Federal Court  Cour fédérale

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

MINUTES

MARCH 6, 2023

VIA VIDEOCONFERENCE

Attendance:

for the Court: Justice Norris (Chair), Justice Zinn, Justice St-Louis, Justice Brown, Justice Go, Justice Sadrehashemi, Associate Judge Tabib, Associate Judge Steele, Associate Judge Crinson, Associate Judge Duchesne

for CAS: Anil Kamal, Klara Trudeau, Michael Switzer, Justine Drouin, Andrew Baumberg, Caroline Perrier

for the Bar: Nastaran Roushan, Richard Wazana, Julie-Anne Desrosiers, Daniel Latulippe, Anabel Busbridge, Stephen Fogarthy, Julie Desilets, Maureen Silcoff, Arghavan Gerami, Mario Bellissimo, Amanda Lord, Deborah Drukarsh, Douglas Cannon, Erin Roth, Patricia Gamliel, Wennie Lee, Jack Martin, David Matas, Anthony Navaneelan, Andrew Brouwer, Véronique Morrissette, Nicholas Woodward, Cheryl Robinson, Lorne Waldman, Michael Battista, Raoul Boulakia, Chris Veeman

Regrets: Chief Justice Crampton, Justice Strickland, Justice McDonald, Dupe Oluyomi

1. **Approving agenda and minutes of the meeting held on November 4, 2022**

Minutes are adopted. Notice for the discontinuance of Unperfected Applications is placed to the top of the agenda.

2. **Notice: Discontinuance of Unperfected Applications**

Justice Norris: provides background regarding this administrative measure to clear out many proceedings that were effectively abandoned. However, the initial Notice has created more problems. The RLO provided a letter with many helpful suggestions.

Associate Judge Duchesne: there is an issue with missed deadlines and requests for extensions, often without a good evidentiary record. We have also noticed an appreciable drop in the number of informal motions after the deadline has passed.

Maureen Silcoff: on behalf of CARL, there is significant concern regarding the deemed discontinuance. If people miscalculate the date, there are serious considerations, including an impact on the statutory stay.

There is also a question whether the rules allow this type of practice notice, or if an actual amendment is required. An amendment with a 60 day time period would be preferable.

Andrew Brouwer: we agree that 60 days is more realistic. The other issue, of course, is to have a carve-out if a motion is pending on the Court docket. There is still an issue with the test, as set out in *Virk*, to get past a deemed discontinuance.

Cheryl Robinson: it is not always feasible to reach DOJ counsel to get consent for an informal motion before the deadline. In some situations, a full motion record is required due to the delay in order to avoid the deemed discontinuance. An extended grace period would be beneficial.

Jack Martin: endorses the letter from the RLO – a 60-day grace period would be very helpful. The jurisprudence on extensions recognize the merits of the case and the length of the delay.

Daniel Latulippe: DOJ needs to be able to provide clarity regarding the status of the file. Personally, there is no need to have the file closed 1 minute after the deadline. The proposal of 60 days may be more than necessary, and 30 to 40 days seems appropriate. Traditionally, the emphasis has been to get everything complete by the deadline, but we need some flexibility. Ending the file on day 30 is not the goal.

Justice Go: we need to have the perspective of self-represented litigants. Some might not even check the docket to see the results.

Daniel Latulippe: SRL's have only one case, and usually track their case carefully.

Andrew Brouwer: in his experience, some SRL's have no simple way of being notified under the current regime. We recommended a written notice be mailed to the litigant. We still recommend 60 days.

Justice Norris: whatever notification process is adopted, we need to ensure that there are sufficient resources at the Registry to meet the goal.

Anthony Navaneelan: the Court's Notice should be sent to SRL's, and a formal notice regarding the discontinuance is required.

Deborah Drukarsh: it is important for the docket to be updated on a timely basis so that the client's view of the file is consistent with what their lawyer is telling them.

Patricia Gamliel: perhaps the Court could follow the IRB practice, with an automated notice providing parties with updates regarding upcoming dates.

Deborah Drukarsh: this sounds like a logical approach. We still have challenges with the Court receiving documents until midnight, whereas DOJ offices accept service only until 5 p.m. This creates a presumption of acceptance, which needs to be addressed.

Justice Norris: there is a strong consensus to push the grace period. This would likely resolve many of the problems. For the longer-term, a change to Rule 21(2) might be considered, to allow for an extension to a deadline on consent.

David Matas: there is some confusion regarding provincial holidays, and whether it changes the calculation of time. There is something on the FC website that suggests that provincial holidays are to be considered.

Andrew Baumberg: the Rules make reference to the *Interpretation Act* definition of holiday. He will double check re FC website calculation of provincial holidays.

3. **Court Update**

Justice Norris notes two new appointments:

- Associate Judge Crinson
- Justice Tsimberis

The statistics for 2022 show a record number of IMM proceedings:

IMM Applications for leave commenced / Demandes d'autorisation introduites (IMM)					
	2018	**2019**	**2020**	**2021**	**2022**
YTD | cumul de l'année	6,522	7,770	6,422	9,762	13,487
↑↓	-	+1248	- 1348	+3340	+3725
↑↓%	-	+19%	-17%	+52%	+38%

There has been an incease in stay motions in the last few years, with relatively stable grant rates.

IMM Workload – Stays (imperfect totals due to rounding)

- 2020: 230 stays (25% granted, 8% refused to hear, 45% dismissed, 22% withdrawn)
- 2021: 378 stays (26% granted, 10% refused to hear, 47% dismissed, 18% withdrawn)
- 2022: 509 stays (27% granted, 10% refused to hear, 48% dismissed, 14% withdrawn)
- 2023 (January-February 23): 127 stays (16.5% granted, 8.7% refused to hear, 33.9% dismissed, 23.6% withdrawn, 17.3% scheduled but not yet heard so no decision has been rendered)

Scheduling

- In light of the significant increase in IMM filings, we have a backlog of hearing date requests, meaning IMM JRs are not being scheduled within 90 days in Toronto or Montreal, but are otherwise generally scheduled within 90 days
- As of February 23, 2023, we have the following backlogs for hearing date requests:
    - Toronto: 210 backlogged requests
    - Montreal: 15 backlogged requests
- We are looking at options to address this backlog

Settlement project

- The settlement rate was 23.6% on a national scale in 2020 and 2021, with 10% of settlements occurring within two weeks of the hearing and 20% of vacated hearing spots being backfilled.
- In 2022, the settlement rate was 28.6% on a national scale, with 5.6% of settlements and discontinuances occurring within two weeks of the hearing and 44% of hearing spots being backfilled.

Scheduling - Mode of hearing

The following figures outline the modes of hearing for hearings that occurred in 2022 and the modes of hearing for hearings slated for 2023. Kindly note that these figures include CMCs, TMCs, stay motions, and other types of hearings that were held remotely before the pandemic.

	Teleconference	**Videoconference**	**In-person**	**Hybrid**	**Total**
2022	1316 (30.8%)	2658 (62.3%)	261 (6%)	33 (0.8%)	4268
2023	208 (15.4%)	629 (46.6%)	474 (35.1%)	39 (2.9%)	1350

Requests for changes to the mode of hearing – Immigration files

We have received 29 requests to change the mode of hearing after leave has been granted and the hearing has been scheduled. All but one requested that an in-person hearing be converted to a Zoom hearing, and one requested that an in-person hearing be converted to a hybrid hearing. All requests were granted.

Justice Norris invites feedback on in-person hearings.

Arghevan Gerami: her office is close to the Courthouse, so it is easy to attend in-person hearings. However, for many lawyers, most of the resistance relates to the logistics / convenience related to mode of hearing. For young lawyers, they are keen to attend hearings in-person. Regarding the settlement project, in many cases, it does not appear that settlement discussions are taking place.

Justice Norris: the project applies to all cases – it is for the parties to turn their minds to the case at hand to decide whether settlement discussions are appropriate.

Nastaran Roushan: for in-person hearings, it is important to be able to access internet in the Courtroom and be able to access materials on a large screen while making oral submissions. It would be helpful to be able to sit, or have access to a standing desk.

Deborah Drukarsh: typically, there is no internet access that is working. Counsel will need to hotspot. This is a significant challenge. Also, counsel have gone from 2 briefcases of materials, some documents which need to be accessed in parallel, to having only a small laptop screen. We have portable screens, but this is challenge to set up. Counsel have been advised by Court staff that existing monitors in courtrooms are for sharing with the Court and other participants.

David Matas: regarding settlement, he sees offers when the decision-maker is a visa officer etc., but not regarding decisions of the IRB. This appears to be the result of a lack of communication between counsel

and the Board. There appears to be hesitation to open up communications, which is understandable, given the need to be at arm's length from the board. However, it would be helpful to find some way to communicate with the Board.

Deborah Drukarsh: we do receive instructions regarding matters at the board on all appropriate cases.

Mario Bellissimo: perhaps we strike a working group regarding the transition to in-person hearings. There are many complicating issues. We may need to afford additional time for scheduling to allow counsel to sort through technical issues.

Justice Norris agrees. Andrew offers to set-up a first call to discuss this.

Deborah Drukarsh: we could perhaps re-launch the modernization committee to focus on this.

Daniel Latulippe: it would be helpful to open the rooms more than 15 minutes ahead of the hearing, which is the current norm, to set-up portable monitors etc. – an extra 15 minutes is needed. There are some space issues, as well, due to the plexi-glass screen, leaving much less room on the counsel table for print copies.

Stephen Fogarty: are there statistics regarding the number of IMM proceedings in January / February? The Registry probably needs more staff to handle the increased workload.

Klara Trudeau shares statistics:

January	113
February	126
Total:	239

4. **Discussion Regarding IMM Caseload –** see statistics circulated to Bar at Annex A

Justice Norris notes the stats at annex A regarding post-leave steps. We are looking at the possibility of shortening the timeline for further affidavits, so as to allow scheduling of cases on shorter timelines. For follow-up at subsequent meeting.

5. **Update: Order of submissions (Applicant / Respondent)**

Justice Norris: no one volunteered for a possible working group. No comments.

6. **Draft Notice (Mandamus) – see draft protocol, as circulated to Bar, in Endnote**

Andrew circulated the draft notice to the Committee on February 9 – request for comments by Feb 24; no comments received. Next steps: subject to comments received in next two weeks, integrate the protocol into an amendment to IMM Consolidation.

7. **Draft Notice: Allegations Against Authorized Representatives**

Justice Zinn notes that there were some editorial comments as well as some more substantive suggestions:

1. There needs to be an anonymity mechanism for the former authorized representative.
    - The working group did not think that this should be implemented, as this goes against the open court principle, and secondly, the lawyer's reputation is irreparably harmed by an allegation being on the record when it has been adjudicated.

2. There should be consequences for the failure to follow the protocol for the Applicant's counsel so that there is incentive to follow the protocol.

    - The working group did not think that this warranted changes, as the chance of getting leave is reduced if the protocol is not followed. This is a sufficient consequence.

3. There should be consequences for bringing frivolous allegations.

    - The working group did not think that this warranted changes, as this is always open to counsel to request costs at the hearing.

Nastaran Roushan expresses concern with a lawyer's application, and allegations against former counsel, being accessible online.

Justice Norris notes that these records are not yet part of the Court's pilot project related to online access.

Caroline Perrier: former counsel's name might appear in the docket.

Justice Zinn: the docket does not provide much information regarding the context.

Andrew notes that there were a number of more minor editorial suggestions which will be integrated into the previous draft. A cleaned up version can be circulated and then integrated into the IMM consolidation.

8. **Sub-committee: Litigation Guardian (LG)**

Cheryl Robinson provides an update regarding the sub-committee. Following completion of research, we will draft a practice guideline for review.

9. **Sub-Committee: Record of the RPD / RAD**

Andrew - Bar 1st expressed concern at Liaison Committee meetings in late 2021 regarding the IRB's shift away from providing a transcript within the CTR:

- on May 3, 2022, the Bar sent a letter to the IRB & Court setting out its position

- on June 24, a comprehensive revision to the Court's Immigration Practice Guidelines was issued, including a minor addition related to the transcript issue, but simply to clarify the process for filing a motion: namely, that if an Applicant files a motion with the Court seeking an Order requiring the IRB to produce a transcript, the motion can be submitted using the existing framework for informal requests for interlocutory relief *if DOJ counsel consents to the request*. Otherwise, a formal motion is required.

- A bilat meeting was held March 1 between CAS and the IRB – in preparation, we conducted a key word search of IMM case dockets and were unable to find any cases since June 2022 in which the IRB was Ordered to produce a transcript. The IRB also checked their records and could find no examples.

- There is no clear explanation for the gap beween, on the one hand, the Bar's concern this last year regarding the lack of a transcript from the IRB, and on the other, the absence of even informal motions on consent for a Production Order requiring the IRB to produce a transcript.

- Lawyers may simply be unaware of the option in the IMM PG.

10. **Delays related to Rule 9 Requests**

Andrew: part of the issue si related to a bottleneck at the FC Registry with regards to contacts lists for IRCC/CBSA.

Deborah Drukarsh: is working with IRCC and CBSA to streamline the contact list for the FC registry. IRCC will be ready to launch for a small group of visa files next week. CBSA will be ready later.

Andrew: it may be useful to get stats to assess whether there is a wider problem.

Deborah Drukarsh: it may have been primarily related to the pandemic.

11. **Rule 5(1)(j) – Annex B**

Update for March 6: only limited progress since Nov 4 meeting -- Andrew raised the issue with the IRB at the March 1 bilat:

- At least some IRB decisions that are subject to judicial review indicate, on an additional information page that is appended to the decision, that the claimant "… may wish to get advice from counsel …" However, the term "counsel" may be interpreted more broadly than professional legal counsel. This may lead claimants to believe that their immigration consultant is authorized to continue to represent them when bringing an application in Federal Court.
- Among other steps, the Court updated its website to make it clear that only a lawyer is authorized to represent a party in Federal Court. See: Who May Represent You in Federal Court.
- It would be appreciated if the IRB might consider adding a reference / link to the Court's web page, or similar information, to the Info Page attached to final decisions of the Board that are subject to judicial review in Federal Court.

The IRB agreed to consider this request
12. **Varia** No time.
13. **Next Meeting** Justice Norris: next CBA conference will be in Ottawa on Friday, June 2 and Saturday June 3 See agenda here. In the past, we have arranged Liaison Committee meetings mid / late afternoon in parallel with conference panels. Possible meeting per draft agenda on Friday evening or at lunch? Please advise Andrew of any preference re timing for a meeting.

Annex / Annexe A

IMM Applications for leave commenced / Demandes d'autorisation introduites (IMM)					
	2018	**2019**	**2020**	**2021**	**2022**
YTD | cumul de l'année	6,522	7,770	6,422	9,762	13,487
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Statistics – Post-leave Procedures / Statistiques – des procédures après l'autorisation

- The relative percentage of proceedings for which no post-leave filings occur have remained relatively steady. Le pourcentage relatif de procédures pour lesquelles il n'y a pas de dépôt après l'autorisation est resté relativement stable.
  - 2018: 53% of proceedings had no post-leave filings / des procédures n'ont pas fait l'objet d'un dépôt après l'autorisation
  - 2019: 53%
  - 2020: 52%
  - 2021: 55%
  - 2022: 69*% *2022 figures are inaccurate, given that proceedings instituted in 2022 are not necessarily at the leave stage yet. Les chiffres sont inexacts, étant donné que les procédures déposées en 2022 ne sont pas nécessairement encore au stade de l'autorisation.

- No further affidavits are filed in the vast majority of proceedings. Dans la grande majorité des procédures, aucun affidavit supplémentaire n'est déposé.
  - 2018: Applicant's further affidavit filed in 6% of proceedings / Respondent's further affidavit filed in 6% of proceedings -- Nouvelle déclaration sous serment du Demandeur déposée dans 6 % des procédures / Nouvelle déclaration sous serment du défendeur dans 6 % des procédures
  - 2019: 6% / 3%
  - 2020: 4% / 5%
  - 2021: 5% / 4%

- The filings of further memoranda are consistent year-over-year. Les dépôts de mémoires supplémentaires sont constants d'une année sur l'autre.
  - 2018: Applicant's further memo filed in 19% of proceedings / Respondent's further memo filed in 41% of proceedings -- Nouvelle mémoire du demandeur déposée dans 19% des procedures / Nouvelle mémoire du défendeur dans 41 % des procédures
  - 2019: 21% / 38%
  - 2020: 20% / 39%
  - 2021: 20% / 37%

- Transcripts of cross-examinations were only filed in 17 of 5939 (or 0.29%) of proceedings. The transcript deadline is typically the same as the deadline for the Respondent's further memorandum, and Respondent's further memoranda were filed in 2321 of 5939 (39.1%) of proceedings from 2018-2021. This therefore means that there is no real opportunity to shorten the deadline as it

would also impact the deadlines for Respondent's memoranda. // Les transcriptions des contre-interrogatoires n'ont été déposées que dans 17 des 5939 procédures (soit 0,29 %). La date limite de dépôt d'une transcription est généralement la même que pour le mémoire supplémentaire du défendeur, et les mémoires supplémentaire du défendeur ont été déposés dans 2321 des 5939 (39,1%) procédures de 2018 à 2021. Cela signifie donc qu'il n'y a pas de réelle opportunité de raccourcir le délai car cela aurait également un impact sur les délais des mémoires du défendeur.

- ❖ IMM proceedings coded as I21 (Other – Arising outside of Canada) consistently have some of the highest "no post-leave filing" percentages. // Les procédures IMM codées I21 (Autre - Originant à l'étranger) présentent systématiquement des pourcentages parmi les plus élevés de « pas de dépôt après l'autorisation ».
  - 2018: 68% of I21 proceedings had no post-leave filings / 68% des procédures I21 n'ont pas fait l'objet d'un dépôt après l'autorisation.
  - 2019: 58%
  - 2020: 56%
  - 2021: 65%

Annex / Annexe B

Federal Courts Citizenship, Immigration and Refugee Protection Rules	***Règles des cours fédérales en matière de citoyenneté, d'immigration et de protection des réfugiés***
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 **(a)** the full names of the parties; **(b)** the date and the details of the matter — the decision, determination or order made, measure taken or question raised — in respect of which relief is sought and the date on which the applicant was notified of or otherwise became aware of the matter; **(c)** the name of the tribunal and, if the tribunal was composed of more than one person, the name of each person who was on the tribunal; **(d)** the tribunal's file number, if any; **(e)** the precise relief to be sought on the application for judicial review; **(f)** the grounds on which the relief is sought, including a reference to any statutory provision or Rule to be relied on; **(g)** the proposed place and language of the hearing of the application for judicial review; **(h)** whether or not the applicant has received the written reasons of the tribunal; **(i)** if the applicant consents to the electronic service of documents, the applicant's electronic address as set out in Form 141A of the *Federal Courts Rules*; **(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.	**Forme de la demande d'autorisation** **5 (1)** La demande d'autorisation se fait selon la formule IR-1 figurant à l'annexe et indique ce qui suit : **a)** les nom et prénoms des parties; **b)** la date et les détails de la mesure — décision, ordonnance, question ou affaire — à laquelle se rapporte le redressement recherché et la date où le demandeur en a été avisé ou en a pris connaissance; **c)** l'appellation du tribunal administratif et, si celui-ci était composé de plusieurs personnes, le nom de chacune d'elles; **d)** le numéro du dossier du tribunal administratif, le cas échéant; **e)** le redressement expressément recherché par la demande de contrôle judiciaire; **f)** les motifs qui justifient le redressement recherché, y compris la mention de tout texte de loi ou règle invoqué à l'appui; **g)** le lieu et la langue proposés pour l'audition de la demande de contrôle judiciaire; **h)** le fait que le demandeur a reçu ou non les motifs écrits du tribunal administratif; **i)** si le demandeur consent à la signification électronique de documents, l'adresse électronique du demandeur indiquée sur la formule 141A des *Règles des Cours fédérales*; **j)** le nom, l'adresse et le numéro de téléphone de toute personne ayant préparé la demande d'autorisation moyennant rétribution; **k)** la signature, le nom, l'adresse et le numéro de téléphone de l'avocat du demandeur ou, dans le cas où le demandeur agit pour son propre compte, sa signature, son nom, son adresse aux fins de signification au Canada et son numéro de téléphone.