Federal Court  Cour fédérale

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

May 4, 2022

Microsoft Teams

MINUTES

1. **Agenda / minutes [December 7]**

Adopted.

2. **Court Update and 3. Update re Hearings**

The Chief Justice presented a detailed PPT deck [to be circulated after the meeting], including a proposed process for parties to indicate (by the time they perfect their record) their preferred mode of hearing. However, logistical constraints will prevent the Court from making a major shift towards in-person hearings before September.

For in-person hearings, it appears that parties will likely prefer to continue with electronic records, rather than reverting to paper. We shall need to develop an implementation plan. Parties may need to identify both their preferred mode of hearing as well as their preferred format for the record (e.g., paper vs. digital record for in-person hearing).

Mario Bellissimo: in video hearings, advocacy appears to be more 'mechanical,' with many lawyers simply reading their submissions. Some training is warranted.

What flexibility will be possible if, after first selecting a video hearing, a party later opts for an in-person hearing due to unexpected developments in the case?

Chief Justice Crampton: the Court can accommodate a small number of hearing mode changes. He acknowledged that members of the Court have also noted a deterioration of oral advocacy. More junior lawyers are not getting the experience that is acquired during in-person hearings. There is also an issue with decorum – although the Court has not decided at this stage to revert to gowning, there will likely be a requirement for a more formal background.

David Matas: there is a medical aspect to all this – we might need some medical advice to address health concerns (i.e., masking, ventilation, etc.)

Chief Justice Crampton: the Federal Court has maintained the masking and social distancing requirements, though some plexiglass barriers are being removed. All Members of the Court and Registry staff working in the Courtroom will be fully vaccinated. Although the Court does not require counsel to be vaccinated, counsel could disclose this to each other.

Deborah Drukarsh: the Department is consulting on these issues and will provide input in due course. She asked about the Court's facilities for counsel to conduct in-person hearings.

Chief Justice: the Court has three main categories of hearing rooms: (a) e-trial evidence display systems, (b) basic electronic courtrooms with monitors for counsel; and (c) rooms with no digital infrastructure. Given the number in in-person hearings anticipated, we are working towards having enough equipped courtrooms for counsel to be able to rely on a digital record.

Justice Norris: ideally, counsel would be able to walk into the hearing room with a printed 25-30 page compendium of the most relevant excerpts, allowing recourse to the digital record for other materials if needed.

Chief Justice: agreed that this woud facilitate in-person hearing.

Justice Norris: we have additional challenges for hybrid hearings – the set-up is not ideal for one person in-person and one via video.

Cheryl Robinson: as a new lawyer, it was very helpful to be able to walk into live hearings to observe advocacy skills. It would be helpful to facilitate such access to hearings for lawyers to observe (e.g., hearing list and protocol to observe), and perhaps for the Court to provide a training session.
Andrew Baumberg: shared the website pages[1] with hearing lists (which provide a simple online registration option to observe) and e-hearing resources.
Justice Norris added that the Court plans to reduce the advance notice for registration to attend a hearing (likely to be set at 24 hours). This could be included in the next COVID PD.
Jack Martin referred to submissions from the Advocates' Society *against* a vaccine requirement. On the contrary, he would feel more comfortable at in-person hearings if there were a vaccine requirement.
He agrees with the proposal to have a compendium available for the hearing, subject to advance disclosure to opposing counsel.
Justice Norris: although it is possible in some cases to accommodate a hybrid hearing, in others it may not be feasible, and then it will be necessary for the Court to decide. He would be reluctant to override counsel's preference to appear in-person.
Nastaran Roushan: her clients have had their video blocked, being treated as "observers". It is appropriate for *parties* to be visible during a hearing.
Chief Justice Crampton: this was initially adopted due to band-width concerns, though he understands the concern. We can revisit this.

Action: FC Registry to review practice for video calls related to appearance of parties' video.

Justice Norris: it appears to be only one or perhaps a limited number of parties – this should not be a problem for bandwidth. He has had cases with the parties appearing via Zoom, and has appreciated their appearance.
Justice Strickland: in some cases, there may be larger numbers of parties (e.g., a First Nation Band). The practice may therefore depend on the party profile.
Justice Norris: we have had some requests to live-stream a Zoom feed to their client out of the country, in locations where there apparently were technical issues with access to Zoom. If such a request is to be made, it should be done well in advance so that any media / security implications can be considered and addressed.
Jack Martin: we did a survey before the last meeting – the vast majority preferred video hearings.
Arghavan Gerami: it is difficult to assess at this stage how the pandemic will unfold in the Fall. Even lawyers who prefer in-person advocacy may still prefer a more cautious remote appearance. A transition to in-person hearings is important and should be encouraged. We have become accustomed to video hearings, but do not want the Court to remain as a "Zoom Court."
Mario Bellissimo agrees. It is important to consider the seasonality of the pandemic, though it will be easier to shift back from in-person to video on short notice if required.
Chief Justice: we would like to leave it in parties' hands, but post-pandemic we encourage parties to opt for the in-person hearing mode.
Cheryl Robinson: it might depend in part on the Court's virtual office / background requirements for video hearings. Not all counsel have an office – many work from home now.
Regarding the online docket, she notes that it still indicates that the negative leave decision has been issued. However, in practice the decision has *not* actually been communicated to counsel, in some cases undermining the solicitor-client relationship. Clients sometimes think that their lawyer is hiding information or misleading them.

[1] See Hearing Lists: https://www.fct-cf.gc.ca/en/court-files-and-decisions/hearing-lists ; E-Hearing page https://www.fct-cf.gc.ca/en/pages//online-access/e-hearings#cont ; and E-Filing Resource page https://www.fct-cf.gc.ca/en/pages/online-access/e-filing-resources#cont

Caroline Perrier responded that this is due to technical issues – we are dependent on a legacy case management system (from 1990) and it is not feasible to create new menu text.
The Chief Justice suggested that we revisit this with the IT group.
Andrew Baumberg added that it might be possible to have a more explicit Notice on the Court website to clarify the inaccurate language in the docket.

> **Action:** Andrew Baumberg and Caroline Perrier to review options to address the misleading docket entries related to negative leave decisions.

Cheryl Robinson: it would need to clarify more than the dates, but also note the error (i.e., that no certificate has in fact been issued).
David Matas: he has relied on the existing notice as a basis for discussion with clients. He also relies on the production Order as an advance signal that leave will be granted.
Jack Martin: the electronic payment system works much better than the prior phone system. He suggested an option for frequent filers to provide their credit card on file to ensure more timely payment, and in some cases avoid the filing being deemed to have occurred the next business day.

> **Action:** Andrew Baumberg and Caroline Perrier to review options for counsel to maintain their credit card information 'on file' for more timely processing of payments

4. Follow-up from December 7 Meeting: Order of submissions (Applicant / Respondent)

Daniel Latulippe noted a number of comments received from within the Department:

- in some cases, the Applicant's further factum could be quite different, without an option for a response from the Respondent
- give the Applicant a further right to reply
- alternatively, if the Respondent goes first, ensure the Respondent has a right to reply
- allow the Applicant to address issues via oral submissions, or at the discretion of the judge
- reverse order could facilitate settlements
- often the client would like to see the transcript before consenting to settlement (though this is no longer applicable given the recent change to availability of a transcript)

Justice Norris: another option would be to have a second template for leave granted Orders, including an option for an additional right to reply.
Cheryl Robinson: concerned with keeping the current order of submissions but adding an extra right to reply for the Applicant. The current framework indicates that an extra memorandum 'replaces' the original memorandum – this is extra work. Also, there may be a timing issue – it would be helpful to know the Respondent's position early, to avoid having to address a whole new set of arguments. For the reverse option, it is not clear why the Respondent should get a 2nd right of reply – the onus is not on them to make the case.
Mario Bellissimo agrees. The practice of *not* filing a Respondent's Record should be discouraged. It complicates matters to add extra steps, which can be costly.
Daniel Latulippe: some of these cases involve the Minister as the Applicant but a self-represented respondent, who retains counsel after leave is granted.
David Matas: there is some jurisprudence indicating that you can't raise substantive new issues that are not raised at the leave stage. This needs to be considered. The further memoranda are useful even just to consolidate with the page numbers of the tribunal record.
Justice Norris: the Court will consider the comments.

5. Sub-Committee: Expedited Judicial review (Detention)

Justice Norris: a draft protocol was developed by the bar and is essentially ready to be issued. Subject to final comments, the draft protocol will be integrated into the draft IMM Consolidation.

Cheryl Robinson: on behalf of Andrew Brouwer, there is concern with paragraph h:

> If the Court does not grant the request for an urgent expedited judicial review proceeding, it may dismiss leave to the underlying Application for Leave and for Judicial Review.

The Court should not short-circuit the leave process.
Daniel Latulippe: paragraph h was drawn from the similar paragraph in the stay of release protocol.

Banafsheh Sokhansanj recommends that we go back to the sub-Committee to revise some additional drafting issues that appear in the latest draft.

Action: the sub-Committee should review and finalize the draft protocol for expedited JRs.

Justice Norris added that requests for an expedited process sometimes arise on an ad hoc basis. Is this satisfactory, or are there other case-types / practice issues for which written guidelines regarding an expedited process would be helpful?
David Matas has a number of refugee clients overseas who are anxious to have their case resolved expeditiously. They would welcome an expedited process.
Justice Norris: this is meant to be the exception, though there are some cases where it is in everyone's interest. For now, we do not intend to strike a new working group, but can consider this proposal further.
Arghavan Gerami: it would be preferable to insert the arguments regarding an expedited process within the leave memorandum, similar to the extension of time issue.
Mario Bellissimo agrees that this should be an exception. However, we should consider the number of cases with similar outcomes (e.g., H&C or RAD) that are refused on the same grounds, and whether there are more efficient ways to track / deal with these cases.
Chief Justice: we considered this approach for a recent group of cases, given the government's reliance on AI screening (using the Chinook software system), but it was decided that they could not be 'bundled' and were not amenable to a "lead case" approach. However the Court remains receptive to this approach in an appropriate case.

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

Justice Norris: we have received a letter yesterday from the private bar to the Court and the IRB. It is very helpful. The next step is for the Court to review the letter and then engage with the IRB.
Chief Justice: recommended that we consider inviting a member of the Bar to attend any meeting with the IRB.

Action: the Court will review the letter from the Bar and then discuss the issue with the IRB.

7. Sub-Committee: Online Access to Documents

Justice Norris: a phase I pilot launch is planned for launch in the near future. Subject to feedback from the phase I practice areas, and further discussion with the immigration and refugee bar, a phase II expansion will be considered for at least some IMM cases (scope still to be decided)

8. Consolidated Practice Guidelines: revised draft

Justice Norris noted the considerable work to update these practice guidelines, which still require some additions (e.g., expedited judicial review applications). We may also add a reminder regarding informal motions for relatively routine matters – i.e., "informal" still requires some rigour, and the judicial officer must still be satisfied that the remedy is justified. We may also consider a minor revision to the protocol for allegations against former counsel – there is a gap in the protocol: it can be highly prejudicial for such allegations to be left hanging for a very long time, with no process for former counsel to expedite the process. Although it is questionable whether current parties / counsel should be forced to expedite the case, there are genuine issues to be be balanced.

Arghavan Gerami: on a related note, would former counsel need to file a full motion record, or simply an informal letter requesting that the Court issue an Order? Some clarification would be helpful. There are definitely cases where the allegations are weak or entirely without merit, but highly prejudicial.
Mario Bellissimo: perhaps the allegation could be addressed via an interlocutory process entirely outside the original framework, which addressed the allegation via the core IMM process. LawPro now requires counsel to refrain from communications, and the existing time-line is difficult to follow.
Justice Norris: it might be appropriate to reconstitute the working group to revisit the protocol. If so, the Consolidated Practice Guidelines may need to be issued in the interim, and then amended once the protocol has been revised.
Maureen Silcoff: while it is difficult for former counsel, the focus of an IMM proceeding is on the core issues being raised by the Applicant, rather than former counsel's concerns. The process should not be driven by the LawPro requirements.
Arghavan Gerami: while counsel have 7 days to respond, there needs to be complete disclosure of the facts relevant to the allegation.

9. Rules Committee Update
For information.

10. Suggestions for Long-Term Committee Plan
No comments.

11. Varia
Mario Bellissimo: suggested that we strike a new sub-Committee regarding the protocol for allegations against former counsel. He volunteers to participate.
Justice Norris: agrees.

> **Action:** new sub-Committee to review the protocol for allegations against former counsel. Advise Andrew Baumberg if you wish to join.

Jack Martin: files in the Sharepoint folder are not maintained until the hearing.

> **Action:** Andrew Baumberg and Caroline Perrier to check whether there are isolated problems or a larger shift in Registry / IT practice [re: sharepoint storage].

12. Next Meeting
Justice Norris: next meeting in November.