

**BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)****Thursday, May 9, 2019**

Attendance in person (Toronto) or by teleconference: Chief Justice Crampton, Justice Diner (Chair), Justice Strickland, Justice Roussel, Justice Boswell, Deborah Drukarsh / Claire le Riche / Daniel Latulippe / Diane Dagenais / Deborah Drukarsh / Keith Reimer / Gordon Lee / Hillary Adams / Alison Engel-Yan (DOJ), Laura Best / Michael Battista (CBA), Jack Martin (RLA), Mitchell Goldberg (CARL), Anthony Navaneelan (LAO), David Matas, Mario Bellissimo, Patrick O'Neil / Fatiha Khayou, Klara Trudeau, Harley Daout, Andrew Baumberg; Regrets: Nilufar Sadeghi (AQAADI).

1. Approval of agenda / minutes (February 13)

Minutes of February 13: approved.

The Chief Justice provided a brief update:

- IMM workload is up close to 40% from last year (YTD).
- stay motions have fallen back to regular volume compared to the December to March levels
- leave grant rate for 2018 was down slightly (37%) compared with 39% for previous year (perfected leavel applications)
- 43% grant rate in 2018 for judicial review hearings on the merits, down from 47% for 2017
- About a third of stay motions are granted – stable over last few years.

The Court is currently scheduling at 90 days across the country. Matters are settling earlier, which gives some flexibility to backfill a case if it settles early enough.

2. Update: Legal Aid / Subcommittee for Assistance of Unrepresented Litigants (SAUL)

Anthony Navaneelan: there is cut of approximately 66% for the legal aid program. Going forward, Legal Aid Ontario (LAO) is issuing certificates for basis of claims for the RPD hearing, but is no longer issuing any certificates for judicial reviews or stays. Only the lawyers at the Refugee Law Offices (about 14 lawyers) will be able to represent LAO clients before the Refugee Appeal Division (RAD) and the Court, with a triage process to identify higher-priority claimants (e.g., particularly vulnerable clients). The Court can likely expect a dramatic increase in unrepresented applications, “ghost” representatives and extension of time requests in Ontario. There is little funding from other levels of government at this stage.

Michael Battista: how will clinics address the demand on services?

Anthony Navaneelan: although there is a mandate to do RAD proceedings, there is a huge triage process needed, and limited resources, so the focus will be on vulnerable clients. It will not be possible to capture the full scope of services of the legal aid program.

Jack Martin: how many lawyers will be available to do RAD and judicial review applications?

Anthony Navaneelan: last year, 400 private certificates were issued for judicial review applications in Federal Court, and 80 for stay motions. In 2019, many of these will likely be unrepresented or with a ghost consultant.

David Matas: we need to anticipate people moving to other provinces due to the differential availability of legal aid.

Deborah Drukarsh: has there been any effort to connect with existing pro bono programs to see if they can fill the gap?

Anthony Navaneelan: RLA has done advocacy for the issue of legal representation. Note that LAO will honour existing certificates. Given the 2-year backlog at the Refugee Protection Division (RPD), it will be some time before the issue will arise for RPD hearings, but for Court proceedings and RAD hearings, the issue will arise quickly due to the short time-lines.

Michael Battista: the designated country of origin (DCO) claimants are most vulnerable – they will not get their work permits so as to be able to work and earn money so as to be able to retain counsel.

Anthony Navaneelan: they will still be in RPD backlog for 2 years, so may still get their work permit in 6 months, get a job, and be able to pay for counsel. There is an active case trying to strike down the limit on work permits – leave has been granted. It addresses the last vestige of the DCO regime. [file IMM-1421-18 KACZOR v. MIRC]

Action: Justice Diner: we will look into the status of this case and provide an update at the May 31 meeting.

Deborah Drukarsh: if a certificate was already issued, will it continue throughout the judicial review process?

Anthony Navaneelan: yes, once approved, LAO will honour a certificate through the full Court process.

Michael Battista: a key initiative under way is to assemble a panel of lawyers available to assist unrepresented litigants. The group of volunteer lawyers has had a first meeting to decide on scope and process. The next meeting is May 24.

Justice Diner: please provide an update for discussion at the May 31 meeting.

Michael Battista: provided a brief update on progress to date for the SAUL initiative, including an impressive roster of approximately 20 lawyers, including senior practitioners, across the country

The group is still studying scope and delivery options for SAUL Chief Justice Crampton: questioned whether there is any liaison with pro bono organizations across the country.

Michael Battista: most pro bono clinics are general legal information services, whereas the sub-Committee focuses on Federal Court proceedings.

Chief Justice Crampton: an earlier discussion with a pro bono lawyer suggested that there was insufficient demand for duty counsel at court (i.e., it was thought better for counsel to be at the RPD). He recommends we liaise with existing Pro Bono organizations, like Pro Bono Ontario.

Andrew Baumberg: for now, the Sub-Committee is not planning an on-site duty counsel model, but rather a referral model, but this remains under discussion.

Michael Battista: we will follow-up with pro bono organizations.

Laura Best: recommends contact with Pro Bono Students Canada, which provides opportunities for law students to help in law firms doing pro bono work. This helped a lot.

Justice Diner referred to his experience with large law firms doing pro bono work.

Michael Battista: given the emerging need, we need specialized practitioners, who won't have a lot of time to train students or practitioners from other practice areas.

Justice Diner: a client might prefer even a lawyer from non-IMM practice areas rather than not having a lawyer at all.

Website

Andrew Baumberg noted the new resources – additional comments / suggestions are welcome.

3. Ghost representative working group

Mario Bellissimo: members of the private bar on the working group recommend:

1. The originating notice should bear a warning that only lawyers called to the Bar in Canada are permitted to prepare Court documents on behalf of Applicants
2. The Federal Court website should also bear the above information
3. The Rule should require that the Notice bear the signature, name, address for service in Canada and telephone number of any person other than the Applicant who assisted in preparing the document (not only for a fee, because there could be other consideration exchanged)
4. The Rule should require, separately, the signature, name, address and telephone number of the Applicant if not represented by a lawyer called to the Bar in Canada – this information to be restricted to Registry staff only, to protect those who fear persecution

5. Beyond the originating notice, the Court should consider introducing a form to be signed by self-represented applicants at the Application Record stage, which states that it has been prepared by them alone without assistance from an outside party, in whole or in part

Our reasoning for the above is the following:

- Although a ghost representative might actively try to conceal their participation, these measures will give them additional reason to reconsider.
- Such measures actively signal to Applicants that only lawyers may represent them.
- Separating the Applicant's address from the representative's address helps to isolate and more readily identify ghost reps.

Our questions:

- Does the Registry technology allow a means of identifying address patterns?
- If yes, could CBA volunteers be granted access to a list of suspiciously recurring addresses as a means of tracking down and reporting unauthorized practice of law to the Law Societies?

Deborah Drukarsh: should the recommendation require identification of the law society number?

Andrew Baumberg: this suggestion has been made elsewhere to the Rules Committee.

Mario Bellissimo: agrees with this additional proposal.

Anthony Navaneelan: does this cover *anyone* who assists with the record? Would it include an interpreter, or someone who helps with photocopying, etc.? Some people might be concerned about having their name on the record.

Mario Bellissimo: there are many ways around the more limited "for a fee" requirement. It needs to be broader, and there is a hope that this will cause applicants to think twice.

Daborah Drukarsh: the Court requires representation by a lawyer; why would the Court accept a document that indicates it has been prepared by someone who is not a lawyer?

Justice Diner: the assistant would not be formally representing the person. The idea is to try to get these details on the record.

Mario Bellissimo: at the leave stage, it is not settled law regarding assistance.

Justice Diner: the Court is looking at options for non-lawyer assistance in special situations.

Andrew Baumberg: we are planning a sub-Committee meeting in the next couple weeks to discuss these recommendations

Patrick O'Neil: addresses are not tracked independently by the Federal Court Registry. There is no simple way to track address patterns.

4. Stay of deportation motions

Justice Strickland: Guidelines were prepared by the Court and circulated to the sub-Committee. The private bar provided comments yesterday, and the Department of Justice will then make its submissions, followed by a further sub-Committee meeting.

Mario Bellissimo has seen examples, in stay motions, of allegations of incompetence of former counsel, but the existing Protocol time-lines are clearly not feasible within the stay motion. This is flagged for consideration by the sub-Committee. At the least, there should be a requirement to give notice to former counsel.

Claire le Riche: the Department can make submissions on this issue as well within its 10 day window.

Justice Diner noted a recent example. Although there was a formal complaint to the law society, it is clear that the time-lines in the Protocol cannot be met, which does not cover stay motions.

Anthony Navaneelan: the notice process for former counsel should not impact the time-lines for service of the motions record, already under a strict time-line. The presiding judge has discretion to address the procedure.

5. Toronto pilot project – [settlement](#)

(i) Grounds for settlement / solicitor-client privilege

(ii) Settlement rate and timing

Justice Diner: there is a higher number of settlements, and these are coming earlier in the process. This helps lawyers, registry, law clerks and judges avoid wasted effort, as well as to allow the Court to back-fill more hearing dates following a settlement.

Claire le Riche: the Certified Tribunal Record is sometimes received by DOJ only a few days before the end of the 30 day window. If leave is granted immediately after the 30-day period, counsel effectively has less time to assess the CTR than outside the pilot project. Could some additional time be added for counsel to review the CTR. Ideally, approximately 2 weeks are needed from the CTR delivery to issuance of the leave decision.

Also, over the Winter recess, many people were on holiday during the time-period slated for review of the CTR. Could an extra couple weeks be provided?

Klara Trudeau: on average, it took 18 days to provide the CTR, but the leave dates were provided at 35 days, and the Court was dropping hearing dates, so the leave Orders were moved up.

Andrew Baumberg: suggested we move back to 21 days for the tribunal to provide the CTR, the standard time-line outside the pilot, rather than 30 days.

Justice Diner: the Court will consider these suggestions.

Mario Bellissimo: the pilot has been working well for the private bar.

Justice Diner: the next step is to expand the pilot nationally, once we address some of these minor issues.

Claire le Riche: before providing comments on expansion of the project, we would like to see the statistics, given that this project involves a lot of extra work for the Department and client. In each case, we need to look at and discuss settlement options – this results in 100's of extra hours.

Andrew Baumberg: in preparation of the Guidelines, the Committee discussions did not propose a strict obligation on DOJ counsel to discuss settlement with client in every case. If DOJ counsel, upon reviewing the CTR, concludes that it is not a case that warrants settlement, why would it be necessary to discuss this with the client?

Chief Justice: agrees.

Anthony Navaneelan: if the Applicant proposes settlement, this should be discussed by DOJ with its client – you are in a box if you speak with Applicant's counsel. You could put in language that counsel assessed settlement opportunities and confirmed that they considered whether to approach their client.

Justice Diner: we do not want to place excessive demands on either side.

Claire le Riche: counsel review the CTR and make recommendation to the client in every case in 15 days -- this is a lot of work.

Diane Dagenais will provide input on this issue at the next call.

Action: input in writing (regarding expansion of the settlement pilot) in preparation for next call.

6. Modernization

(i) Toronto pilot project (amendment) (launched October 31, 2018)

Justice Diner: take up is very low. The sub-Committee recommends:

- o include RAD – new scope will include all 4 IRB Divisions
- o allow lawyers to opt-in to the pilot later in the proceeding, and in particular, after legal aid is confirmed (i.e., after Notice of Application filed, but before perfection of record)
- o issue a simplified 1-page summary of Pilot

Action: Comments within 2 weeks.

Deborah Drukarsh: the Department will be testing a drop-box cloud service, with an update that might be possible for May 31.

Jack Martin: the increased scope and flexibility should lead to more cases, even with the changes to LAO.

Justice Diner: the Court is trying to increase access to justice -- modernization reduces costs for parties.

(ii) Direction : electronic copy of materials

Justice Diner: some judges issue a Direction requesting an electronic version. We are looking to increase the Court's capacity to make such directions a standard practice e.g., to require electronic copies of all memoranda of fact and law.

David Matas: files all documents electronically. In one case, he received such a Direction (i.e., requiring him to file an electronic copy), even though the court already had an electronic copy from him.

Justice Diner: we will raise this with the Registry.

David Matas: although the Respondent does not currently use Dropbox, it will allow a linked dropbox.

Deborah Drukarsh: this is available on a pilot basis, with efforts to expand it.

Jack Martin: does not use MS Word.

Justice Diner: a PDF version should be acceptable.

Action: A sample direction will be circulated.

(iii) E-filing of Stay motions

Justice Diner presented a proposal for comment by members of the Bar, namely, that all stay motions be e-filed (earliest start: Fall). It is recognized that both public and private bar counsel may have constraints.

Claire le Riche: our system will crash if documents that are too large are served by email.

Deborah Drukarsh: the email server will not function with large files. We are exploring options

Anthony Navaneelan: e-filing does not require e-service; however, counsel would prefer not to have to proceed both with paper and electronically.

Justice Diner: for further discussion May 31.

(iv) Online access to Court documents

Chief Justice Crampton: the Court is reaching the point where it will be able to make documents available online. This would be a huge access to justice improvement, but must be balanced with confidentiality – we are looking to make an exception for RPD / RAD / PRRA proceedings, and perhaps follow-on H&C proceedings. For non-refugee cases, there remain privacy issues, but these are different from risk issues present in refugee proceedings.

Other areas of the bar are enthusiastic about this initiative.

Justice Diner: the proposal, for discussion at a future meeting: electronic posting on our web site of (i) parties' pleadings (Notice of application, all facta), and (ii) Court documentation (correspondence, orders and decisions), with a view to making these materials more available and accessible. At this stage, evidence would not be included.

Chief Justice: we are considering the option of posting material only if leave is granted.

Anthony Navaneelan noted that PRRA and ID cases often deal with refugee files. Perhaps VISA applications would be appropriate for such a project, but he had concern regarding any inland applications, which typically include issues that might trigger risk concerns; even H&C applications.

Chief Justice Crampton proposed further discussion on this initiative to address the remaining risk issues that might arise from the various types of inland applications. He recommended consideration of efforts by counsel to draft materials in a way that can be redacted for public access.

Anthony Navaneelan: such applications typically treat an applicant's whole life, which are difficult to redact.

Claire le Riche: even in a business VISA application, if it were available online, it would allow easy access online to sensitive information.

Michael Battista: perhaps we can look at how other courts are dealing with similar issues for areas like family law.

Chief Justice: we need to address this collectively. The IMM Law Section of the CBA should discuss this with the Media Law Section, as they have a very different perspective on some of the relevant issues. The IMM Law Section should get back to us once it has reached a consensus with the Media Law Section.

David Matas: noted that the court delinked search access to its decisions.

Andrew Baumberg: added that this was completed using web coding that relies on voluntary compliance by major search engines. However, it does not prevent copying of information from the Court website.

David Matas: agrees, though wider internet access is worse.

Jack Martin: many government regimes gather information. Clients may need to shift limited resources to filing full confidentiality motions. His practice is inland – input would be needed from counsel who work in VISA area.

Mitch Goldberg: resettlement is a small part of VISA offices' mandate, but there is clearly a risk issue.

7. Practice Directions – General Comments

Justice Diner: there are numerous Practice Directions. Would it be preferable to have a single 'omnibus' practice guidelines issued each year?

Comments for next meeting.

8. Common list of authorities – Updates?

Justice Diner: the list is out of date. A new, draft list was circulated for consideration by the Bar.

Volunteers are requested from public or private bar to work on updates to this list.

Please contact Andrew Baumberg.

9. Next Meetings

(i) Winnipeg: Friday, May 31, time to be confirmed

Justice Diner: the CBA agenda shows the meeting on Friday from 3:55 – 6:00 pm. Members of the Bar are asked to provide their availability / preference by Monday for either a 1 or 2-hr meeting on May 31.

(ii) Fall 2019 – to be confirmed