information; the Bar could make submissions with confidential information provided in sealed annex; this would require further consultation

**2. Immigration and Refugee Law Moot**

Justice Diner: there is interest among the Bar in launching a small moot on a pilot basis, in Ontario the first year and then Quebec. There would be 2 key events: a reception and a dinner. A CIRAL Advisory Group (citizenship, immigration, refugee, administrative law) is being set up.

Karen Chen: there is increased interest in mootings, including for competitive moots. The proposed moot would be a good fit for students taking administrative law.

Michael Battista, who teaches IMM law at University of Toronto, noted that there is a lot of interest in practical dimensions of law, including an administrative / IMM moot.

Rana Khan: the global number of asylum seekers is increasing, with many issues on the table – a moot would raise awareness of issues and engage the wider community. There is a gap in the moot system. She will raise the proposal within the UNHCR office.

Justice Diner: volunteers may send their name to A. Baumberg. Prof. Liew has already offered to participate, as well as Chantal Desloges, Robin Seligman, and Karen Chen and Zoe Sebastien from U of T law school, plus Chloe Magee (law clerk), to assist on the advisory group.

Mandate: assess the proposal and report back at the April 3 meeting.

Matthew Chan (law clerk) also offered to assist – he has seen a similar interest in moots at UBC.

### **3. Modernization**

#### **(i) e-Process Pilot Project**

Justice Diner provided some background: there is low uptake on e-filing generally and on the Court's e-process pilot for Immigration files in Toronto. Members of the bar have said that they face a significant training gap: many are solo practitioners or small firms with little capacity to make the shift to digital litigation. So, CAS hired Sam Plett to develop a practical 'how to guide' for immigration lawyers to assist them with the transition from paper to digital litigation. The framework for the Guide was circulated to the Committee for discussion.

Sam Plett: any e-process must be feasible for different types of parties / representation, including self-represented litigants. His initial project focus was a survey of stakeholders. There is a lot of momentum to solve the existing challenges, some of which are technology issues, some workflow issues. The profession must catch up with existing technology as well as upcoming changes. The ToolKit is seen as a resource, available in different media, providing a start-to-finish guide to collect and compile documents. The feedback from lawyers is that the challenge is not the e-filing portal on the Court website, but all the steps in a lawyer's office leading up to use of the portal. The guide is to provide practical tips, rather than an explanation of the Rules.

**Action:** Please provide comments regarding the draft ToolKit outline off-line, either in person / phone or in writing.

#### **(ii) Electronic stay motions**

Justice Diner: one priority is to launch a pilot for electronic stay motions.

Sam Plett: as with other aspects of e-filing, there are technological issues as well as process issues. There is some momentum, but discussions are ongoing. The parties must be ready to do e-stays before launching the pilot, otherwise the pilot will cause more problems than it solves. The idea is for a controlled pilot with a small group of counsel that allows for the process to be managed carefully, which is important for urgent processes.

Chief Justice Crampton: is there a policy update for Legal Aid Ontario paying for disbursements for copies, but not scanning?

Sam Plett: does not speak for LAO, but it is his understanding that they are exploring options to accommodate an electronic process. LAO is open to exploring a framework that includes e-documents. However, LAO is concerned about the possibility of a hybrid system that would require payment for both paper and electronic processes.

Chief Justice Crampton: is there a senior member of the bar involved?

Justice Diner: Jack Martin (RLA) and John Norquay (LAO) are in discussions. LAO was not ready in initial discussions to fund some disbursements, such as equipment costs, but they are exploring options.

Ms. Khan raised a question re cuts to legal aid: what happens to people who are unrepresented? What steps are being considered to help them?

Justice Diner: referred to the Pro Bono program, as well as internal development work at the Courts Administration Service to assist.

**(iii) Long-term modernization initiatives**

Andrew Baumberg provided an update:

- CAS received \$52M in funding over 5-years for a project to replace the core business engine for case and records management in the Court
- The project is in year 1, now focussing on a Request for Proposal (RFP) process to invite proposals from vendors of existing commercial, off-the-shelf systems (COTS) – once these are published for review by vendors, they can also be shared with members of the Bar
- In parallel, the Court is finalizing its next 5-yr strategic plan, which will identify the Court’s modernization priorities
- In addition to these larger scale projects, there remain opportunities to identify and advance other smaller-scale modernization initiatives
- the current e-process Toolkit is one example, but discussions with the Bar have raised suggestions of other opportunities to leverage technology to simplify IMM litigation in Federal Court, including smart forms, e-document assembly tools, chatbots, and AI research tools
- for now, there is no close coordination between the key stake-holders interested in IMM proceedings regarding longer-term modernization initiatives or opportunities, even though these will necessarily have a significant impact
- at this stage, the proposal is for the Committee to consider giving the Modernization sub-Committee the mandate:
  - to continue its role to support the Toronto e-process pilot and now also the new ToolKit that is being developed
  - to conduct an initial screening of opportunities for the use of technology to improve the IMM process

Justice Diner: modernization is a priority issue for the Committee.

Michael Battista noted his discussions with Sam Plett regarding self-represented litigants (SRL), and referred to the pro bono program and Court Outreach centre with resources for SRL’s.

Sam Plett: the toolkit is meant to be plain language, usable by both lawyers and SRLs. There is a lot of synergy with the IRB as well.

**4. Toronto settlement pilot project**

**Revised Order for discussion**

Justice Diner referred to comments from Raoul Boulakia (RLA) at the last meeting, who suggested we could aim for 100% backfill rate by front-loading the entire IMM process: completing all procedural steps *before* setting the hearing date.

Diane Dagenais: regarding the statistics, they are showing a positive impact on the goal, which is not to increase the % of settlements, but to make them arrive sooner. She checked with clients regarding workload: from the clients’ and DOJ perspective, it is not resulting in an inordinate amount of extra time to address the extra settlement step, though there is additional time for the extra form. Also, sometimes the goal of the pilot is misunderstood by the applicant’s counsel, or possibly by registry staff, which requires extra time, sometimes a great deal of time, to fix the consequences. If we are expanding nationally, where there may be even more practitioners who do not regularly do immigration, it would be useful to address this.

On the new template, DOJ will need more time to assess. Of concern, there are too many options that leave room for confusion – such as the option for mediation. Also, anything that suggests consent of parties can lead to confusion. The emphasis should be on the Respondent filing a Notice of Settlement, or not, to indicate that the Respondent has not agreed to settle. Otherwise, the Applicant is in an awkward position of filing a document that suggests that they consent not to settle.

In some DOJ offices where there is little IMM work, it may take longer to prepare for a national roll-out. Wennie Lee: if the lead is on the Respondent, she hopes that there would still be a concerted effort by the Department to assess files for possible settlement.

Diane Dagenais recommended removal of some elements from the form indicating that both parties must file a form, or the option of additional mediation.

Mario Bellissimo: instead of removing the language regarding judicially assisted mediation, perhaps qualify it that this is to be exceptional. In some cases, a client might not accept legal advice, or DOJ won't be able to get instructions. The language provides a safety valve.

Andrew Baumberg: has the Court-assisted mediation option ever been used?

Diane Dagenais: not on request by DOJ, but there was one case where it was used by the applicant in a way that simply created a complication that took a lot of time to resolve.

Banafsheh Sokhansanj: given her background, the normal mediation time-line will be difficult to fit into the constraints of the IMM framework.

Justice Diner: if this has never really been used, it may be preferable to take out, though there is always the option within the Rules to ask for case management and judicially assisted mediation.

He asked DOJ for proposed amendments, after which we could look at expanding the program nationally.

Anthony Navaneelan: in order for the Court to be requested to assist with mediation, it does require consent from both parties. If there are no notices to the Court, it may be lack of take-up from the Respondent, not due to the Applicants' counsel, who are usually wanting to move to a mediated outcome.

Diane Dagenais has no knowledge of any other requests from Applicants' counsel.

Gordon Lee: no requests have been received from Applicant's counsel

Daniel Latullipe: Quebec is not under the pilot; however, when we settle, we settle earlier – parties are well aware of the need to settle early.

Justice Diner asked Diane Dagenais / Gordon Lee to reach out to survey DOJ counsel re requests from Applicant's counsel to get mediation.

Phase II will require further study (new type of leave process).

**Action:** All organisations are asked to provide comments on the draft revision to the production order template.

Cheryl Robinson: if someone is in removal proceedings, CBSA does not recognize a production Order, whereas it currently recognizes the leave granted Order. A new production Order would need to be recognized by CBSA, or else there may be many more stay motions.

CJ Crampton: that may be more of a communication problem – we are not issuing a production Order unless the judge is inclined to grant leave. It is important to clarify this with CBSA.

Justice Diner asked Diane Dagenais to raise this with DOJ's client (CBSA).

Diane Dagenais: there was a case when a production order was issued but no leave granted.

There is concern regarding possible work after the production Order issues if ultimately there is no leave order. We presume that the two go hand in hand, but need stronger language in the preamble to be able to advise client that the two steps are certain.

CJ Crampton: there need to be better lines of communication with CBSA. One exceptional case, which is an anomaly, should not define the overall process.

Deborah Drukarsh: there is a long-running inter-agency committee with IRB, FC, DOJ stake-holders, providing an information-sharing mechanism to allow all participants to plan.

Backlog information can be shared, but operational planning will never be shared.

CJ Crampton: with more tribunal decision-makers being hired, we need better workload / case-load info for planning purposes.

Diane Dagenais will raise the current discussion with her client.

Justice Diner: the key message is that a production order under the pilot is equivalent to leave being granted.

## 5. Stay of deportation motions

Not discussed – to be raised at subsequent meeting.

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

ACJ Gagné noted her presentation to the Conseil du barreau, which is currently negotiating the legal aid tariff in Quebec. The Court sees a significant difference between Ontario and Quebec.

Anthony Navaneelan: the stay motion tariff has increased from 6.5 to 15 hours preparation. This has increased the disparity in Quebec. Last year, the province cut legal aid funding, and so LAO spread the remaining funds for the year, with limited services, and the federal government then offered funding until March 31. If this is not renewed, LAO will revert back to having only 30% of needed funds for immigration and refugee law proceedings. This would run out entirely by August, or else LAO would need to cut services if it wants to maintain a minimal service level through the full year. There is no clear commitment from any level of government for April 1 going forward.

**(i) Pro Bono**

Michael Battista provided background regarding the legal assistance program, launched in 2019. So far, there is only a small sample of cases in the program, given that the program has not been promoted. It is simply on referral from a Registry officer at the public counter. There is a lot of work at the front end of the process. A further update will be provided at the April 3 meeting.

After a larger sample of cases is complete, the sub-Committee can assess options for scaling up the program nationally.

Justice Diner: initially, there was hesitancy to commit to a large-scale program, in case there were insufficient resources, so that the process could be tested.

Ms. Khan proposed that the Pro Bono or other options be included in the RAD refusal letter.

Michael Battista: for consideration when we scale up the program.

CJ Crampton: more marketing might increase the number of the roster lawyers.

Michael Battista: we have a good group of volunteers (close to 20), but are still going slowly to ensure the process is tested before increasing scope.

CJ Crampton encouraged efforts to prepare for new volunteers to be ready if the government does not fund LAO.

Justice Diner: the Bar does not necessarily want to provide a comprehensive pro bono service that the government may rely on to justify cutting legal aid.

Jack Martin: many lawyers rely on legal aid, and would be hard pressed to pay their monthly rent if legal aid is cut.

Michael Battista concluded that so far, the program is running well.

**(ii) Limited Scope Appearance**

Not discussed – to be raised at subsequent meeting.

**7. Ghost representative working group**

**8. Related Applications**

**9. Common list of authorities**

**10. Practice Directions**

Not discussed – to be raised at subsequent meeting.

**11. Next Meetings**

**(i) Friday, April 3 (3:55 - 5:15 pm EST)**

The meeting will be held as a panel at the CBA Conference (Montreal, Qc).