



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

May 25, 2009

The Honourable Judith A. Snider
Federal Court of Canada
90 Sparks Street, 10th Floor
Ottawa, ON K1A 0H9

Dear Justice Snider:

Re: Ex parte interim stay motions at the Federal Court

I am writing on behalf of the Citizenship and Immigration Section of the Canadian Bar Association (CBA Section) in relation to an agenda item at the April 2009 meeting of the Immigration Federal Bench and Bar liaison group in Whistler. As requested, we are providing more details of our concerns.

CBA members have brought to our attention several occasions where counsel of record was not notified of interim stay motions of IRB Immigration Division decisions brought by the government before the Federal Court. The practice appears to be more prevalent in Quebec. However, we have reports that this practice has also occurred elsewhere in the country. The CBA Section previously raised this issue with Department of Justice officials at a meeting in Ottawa on November 3, 2008.

Quebec's Batonnier has also objected to this practice. In a January 26, 2009 letter to the Minister of Justice, he stated:

This practice should be especially discouraged since it can have serious consequences, and could lead to an extended period of detention. We presume that the Federal Court would like to hear both parties on this subject, as per the principles of fundamental justice, especially since an individual's right to freedom is at stake. [translation]

We agree.

We appreciate that the government has a duty to protect the public and has a right to apply for interim stays of Immigration Division decisions. However, these motions follow a specialized tribunal's decision to release the persons concerned and stipulate conditions. It is well established that deference is owed to a finding of fact made by a specialized tribunal in judicial review or stay motion applications. The standard is high, and the ultimate success of the government's application far from certain.

When there is a counsel of record, we believe *ex parte* appearances should be limited to the most exceptional circumstances, as per the Federal Court Rules. The government should resort to *ex parte* appearances only in circumstances where it is completely unable to contact counsel before the person concerned would be released from detention. The fact that service must occur in late afternoon or after business hours would not meet this standard. Counsel on record can easily be identified from the file of the IRB hearing, and as a matter of routine practice, DOJ counsel should request this information from their clients (CBSA hearings and removal officers).

Alternative forms of communication, such as phone calls or e-mails to counsel, should be employed if normal forms of service are not possible. DOJ counsel should make every effort to serve counsel of record as soon as practically possible.

As the Batonnier stated, a person's liberty is at issue. It is therefore critical that Federal Court judges are able to make informed decisions based on submissions from **both** parties.

Michel Synott of the Department of Justice sent us a copy of his May 1, 2009 letter to you. He states that in most circumstances, the Department "seek[s] to inform *the person in question or their attorney* without delay of the existence of the proceeding that has been filed". [translation, emphasis added] In our view, where there is counsel of record, it is inappropriate to serve the person concerned in lieu of their counsel. The refugee and immigration applicants involved often do not speak English or French, have no legal training, and may be in a penitentiary where access to legal advice after hours and without notice is virtually non-existent.

After discussing this matter with the Department of Justice, we believe that the private bar and the Department may be able to agree on effective ways to serve last minute emergency motions, such as by e-mail. The agreement could then be implemented by way of national guidelines for DOJ counsel. We are open to working with Me. Synott and his colleagues to ensure that the interests of both parties are served. We hope to report on our progress at the next Immigration Federal Bench and Bar liaison group meeting.

We appreciate the Federal Court's continued vigilance in enforcing the principles of fundamental justice in relation to *ex parte* motions. Thank you for your attention to this matter, and we look forward to further discussions about it at the next meeting of the liaison group.

Sincerely,

(Original signed by Kerri A. Froc for Baerbel Langner)

Baerbel Langner
Chair, National Citizenship and Immigration Section

cc. Me. Michel Synott, Director, Immigration Law Branch, Quebec Regional Office, Justice Canada