

**BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)****Friday, May 8, 2020 via Zoom Meeting****MINUTES****1. Agenda / minutes [April 3]**

Minutes – approved per David Matas / Diane Dagenais.

**Common list of authorities**

Amanda Bergmann provided a summary of consultations on the new list that was circulated.

Lorne Waldman: this list is nothing more than a list of cases that are cited very often, though of course they are valid and have not been overruled. It includes SCC, FCA, and FC cases, though the last category was more challenging, given the occasional divergent lines of authorities.

Chris Crighton: agrees with the proposed list from Lorne Waldman.

Justice Diner thanked the sub-Committee for its work.

**Action:** send comments, if any, on the List of Authorities to Andrew Baumberg by May 30.

A further question for consideration: what should an electronic book of authorities look like? This may be referred to the sub-Committee.

**2. COVID-19 Pandemic Update****(i) COVID-19 Amended Practice Direction and Order (April 4) and COVID-19 Practice Direction and Order: Update #2 (April 29)**

Chief Justice Crampton: we are down only about 15% in the total number of new proceedings in the first quarter of 2020.

On the April 29 Practice Direction – key changes:

- Extended Suspension Period to May 29th
- Buffer after end of Suspension Period – 14 days for procedure / 30 days for hearings, subject to exceptions, as requested by the bar
- Extending range of matters that we will adjudicate during the Suspension Period
  - New category of matters identified by the Court to move forward;
- recalibration of consent requirement given that some litigants are taking strategic advantage; consent still required for adjudication in writing of matters that would ordinarily proceed by way of an oral hearing, but not for other matters
- Continuation of motions in writing and leave applications, subject to documents being available electronically; of note, there are about 40 pending leave applications (paper-based file) – the Registry must work within the Treasury Board's essential services framework
- Encouragement of Bar to request that we adjudicate matters in writing
- Confirmation that remote hearings will be held via Zoom

Key elements of April 4 Practice Direction remain in force:

- Rescheduling
- E-filing
- Statutory deadlines
- Court fees
- Electronic Service and deemed consent
- Affidavits

Feedback is welcome on the issue of whether we should consolidate the April 4<sup>th</sup> and April 29<sup>th</sup> Practice Directions into a single document. (The former document remains in force, except to the extent amended by the latter document.)

**(ii) Planning for hearings**

Chief Justice Crampton noted the key categories for hearing: There have been few (approximately five) requests from the Bar to move forward with a hearing, pursuant to exception 3 of the Practice Direction. The Court has identified 173 files under exception 4 for which all or nearly all the documents are available electronically. In many cases, the law clerks have volunteered to go in to the office to scan the materials, but for some files, there remain gaps in the electronic record. We are approaching parties regarding their preference for the hearing – most are agreeable to moving forward with a video hearing. The Court has deployed laptops to Registry officers across the country so that they are able to manage remote hearings. There has been a lot of internal training and planned training on Zoom, OneNote, Teams, etc., a mock hearing is planned for next week, and guidelines for public / media access are being finalized.

The difficulty in accessing the paper file remains a key challenge for all stakeholders. We are looking at options to use a cloud platform to share such documents. However, where the Court has not yet received the CRT, potential access to an electronic CTR appears limited to the RAD and possibly ID, for now. The legal aid tariff may also be a hurdle for lawyers switching to electronic processes.

Jack Martin: for video conferencing, a webinar would be helpful (similar to what was done for e-filing).

David Matas: regarding the CTR, many VISA offices are closed. This may continue to be a problem.

Deborah Drukarsh: most of the overseas offices remain closed, and those that are open must focus on urgent matters. We are exploring options, but it would be helpful for overseas offices to be able to share the CTR via a cloud platform such as Office 365 arranged by the Court.

Diane Dagenais: for May 15, we may be asked to provide mutual dates of unavailability. Does this require a single note setting out when both are unavailable?

Chief Justice Crampton: in contrast to trials, we are not able to go back and forth to get a fixed date.

Caroline Perrier: in IMM, we usually do not consult counsel. However, under the present circumstances, we are trying to accommodate counsel to avoid double-booking. It would be helpful to have a single communication regarding unavailability so that the Court can schedule a hearing without a back-and-forth process.

Diane Dagenais: we will try to comply, though it is not always possible to reach Applicant's counsel.

Robert Blanshay: for one application, he has been exchanging scheduling options via email. The simplest approach has generally been to have an exchange with the Registry Officer by email.

Caroline Perrier: we don't need a formal letter, an email is sufficient. It is preferable not to copy the Registry, but simply write to the Judicial Administrator for scheduling. Use the email address provided in the Practice Direction.

Chief Justice Crampton: In response to a question regarding the scheduling of judges who may be retiring this year, he clarified that only Justice Russell and Justice Campbell are nearing retirement, with the latter having some pending matters. The Court generally does not schedule any cases in the last month before retirement.

Chantal Desloges: expressed appreciation to the Registry for its considerable support during the pandemic.

**(iii) e-ToolKit / Webinars**

Justice Diner: for the first webinar, we had complaints that it was not possible to register due to the cap (1000 max). The recording is available on the Court website, and the ToolKit is being updated. Further resources are also being developed, including a FAQ. See <https://www.fct-cf.gc.ca/en/pages/online-access/e-filing-resources#cont>

**3. Toronto pilot project – settlement / Tab A & Revised Order for discussion – Tab B**

Justice Diner: We have proposed delaying the national expansion, at the request of the Department of Justice. On the proposal to amend the leave granted Order template, comments were received from DOJ, RLO and Raoul Boulakia. We would like to test out a few cases with the revised template.

Diane Dagenais: in addition to suspending the national expansion, we would also like to suspend the current pilot or any other changes. We would like to see a 4-month suspension. There is a referral to a further annex C, which we did not see. However, we also do not see the advantage of the revised template – it requires a lot of work upfront, with the possibility of a time-lag between the work and any possible hearing. It is not clear what the benefit is.

Justice Diner: one goal is to further reduce late drop-offs.

Andrew Baumberg: a primary goal is to increase the backfill rate from about 35% up to 100%, particularly given the increased backlog under the pandemic and the IRB backlog.

Anthony Navaneelan: the proposal raises more issues than it may solve. It proceeds on the premise that the parties need to see the CTR before talking settlement. However, there are still many last-minute settlements – this may not change under the revised framework. We need to understand better why these are settling so late. There is also a problem for litigants who do not benefit from a statutory stay. There are many more months not ‘covered’ by a leave order – will CBSA recognize this? It may result in an increase in deportations, and stay motions. The new process may also lead parties to wait until all the documents are exchanged before considering settlement, rather than focussing on it right after leave is granted. The hearing may be scheduled on shorter notice under the new framework – this may be problematic for counsel, whose schedule is usually full about 4-6 weeks out. Alternatively, the hearings may be scheduled much later, but this results in duplication of work to do a ‘refresh’. Finally, there is a certain ‘fiction’ under the current process, but under the new process, will the leave judge look at the new material that is submitted, such as the further factum, or rather make a decision on outdated documentation? This is a concern because the further memorandum replaces the leave memorandum. It may be pushing the envelope a little too far.

Justice Diner: noted that Roual Boulakia, earlier in the day, shared responses by email on some of the issues. We will review the comments.

Justice Roussel: the only matter not addressed was the suggestion to extend the 21-day CTR period to 30 days, to have additional time for the tribunal. Another suggestion was that matters that fall under section 37 and 38 of the Canada Evidence Act be excluded.

Diane Dagenais: a further suggestion was to remove the reference to Court-assisted mediation.

Justice Diner: the mediation language will be removed, and the revised CTR dates can be considered.

Diane Dagenais: we need to get out of the backlog – having the extra time would be helpful. Further detailed suggestions were provided in writing by email. When the pilot expands nationally to regions where there are lawyers who practice immigration less frequently than in Toronto, there may be compliance issues.

For the revised template, it was suggested that there might be a lot more work to respond to new facts / issues that arise.

Justice Diner: there may be more flexibility to re-schedule matters with remote hearings, but the scheduling pressure remains. We will assess the comments and then decide how to proceed.

Caroline Perrier: remote hearing will continue, so we may not have as many judges in given cities. We may reach out to counsel for a possible hearing on shorter notice.

Chief Justice Crampton: we are hoping that the investment in video-conference hearings and electronic document exchange will allow the Court to continue with electronic filing/records and lots of video-conference hearings even after the pandemic.

**4. Update: Practice Guidelines For Citizenship, Immigration, And Refugee Law Proceedings**  
**Action:** please provide comments in writing to Andrew Baumberg.

**5. Common list of authorities**

Discussed earlier.

## **6. Immigration and Refugee Law Moot**

Justice Diner: We have the support from the Department of Justice, the IRB, the UNHCR, and law professors. We recommend consulting with law schools on a virtual moot in the Spring of 2021.

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

Justice Strickland: additional research has been conducted, revised guidelines will be circulated within the Court, and then an update will be provided to the Bar.

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

Justice Zinn: the sub-Committee held its first meeting April 14, and the next meeting is May 26.

We are aiming to develop a national protocol, with input from public and private counsel.

In the interim, Greg Kipling (who manages the ID) contacted the Court suggesting a discussion to clarify any procedural issues that arise regarding production of the tribunal record. They may join the sub-Committee, at least as an observer.

Chief Justice Crampton: the accepted approach is to create a tripartite committee, with representation from the bar, the executive and the judicial branch, it is a good forum for policy discussions. Otherwise, legitimate questions could be raised.

Justice Zinn: these discussions take longer than expected, given the need to have background discussions with clients. It would be more efficient to have the party that is producing the document at the meeting. If there are any concerns from members of this Committee with him inviting Greg Kipling to participate in the detention review sub-Committee, please provide notice.

Justice Diner: the IRB had representatives on the modernization sub-Committee yesterday. It was quite helpful to have their direct input on operational issues.

Deborah Drukarsh: there is a difference between participation for operational consultation and being a permanent member. It is useful to have them involved for some issues, but their presence could also discourage full and frank discussions on other issues. Unlike IRCC and other departmental decision makers, the IRB and other Boards are not the Department's clients.

## **9. Pro Bono Initiative**

Michael Battista: please change the Practice Direction to refer to the program as the Federal Court Legal Assistance Program.

When launched last Fall, the program was meant to be a pilot running for 6 months or at least 10 cases. In March, we had received only 6 participants, followed by the pandemic shutdown. We would like to extend the pilot till the end of the year and expand it to include Toronto, Vancouver, and Montreal.

Justice Diner: if we expand it nationally, we shall need information to share with the Registry offices.

We can follow-up internally with the Registry.

Chief Justice Crampton: this seems a worthwhile initiative. It seems to be primarily the members of the bar who will need to do most of the work. The Court is very supportive of the initiative -- please let us know what we can do to help.

Michael Battista: we can identify a lawyer as a regional coordinator for each city. There is already an email address that was set up that can be used to send applications and documentation.

Chief Justice Crampton: as we expand the Outreach centers across the country, local staff will need to know who the are lawyers participating in the program.

Justice Zinn: we have hundreds of former law clerks across the country who could be advised of the program. At least some of them might be interested in participating.

Michael Battista: at present, we have a roster of close to 25 lawyers across the country, but there are insufficient clients.

Justice Shore: under the former Minister of Justice Irwin Cotler, there was strong support for pro bono work. Perhaps former law clerks from the Department of Justice and other Departments could also be contacted.

### **Legal Aid tariff**

Alyssa Manning: the matter is before the lawyers service group. They have questions for the Court - she will follow-up with Andrew Baumberg.

Stephanie Valois: there is no update in Quebec. Photocopies are not reimbursed in any event, so scanning is less expensive. She will encourage members of AQAADI to look at the webinar and e-filing materials provided by the Court.

Erin Roth: we shall provide an update in writing.

### **Electronic Book of Authorities (BOA)**

David Matas: has filed an electronic BOA for a recent video hearing, which required conversion to word to insert page numbers. Decisions should be available in Word and PDF to allow for easier pagination.

Sam Plett: the second webinar will provide a visual demonstration of putting together a record, including pagination in Adobe Acrobat. The same steps can be used for a digital e-CTR. Resources could be prepared solely to show how to prepare an electronic BOA, which is must faster than paper.

Justice Diner: having an e-BOA could reduce the number of materials.

David Matas: pagination is feasible with Adobe Pro, but not the lower cost version.

Chief Justice Crampton: noted a concern with the possible editing of Word documents.

David Matas: the international case law is in multiple formats (Word, PDF, html).

Sam Plett: Adobe Pro is now available as a subscription at about \$20 per month. There is also freeware, though it may have security issues. There are lower-cost applications that offer a good alternative to Adobe pro if the expense is a concern. Note that PDF is the format that is most compatible across platforms – it opens in the same way in many applications.

Jack Martin: why is blacklining proposed under the new practice direction?

Justice Diner: when only a few lines have changed from the first factum, the blacklining helps identify what has changed.

Jack Martin: there may be changes to formatting, re-organization, etc.

### **10. Next Meetings**

Mario Bellissimo: we need another meeting, given the changes to the suspension period.

Justice Diner: we can look at a possible meeting either at the end of June or early September, as needed.

Mario Bellissimo: will hearings be recorded and available after the hearing? If so, the Bar would like the opportunity to provide input.

Andrew Baumberg: there is an open policy discussion on this point. A general guide is being developed for the public / media and for litigants, and will be available soon.

Chief Justice Crampton: members of the Bar will be able to opt for an audio-only participation.

Confidential material can be discussed via appropriate protocols during an oral hearing. Ideally, even the submissions would be made anonymously, with confidential information in a separate annex.

Deborah Drukarsh: counsel will appear via Zoom and be on the screen. Should they be indicating in advance that they prefer not to appear visually?

Chief Justice Crampton: if you do not want your image on the screen, then you can simply turn off the camera. That is a decision for counsel. Counsel can ask the Registrar whether there is any public / media attendance at the hearing.

Patrick O'Neil: note also that the hearings have an audio recording via a handheld device at the RO's home – there may be background noise.