Federal Court  Cour fédérale

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

November 4, 2022

MS Teams

MINUTES

1. **Agenda / minutes (May 4)**

- minutes approved
- "litigation guardian" added to agenda

2. **Court Update**

Justice Norris provided an update:

- Judicial Appointment (October 7): Justice Guy Regimbald
- Associate judges: coming in force of statutory changes to the title of prothonotaries, who as of September 23 are now officially named Associate Judges
- Associate Judge Aalto became supernumerary, and Justice Zinn will become supernumerary December 1

Workload Update - Overview

- 36% increase in IMM caseload over 2021

Scheduling – Timing

- IMM JRs are generally scheduled within 90 days, except for Toronto (backlog of hearing date requests will be addressed by increasing the number of scheduled IJRs in 2023)

- Vacancies (6 vacancies)
    - Four positions (3 Quebec)
    - Two positions from Budget 2019 and one from Budget 2018: to be filled when the Court demonstrates need → building case now

Litigation Guardians

Cheryl Robinson: there have been a number of cases in the last year that have raised issues related to litigation guardians: appointment (what happens if you don't have someone to act as a guardian, how do you change guardian mid-proceeding, what is the potential for costs to be awarded? There are no rules that are applicable -- we would like to see some guidelines from the Court.
Justice Norris recommends a sub-committee:

> **Action:** a new Litigation Guardian sub-Committee will be struck. If you wish to participate, contact Andrew Baumberg.

Deborah Drukarsh raised a question as to whether this should be referred to the rules committee. She also asked for detailed statistics regarding the number of hearings, which are typically provided at these liaison meetings.

> **Action:** Andrew Baumberg to provide recent Court statistics regarding IMM proceedings.

Cheryl Robinson: we could do the research work in this sub-Committee and then provide recommendations.
Andrew Baumberg: the Rules Committee has only one member from the IMM bar, and would probably look to this Liaison Committee for a more detailed analysis.

3. Update #9 and Consolidated Covid-19 Practice Direction (October 24)

Justice Norris:

- The Court issued Update #9 on October 24 – this practice direction update replaces and supersedes *Update #8 and Consolidated COVID-19 Practice Direction (June 24, 2022)*
- In Update #8 PD, the Court announced that all matters scheduled for 3 hours or longer would be presumptively scheduled to be heard in-person.
- Update#9 is to announce the next phases of the Court's transition back to in-person hearings, and aims to reach an appropriate balance between in-person and remote hearings.
- It is recognized that there are advantages for both in-person and remote hearings.
- The initial framework was an opt-in model, which did not lead to many in-person hearings – this is now being replaced by an opt-out model. We are trying to ensure that the hearing mode preference of counsel is respected as much as possible.
- The Court determined the division of cases presumptively being scheduled for in-person hearings in order to have an increase in in-person hearings but without overloading the Court / Registry capacity.

No comments from the Bar.

4. Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings (June 24) [including Protocol for Expedited Judicial review (Detention)]

Justice Norris:

- Following a lengthy consultation period, this updated Consolidation was issued on June 24.
- It includes the Protocol for Expedited Judicial review (Detention) that was developed by the sub-Committee this spring (with Justice Zinn).

No comments from the Bar.

5. Consolidated General Practice Guidelines (June 8)

Justice Norris:

- The Bar has given feedback over the years that there are too many standalone practice notices and directions, so this was essentially a house-keeping step to bring 9 individual notices within one consolidated and streamlined document

No comments from the Bar.

6. Allegations Against Authorized Representatives as defined in the Immigration and Refugee Protection Act and Citizenship Act in Citizenship, Immigration and Protected Person Cases

Mario Bellissimo: the sub-Committee modernized the protocol, with support from all members of the sub-Committee, and attempted to clarify the process, encouraging a written reply within 10 days

(rather than the current 7), preferably an affidavit with exhibits, and if necessary to seek leave at the leave stage to request additional time (you are compelled to reply even if you seek leave), and clarifying the definition of authorized representative (defined under IRPA).
Raoul Boulakia: the main policy we are trying to achieve is to balance procedural fairness for former counsel with their responsibility.
Arghevan Gerami: the changes are important and will be helpful for the process – there is still an option for an affidavit at the leave stage, or to seek leave to intervene.
Andrew Baumberg: a draft was circulated this week within the sub-Committee – it could be translated and then circulated to the wider Committee, and then issued.
Justice Norris thanked the members of the sub-Committee for their work on this important project.

> **Action:** Andrew Baumberg to arrange for a translation of the draft Protocol, circulate it to the Committee for comment, and then proceed with publication.

7. Order of submissions (Applicant / Respondent)

Justice Norris summarized this issue – it arises when the Respondent does not file a memorandum at the leave stage. As a result, for post-leave steps, the Applicant is sometimes at a disadvantage, because they do not know the Respondent's position until later in the process. Various options have been considered, though none appears to address all the issues. One option would be for the Respondent to provide its position to the Applicant in the 15-day window for settlement. It was noted recently that in a significant number of cases in the Toronto office, the Court received nothing from the Respondent, even upon follow-up inquiries from the Registry regarding the possibility of a response having been misplaced by the Registry.

Deborah Drukarsh is not aware of this issue, and requests details for her to follow-up.

Mario Bellissimo: one idea being considered at the Rules Committee was to allow a further reply, though this was suggested before the Court established the position that the further memorandum replaces the previous memorandum. This proposal remains on hold.

Justice Norris encouraged members of the Bar to develop a joint proposal for consideration, which might then be implemented via a leave granted Order.

Stephen Fogarty: how does a party file a further memorandum if they have not filed a first memorandum? He added that given the delays, the jurisprudence sometimes evolves between the leave application and the hearing. Ideally, the Applicant should be able to file a reply, even if it has some strict page limits.

Raoul Boulaki: recommended that the Applicant get a further right to reply. He noted some experience with the Court refusing to allow him to raise new points at the hearing, whereas this does not appear to apply to DOJ counsel. Most judges will allow him to respond, but it is not guaranteed.

Justice Norris: it may be preferable to address this via the leave granted order rather than via a rule change.

Andrew Baumberg: a rules amendment would probably take about 2 years, so it would probably be better to focus on a change developed in this committee that can be implemented via leave Order.

Cheryl Robinson expressed concern with the extra time required to file a further reply – there are limits in legal aid funding. There would need to be some decision whether the reply also replaces the earlier memorandum. Although it is understood that the Respondent first needs to know what they are responding to, it should be noted that they would already have the Applicant's perfected leave application on the record. The reverse order of proceeding, with the Respondent going first after leave is granted, should be considered.

Justice Norris: the reverse order is still under consideration.

Dupe Oluyomi-Obasi: perhaps we could capture all the ideas raised here and then set up a small group to develop a proposal, having considered all the pros and cons for each.

Justice Norris agrees.

Richard Wazana also noted the issue regarding the implications for legal aid if a third memorandum is required. It is preferable simply to reverse the order of further memos if there is no initial Respondent's memorandum. He proposed this in a case in the last year, which was endorsed by the Court and the Respondent. A permament solution would be preferable over an *ad hoc* approach.

Stephen Fogarty: the proposal by Richard Wazana is the simplest solution.

Nastaran Roushan noted the issue with the Respondent not filing anything. It is surprising to see the Registry extending the courtesy of asking the Respondent if they intend to file something. If there is a delay by the Applicant, there is no similar courtesy afforded.

Justice Norris: this was a combination of many factors, including the pandemic and the shift to online filing, to do due due diligence on the Court side to ensure that something had not been missed.

Nastaran Roushan added that even if it is perhaps not the intention of the Registry to provide a courtesy to the Respondent that is not provided to the Applicant, this might be the perception. There might sometimes be a situation of applicant's counsel incorrectly entering a deadline in their calendar, but without being afforded this courtesy.

Justice Norris added that this will be raised further in agenda item 11.

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

Justice Norris: we have attempted to address the transcript issue via the Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings issued on June 24, which includes the following two paragraphs:

> **Submitting a Motion for Transcript of Tribunal Hearing**
>
> **Paragraph 38.** An Applicant wishing to file a motion requesting that the Court Order the tribunal to produce a transcript of any oral hearing may include this request, including the grounds in support of the request, within their Perfected Application (Rule 10). The Respondent may respond to the request in their Rule 11 Affidavits and Memorandum of Argument.
>
> **Paragraph 39.** The request shall then be determined on the basis of the same materials as the application for leave.

Shortly after this Practice Guideline was issued, the IRB expressed concern with the viability of this framework.

Andrew Baumberg noted the IRB's letter to Cheryl Robinson, and his call with the IRB in June. At the time, they expressed concern with a blanket requirement for transcripts to be produced in all cases, as well as with challenges related to limited time-lines and preparation of French transcripts.

Arghevan Gerami: in some PRRA cases, we have filed a motion on consent, but there is no transcript or audio recording available. This may need to be raised in due course.

Stephen Fogarty: is there any possibility that the judge reviewing the case would review the audio file if there is no transcript?

Justice Norris: in his experience, an audio recording is normally provided. However, there is debate about the propriety of expecting the judge to listen to the audio recording – there are tremendous inefficiencies compared with checking a transcript. Also, there are issues in an adversarial process – it is important for the parties and judges to all be looking at the same evidence at the same time.

9. Pilot Project: Online Access to Documents (September 7): ***Maritime and Admiralty, Class Actions, Indigenous Law, and Intellectual Property Only***

Justice Norris: this pilot project was launched on September 7 in the areas of Maritime law, Class Actions, Aboriginal Law, and Intellectual Property. The launch was delayed, and so the subsequent launch of the pilot for IMM cases will also be delayed. As noted earlier, it will focus on IMM cases that don't raise risk issues. As there is increasing access to public files, which eventually will include at least some IMM files, it might be good timing to look at professional development for privacy issues. If the Bar is interested in this, the Court would participate.

Raoul Boulakia: it is artificial to distinguish refugee cases from other types of IMM cases as a bright line for risk factors. A lot of lawyers do not understand the danger involved even in non-refugee cases.

Justice Norris: the intention is not to upload the CTR, though there are risks – we intend to proceed cautiously.

Cheryl Robinson agreed with Raoul Boulakia. This could affect our ability to collect supporting documentation. Even in the current situation, people are reluctant to provide documents. It will be even more challenging if it becomes possible to scrape information from the website.

Stephen Fogarty: it is appropriate to be concerned about client's information, but per Rule 66(3), we are required to sign all applications and procedures. It then becomes easy to copy a lawyer's signature. According to law society rules, we are required to protect our identity.

Claudia Mollina: these are important issues, especially regarding children's rights. When we look at how the provincial courts deal with family and children's cases, they are by default not available to the public. This is included in the Civil Code. However, in Federal Court, we have cases dealing with adoption, for example, that are by default on the public record.

Mario Bellissimo: the Court has already received submissions on this issue from the CBA, including a suggestion to consider the Australian approach to provide special access codes. However, there is also an issue regarding ghost representatives, who could more easily gain access to documents prepared by legal counsel.

Justice Norris: policy work on this will need to continue while phase I of the pilot progresses in other practice areas.

Claudia Mollina: the use of initials does not provide sufficient protection – ideally a better model would be used, such as using a computer algorithm. Also, UN body issued report recently: at the judicial review level, Canada and US are the only signatories to the Refugee Convention that make refugee decisions available *and* do not anonymize the decisions.

Justice Norris: as noted earlier, this is an area that is ripe for a professional conference to engage in discussion on these issues.

10. Timing for Issuance of Orders Dismissing Applications for Leave and Judicial Review in IMM Proceedings (June 30)

Andrew Baumberg: the June 30 notice addresses an issue raised by Cheryl Robinson at the May 4 meeting.

Jordan St-Pierre: the dismissed file backlog is around 200 files, down from 900 earlier this year – we are continuing to work on this. We expect to address this within the next month.
For leave orders being processed, they are recent files (from within weeks to a month from notification from the Court), whereas for unperfected files, there is a longer delay.

11. Discontinuance of Unperfected Applications

Justice Norris: we are looking at ways to make the process more efficient. There has been a significant increase in the IMM caseload, including unperfected Applications where parties have effectively abandoned the proceeding. The current practice of the Registry, if the file remains unperfected, is to refer these to the Court for dismissal by Order under Rule 14. However, this process takes up Registry resources to process large numbers of files.
Under consideration: in IMM cases that remain unperfected following the expiry of the time-lines in Rule 10, the proceeding would be deemed to have been discontinued by the Applicant, without the need for formal notice by the Applicant or a Court Order. The deemed discontinuance would be entered into the online docket. This would still allow for a party to file a motion to re-open the case.
Daniel Latulippe: agreed with the proposal, though asked whether an Order is required to dismiss the Application.
Andrew Baumberg: this would not be a formal dismissal, but an administrative discontinuance.
Andrew Brouwer: this is a great way to deal with the issue, though it is important to keep the possibility to re-open the file.
Richard Wazana: would this affect the 12-month delay from dismissal before bringing a new H&C application?
Justice Norris: we shall need to consider the impact of this issue.

12. Delays related to Rule 9 Requests

Justice Norris: the Court is aware that there can be significant delays in production of tribunal reasons.
Andrew Baumberg: there are registry-tribunal bottlenecks, but it appears to be a larger issue.
Raoul Boulakia: there have been cases of lengthy delays in the Rule 9 request being issued. However, there are other cases where there was a delay of up to 11 months from the time that the Rule 9 notification was received by the tribunal to the delivery of its reasons. Part of the problem may be resources at the Court, though it is not always clear where the decision was actually made – this might warrant a multi-institutional working group. This is a point that needs to be addressed.
Arghevan Gerami: this whole issue would be avoided if the reasons were provided with the original decision. If H&C decision were refused, the reasons could be provided at the same time.
Mario Bellissimo: the department was very close to allow real time access to files, even pre-litigation, to check for updates. This could all be resolved in the next couple years.
Jordan St-Pierre: one option might be for the Applicant to advise the tribunal directly of its Rule 9 request. With 300 applications being filed, and 200 with no reasons, this is a resource issue for the registry to identify the appropriate tribunal contact and then send out the Rule 9 request, including follow-up requests if no response is received. Of course, the Applicant is free to inquire with the tribunal directly.
Deborah Drukarsh: this conversation started with a focus on Federal Court Registry contacts with tribunals. IRCC and CBSA are working on streamlined communication channels. She had no comment on the suggestion to provide reasons in every case – this might significantly increase delays. Given the work that is underway, there should be some improvements regarding the Registry-Tribunal bottleneck, without the need for a working group.
If there are further concerns, though, with respect to significant delays in individual cases even *after* the tribunal has received the Rule 9 request, these can be addressed separately.

13. Rule 5(1)(j) – Annex A

Justice Norris: the sub-Committee's work led to the new Rule 5(1)(j). A question arises, though, as to what should be done when it appears that there has been a failure to submit a declaration under this rule.

> Rule 5(1)(j)
>
> > 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;

Form IR-1 (Rule 5) now includes the following:

> The application for leave was prepared by:
>
> (*As applicable, set out the name of the solicitor or party signed below or the name, address and telephone number of any other person who, for a fee or other consideration, prepared the application for leave.*)

Mario Bellissimo: we did research about a decade ago of 1000 cases – most individuals did not know that their representative was not authorized to represent them. Additional work is needed for counselling, pro bono counsel, regulatory bodies, education (e.g., a fact-sheet that is handed to these individuals), etc.

Andrew Baumberg: this Rule applies both to lawyers and others who might assist an applicant for a fee. It is possible that lawyers are remaining "off the record" pending confirmation of legal aid. Note, though, that a lawyer now can:

- Disclose their off the record role via Rule 5(1)(j) without becoming solicitor of record
- Submit a Notice of Limited Scope representation per Rule 124 – see Form 124D

Andrew Brouwer: there is a shift in lawyers' practice, but it is still in progress.

Cheryl Robinson: there may be legal aid requirements that you need to file in the client's name. This requirement would need to change, rather than simply an informal practice among lawyers.

Raoul Boulakia: perhaps this should be raised with legal aid so that their requirements are made consistent with the new Rule. He will share the wording with Andrew Baumberg.

Mario Bellissimo invited volunteers.

Andrew Brouwer volunteered to assist with the ongoing work.

14. Varia

Daniel Latulippe: further factums are due in December / January, with no flexibility in the schedule. Perhaps the Court might give an extra week in the future.

Justice Norris acknowledged this issue -- we will consider this for next year

Deborah Drukarsh: please add a sub-Committee listing to the agenda / minutes.

15. Next Meeting

Justice Norris: February 2023. This will provide an opportunity to discuss the initial experience under Phase I of the new presumptive in-person model for hearings.

There may be a follow-up in the interim (e.g., stats).

END OF MEETING