



BENCH & BAR LIAISON COMMITTEE (CITIZENSHIP, IMMIGRATION & REFUGEE LAW)
Tuesday, December 7, 2021

MINUTES

1. Agenda / minutes [September 13]

Approved.

2. Court Update

Presentation by Chief Justice of PPT deck.

Action: Andrew Baumberg to circulate the PPT deck to the Committee. [[Annex A](#)]

Jack Martin: regarding the request that counsel streamline submissions and materials in the record – this may give the impression that Applicant’s counsel is avoiding issues that counsel for the AG considers important. Is it acceptable to include only a few pages from a much larger human rights report, for example.

Chief Justice: it is preferable to have enough context to understand the cited material, but this does not require the entire document. It is really a judgment call in each situation.

Nastaran Roushan expressed concern that a negative decision will be communicated only via the docket, with the certificate of Order sent only much later – it is not feasible for counsel to be checking all their cases on a daily basis.

Caroline Perrier: the goal is to move files more quickly, but the Registry currently does not have the resources to move all the files. Even an email to counsel would take almost as much time as a certificate of Order. However, we are now increasing our capacity, and so the proposed process for negative leave decisions will be temporary, and should be resolved within 3-4 months maximum, after which the docket update and issuance of the certificate will be done at the same time. The Registry is currently processing negative decisions for August.

Claudia Molina: please send the letter from the Association of Justice Counsel.

Action: Andrew Baumberg to circulate the Association of Justice Counsel letter to the Committee.

Chief Justice Crampton invited ongoing feedback from the Committee regarding its preference for in-person versus virtual hearings.

3. Sub-Committee: Judicial review (Detention)

Justice Zinn: the first meeting was held November 3 to look at ways to expedite the process to get to the judicial review, including the possibility of skipping the stay. However, there was resistance to this proposal. Instead, there was a proposal to work on a protocol to provide clarity for applicants wishing to complete the judicial review application within 30 days – i.e., before the next Immigration Division hearing. Volunteers from the private bar offered to prepare a 1st draft of a 30-day protocol, which is expected to be available soon.

4. Sub-Committee: Record of the RPD / RAD

Justice Strickland: the first meeting was held November 29, at which the Bar reported that the IRB has recently discontinued its regular practice of preparing a transcript when leave is granted. The private bar members undertook to prepare a formal note to the Court and to the IRB setting out their position, that of

their constituents, and recommendations. This is expected by the end of 2021, after which the Court will continue discussions, as appropriate, with the Bar and IRB.

5. Sub-Committee: Online Access to Documents

Justice Norris: a first meeting was held September 15, with Justice Norris and Justice Sadrehashmi co-chairs. Numerous issues were raised for initial discussion that will require further consideration. Following this meeting, the Refugee Law Lab held a seminar on November 24 (and circulated a paper¹) covering many of the same issues, with some members of the sub-Committee attending. The work of the Refugee Law Lab is greatly appreciated.

The work of the sub-Committee will continue, part of a broader online access project involving other practice areas that raise fewer privacy issues, and so which will proceed on a pilot basis earlier than the IMM section.

6. Consolidated Practice Guidelines

Justice Norris noted efforts to re-work the guidelines.

Andrew Baumberg: we are working on revisions to the Consolidated IMM Guidelines, now also including additional changes to reflect the Rules amendments that came in force on June 17, and also to review the integration of the detention JR and stay motion protocols that were published within the last year to ensure that the content is maintained while also being consistent with the consolidation template.

7. Rules Committee Update – [Annex B](#)

Andrew Baumberg: three sets of amendments came in force on June 17 – including amendments to the *Citizenship, Immigration and Refugee Protection Rules*. Of note, there is a new requirement at Rule 10 that requires counsel to indicate in their application record whether the hearing is to be in English, French, or both:

Perfecting Application for Leave

10 (2) The applicant shall

- (a) serve on every respondent who has filed and served a notice of appearance, a record containing the following, on consecutively numbered pages, and in the following order:
 - (i) the application for leave,
 - (ii) the decision or order, if any, in respect of which the application is made,
 - (iii) the written reasons given by the tribunal, or the notice under paragraph 9(2)(b), as the case may be,
 - (iv) the request, if any, for an anonymity order under rule 8.1,
 - (v) one or more supporting affidavits that verify the facts relied on by the applicant in support of the application or a request for an anonymity order under rule 8.1, if any,
 - (vi) a memorandum of argument that contains concise submissions of the facts and law relied upon by the applicant for the relief proposed in the event that leave is granted, and
 - (vii) a statement indicating whether the hearing will be in English or French, or partly in English and partly in French, and whether the materials for the hearing will be in English and French, or partly in English and partly in French; and
- (b) file the record, together with proof of service.

Furthermore, three other sets of Amendments (to the *Federal Courts Rules*) were pre-published in the April 10 edition of Part I Canada Gazette:

¹ For reference, see: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3966386

- a. comprehensive update to the Rules on enforcement;
- b. rules for Limited Scope Representation so a party could be represented by a lawyer on a defined, limited mandate (e.g., only for a motion);
- c. amendments incorporating the principle of proportionality, adding more tools to deal with abuse of process (in particular Rule 74), and providing a framework for Motions at the FCA.

These are now moving forward in the approval process for publication in CG2, and coming in force is possible in early 2022. A notice will be sent once these receive GIC approval.

Justice Norris added that the anonymity process is now integrated into the *Citizenship, Immigration and Refugee Protection Rules*.

8. Sub-Committee: Ghost representatives

Andrew Baumberg: at the request of the IMM Bar, the *Citizenship, Immigration and Refugee Protection Rules* were amended June 17 to include a requirement for disclosure on the record by a person paid to prepare the Application for Leave:

Form of Application for Leave

5 (1) An application for leave shall be in accordance with Form IR-1 as set out in the schedule and shall set out

...

(j) the name, address and telephone number of any person who, for a fee or other consideration, prepared the application for leave; and

(k) the signature, name, address and telephone number of the applicant's solicitor or, if the applicant acts in person, his or her signature, name, address for service in Canada and telephone number.

Also, the Court website was amended to clarify who can represent a party in FC.² A further follow-up is under way with both the Department and IRB to invite them to refer to this same information (or a link to the page) so that claimants are aware of the requirement to have a lawyer rather than an immigration consultant represent them in Federal Court.

9. Sub-Committee for Assistance of Unrepresented Litigants

Nicholas Woodward: the pro bono program screening form is now available online via the Court website.³ Statistics: 9 applications in 2021 compared with 4 in 2020.

10. Suggestions for Long-Term Committee Plan

Justice Norris noted some of the suggestions from the September 13 and welcomed further input from the members of the Committee.

11. Varia

² Who May Represent You in Federal Court <https://www.fct-cf.gc.ca/en/pages/representing-yourself/finding-legal-help/who-can-represent-you-in-federal-court#cont>

³ Federal Court Legal Assistance Program <https://www.fct-cf.gc.ca/en/pages/representing-yourself/finding-legal-help/federal-court-legal-assistance-program#cont>

Annabel Busbridge invited the Court to publish a notice to clarify its interim procedure regarding this process, which can be used by counsel in communications with their clients.

Justice Norris agreed, subject to consultation with the Court.

Caroline Perrier: confirmed that this is feasible.

Action: Caroline Perrier / Andrew Baumberg to prepare a notice regarding the interim Registry process for updating the Court docket related to negative leave decisions.

Daniel Latulippe added a few comments regarding the settlement project:

- change website reference to this being a national project (rather than just Toronto), and perhaps move it higher up the list
- there is a traditional Order on one day and a production Order in a parallel file
- some members of the private bar are not aware of the project, and think that the Production Order indicates an encouragement by the Court to settle the case

Action: Andrew Baumberg to correct the website information related to the settlement project.

Justice Norris acknowledged that the Settlement Notice was meant to be replaced by the IMM Consolidation. Pending completion, a revision to the current Notice is in order. Furthermore, some education might be in order, including a possible town hall for the wider bar. There was a webinar town hall in 2020, and we are considering holding another one in the first quarter of 2022. Suggestions for topics are welcome, whether substantive, procedural, or professionalism.

Justice Norris then noted an issue raised by a private bar lawyer. Namely, in some cases, the Respondent does not object to leave and therefore does not file a memorandum. In these instances, the Applicant is faced with filing a further memo, or not, without ever having seen the Respondent's arguments, and going to court without the opportunity to have presented a written reply to the Respondent's arguments. He asked whether counsel have seen this issue, if guidance from the court is needed, and if so, what is recommended.

Jack Martin: part of the solution would be for a further written reply after DOJ has submitted their further memorandum. It does not necessarily have to be in the leave granted order, but it would be helpful to know that the Court will not object to the filing of the further memo.

Erin Roth has seen this, though the easiest solution would be simply to reverse the order of submission of the memoranda. There is not strictly a need to amend the leave Order, which already provides flexibility.

Deborah Drukarsh: the proposed process was already the default process many years ago, though perhaps without a formal practice direction. If the respondent did not file a memorandum, the order was reversed as a matter of course.

Daniel Latulippe agreed that this was the default.

Richard Wazana: in his experience, he has written to the Court to ask for the process to be reversed, and this was accepted, though ideally it would be a matter of course without the need for a request.

Deborah Drukarsh: we can take this suggestion back to the Department for review to reverting to the previous practice.

Action: Deborah Drukarsh to review the proposal for reversal of the order of submitting further memoranda in the event that the Department does not file a leave record.

Justice Norris: the proposal does appear to result in a fairer process for the applicant. A possible solution would be to make a minor revision to the leave granted Order.

12. Next Meetings

Justice Norris proposed meeting in the following time-frames: February / March and then May / June 2022.

Annex A – Presentation by the Chief Justice

IMM Liaison Committee Meeting Chief Justice's Update December 7, 2021 (Virtual Meeting)

Workload Update - Overview

- We are essentially operating at a full workload
- IMM, Aboriginal and National Security workload increasing.
 - Impact of recent national expansion of Toronto Settlement Pilot will not be noticeable until approximately February 2022.
- Still waiting to see uptick in TM cases.
- We now have 93 class actions.

IMM Workload – Leave Applications

- 33% more filings YTD (to end of Nov), relative to 2020.
 - 19% more than for the first 11 months of 2019.
 - Approx. 2/3 non-refugee; 1/3 refugee.
- Non-refugee: 42% ↑ over 2020 (5,874 vs 3,416) and 28% ↑ over 2019 (4,227)
- Refugee: 14% ↑ over 2020 (2,880 vs 2,470) and flat vs 2019 (2,861).

IMM Workload - Stays

- 52% drop relative to Jan-Nov 2019: 351 vs 730
- 26% grant rate vs. 30% in 2019
 - Dismissed rate flat (46% vs 47%)
 - Withdrawn rate also flat (18%)
 - “Refused to hear” up from 6% to 10.5%

IMM Workload - Shifting Priorities

- Registry has shifted focus to processing dismissed Leaves – new hires and overtime:
 - 986 dismissed Leaves to be processed, some dating to July 2021.
 - 419 Leaves to be forwarded to the Court (excluding “No As”)

IMM Workload - “Heads up”

- To provide earlier notification of dismissed leaves, the Registry will enter the decision in our recorded entries.
- In the interests of prioritizing this task, the sending of certificates to counsel may be delayed.

- Consider alerting clients in advance.
- We are in the process of rebalancing the prothonotaries' workload: BC/Prairies, Ontario/Quebec/Atlantic.

Scheduling - Timing

- Files (1-3 days) being scheduled within 90 days unless a fall date or an in-person hearing is requested
- Hearings of 4-9 days being scheduled for early 2022
- Trials of 10+ days being scheduled for spring 2022
- PMNOC's being scheduled for early 2023

Scheduling - Mode of hearing (1)

- We are continuing to schedule all JRs and all General Sittings to be heard virtually. We will revisit this in Feb/March.
- Parties will continue to have the option to request an in-person hearing.
 - Very few requests being made & few disagreements
 - There are only an average of 10 per month from Oct – Dec
 - Court is being guided by what the parties want.
- Case management judges and trial judges will decide on mode of hearing for trials and other matters, where a request is made after they have become seized.

Scheduling - Mode of hearing (2)

- The broad shift to virtual hearings has given substantial flexibility to draw on Registry resources from across the country.
- The Association of Justice Counsel has written to Chief Justices to express concerns about in person hearings, due to risk of aerosols. It has recommended:
 - Virtual hearings as “first and best line of defence”
 - That counsel leave hearing room where it is unsafe, including when Court permits persons to remove masks (or where judicial officer does so)

E-Filing Portal

- Overhauled portal launched earlier this year.
- Since then, there has been a major increase in its use.
 - Note that the portal only accepts documents in PDF format.
 - Special arrangements need to be made to send Word documents.
- Pay Now function is working well.
 - 1,399 transactions were approved
 - 31 were rejected
 - 3 reimbursements

- There are a few pending/in-progress

COVID-19 Practice Direction (Update #7)

- To be updated:
 - filing electronic documents by e-mail
 - access to electronic documents
 - access to video recordings
 - electronic payment
 - in-person hearings in certain cities?
 - Confirmation of vaccination by judges/court staff?

Courtroom Safeguards (1)

- [COVID-19: Safety Measures - Guidelines for Safe Court Facilities and Courtrooms operations during the COVID-19 pandemic](#) (updated on September 10, 2021):

“All attendees are required to wear a blue disposable procedural face mask in the courtroom, unless directed otherwise by the presiding judge. The presiding judge may also direct other health and safety measures depending on the circumstances. Attendees who have concerns about the use/non-use of face masks or other health and safety measures in the courtroom should raise them as soon as possible with the presiding judge.”

Courtroom Safeguards (2)

“If a hearing participant (counsel, party, or witness) has a genuine accommodation need which precludes the wearing of a blue disposable procedural face mask in the courtroom during a hearing, then counsel, the party, or the party calling the witness must advise the Registry of the general requirements of the accommodation in writing as soon as possible in advance of the hearing.”

- Plexiglass
- Physical distancing
- Hand sanitizer
- Security questionnaire.

Decorum – virtual hearings

- We have noticed a material reduction in decorum in a small number of hearings.
- This is consistent with the experience of other courts across the country.
- Paragraph 18 of the COVID-19 PD (Update #7) states:

“Counsel and parties are expected to dress in appropriate business attire. Judges and prothonotaries will similarly dress in business attire. Gowning for in-person hearings remains subject to the February 6, 2017 Notice to the Profession.”

50th Anniversary

- Internal event on June 1, 2021 – video available on YouTube
 - Search « Federal Court 50th Anniversary »⁴
 - Book launch on October 1, 2021
 - International event: June 27-29, 2022, Château Laurier

Varia

- Need for more streamlined submissions and other documents
- Please bookmark!
- Focus on 2-4 main issues
- Certified Questions in advance.
- Earlier notification and filing of stays
- If case likely to require more time, please request a special sitting.

⁴ See Commemoration of the 50th Anniversary of the Federal Court of Appeal and the Federal Court:
<https://www.fct-cf.gc.ca/en/pages/about-the-court/fiftieth-anniversary>

Annex B – Rules Committee

IN FORCE JUNE 17 / EN VIGUEUR LE 17 JUIN

Substantive Amendments – *Federal Courts Rules* / Les modifications de fond – *Règles des Cours fédérales*

- [*Rules Amending the Federal Courts Rules: SOR/2021-150*](#)
- [*Règles modifiant les Règles des Cours fédérales : DORS/2021-150*](#)

Miscellaneous Amendments – *Federal Courts Rules* / Modifications diverses - *Règles des Cours fédérales*

- [*Rules Amending the Federal Courts Rules: SOR/2021-151*](#)
- [*Règles modifiant les Règles des Cours fédérales : DORS/2021-151*](#)

Amendments to the *Citizenship, Immigration and Refugee Protection Rules* / Les modifications aux *Règles en matière de citoyenneté, d'immigration et de protection des réfugiés*

- [*Rules Amending the Federal Courts Citizenship, Immigration and Refugee Protection Rules: SOR/2021-149*](#)
- [*Règles modifiant les Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés : DORS/2021-149*](#)

PRE-PUBLISHED ON APRIL 10 IN CANADA GAZETTE PART I / PRÉ-PUBLICATION LE 10 AVRIL DANS LA PARTIE I DE LA GAZETTE DU CANADA

- [*Rules Amending the Federal Courts Rules \(enforcement amendments\)*](#)
- [*Règles modifiant les Règles des Cours fédérales \(modifications concernant l'exécution\)*](#)
- [*Rules Amending the Federal Courts Rules \(Limited Scope Representation\)*](#)
- [*Règles modifiant les Règles des Cours fédérales \(mandat limité\)*](#)
- [*Rules Amending the Federal Courts Rules \(proportionality, abuse of process and Federal Court of Appeal motions\)*](#)
- [*Règles modifiant les Règles des Cours fédérales \(proportionnalité, abus de la procédure et requêtes devant la Cour d'appel fédérale\)*](#)