THE CANADIAN BAR ASSOCIATION

L'ASSOCIATION DU BARREAU CANADIEN

Federal Courts Rules Consultation

NATIONAL IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

January 2013

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Immigration Law Section of the Canadian Bar Association.

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INTRODUCTION

The Immigration Law Section of the Canadian Bar Association (CBA Section) thanks the Federal Courts Rules Committee for the opportunity to respond to the October 2012 Report of the Subcommittee on Global Review of the *Federal Courts Rules* (Global Report). The CBA is a national association of over 37,000 lawyers, notaries, students and law teachers, with a mandate to promote improvements in the law and the administration of justice. The CBA Section comprises lawyers whose practices embrace all aspects of immigration and refugee law. Our comments below follow the order of the Subcommittee's findings and recommendations.

1. NO NEED FOR FAR REACHING REFORM

The CBA Section agrees that wholesale change to the *Federal Courts Rules* is not required.

2. NEW REGULATORY TOOLS TO CURB CERTAIN ABUSES

The CBA Section believes that it is important to take into account the particular dynamics of immigration and refugee proceedings, in determining whether a particular power to curb abusive litigation is needed. Immigration matters involve disproportionate power imbalances between litigants. On one side is the federal government with an institutional structure and litigation resources at its disposal; on the other, individuals who are usually of modest means. Immigration proceedings are typically relatively simple. Abuse of process motions can be just as complex and resource-demanding as judicial review. Changes encouraging abuse of process motions may have a reasonable impact in one field (such as patent litigation, where delays are often solely tactical), but disproportionate impact in another (as we anticipate might be the case in immigration).

We agree that litigation conduct should not be abusive, inappropriate, disproportionate or wasteful. However, in advance of adjudication, it is not always immediately obvious whether

any particular form of litigation conduct is abusive or unmeritorious. Arguable claims may ultimately be unmeritorious, but not abusive. That is why the court system traditionally guarantees equal access, with costs to penalize those who conduct the litigation inappropriately or who put the other party to extra cost.

New mechanisms to address the problem of abusive litigation may themselves be prone to abuse by well-funded litigants seeking to distract from the substance of the case, drain the litigation resources of the less-resourced party, and delay. We would be concerned that motions which could otherwise be heard and determined on their merits will tend to be shifted towards procedural objections. This could have a particularly unfair impact in motions for stays of deportation. A claim of abuse which fails before one gets to the merits adds costs and time spent on litigation. There are ways to prevent misuse of the power, for example, costs awards against unsuccessful abuse allegations in any event of the cause. An example of an award of costs being granted where a motion to strike was rejected is the series of decisions in *Lominadze v. Canada (Minister of Citizenship and Immigration).*[1] Even when costs are awarded, the energy and time devoted to the motion compares to the time for the judicial review itself. The Global Report does not address this issue, despite its otherwise comprehensive treatment of the problem of abuse. If this recommendation is pursued, there should be substantial disincentives to avoid a wealthier party using applications for tactical reasons, to increase costs or take advantage of the relative lack of sophistication and resources of the other party.

There is merit in allowing the Court, on its own motion, to find particular pleadings or other uses of the *Rules* abusive or contrary to Rule 3. Just as when the other party makes such an allegation, there should be an opportunity for the party in question to make submissions in response to the motion. The Rule should state that the Court should entertain a motion only in the clearest of circumstances and in a manner that would not unnecessarily prolong the proceeding. It should not be used, for instance, in circumstances where delay or procedural problems are caused by a lack of resources (i.e. delay through inability to retain counsel or inability to afford producing the record).

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[1] 1998 CanLII 7302 (FC); 1998 CanLII 14575 (FC); 1998 CanLII 14573 (FC); 1999 CanLII 14643 (FC).

3. *RULES* CURRENTLY STRIKE AN APPROPRIATE BALANCE BY VESTING DECISION-MAKERS WITH AN APPROPRIATE LEVEL OF DISCRETION

We agree. Please see our comments under recommendation 2 on discretion in abusive litigation.

4. APPROPRIATE BALANCE BETWEEN JUDICIAL DETERMINATION AND PRE-TRIAL DISPOSITION

We appreciate the impetus to de-prioritize "determination" in the *Rules.* However, sometimes applicants have a legitimate desire for judicial determination over another resolution of their particular matter. In the immigration context, settlement obtains the particular relief sought (i.e., redetermination), but may not address broader, systemic issues about how the tribunal determines claims. A litigant's desire to see changes in the system may ultimately save resources, whereas settlement may result in similar applications to the Court in the same or similar cases. The potential of increased negative costs awards against individual litigants may also have the perverse effect of eliminating meritorious claims from the system due to the fear of those awards.[2] There may be other ways the Court could facilitate settlement (such as intervention where the respondent opts not to file their record, or has standing instructions not to settle in stay motions).

On costs, the Global Report states:

> For example, a majority of the subcommittee would like to see the costs provisions amended in order to make it more likely that a higher quantum of costs will be awarded when warranted. For example, the current scale of costs in the Tariff is low and has little effect on the conduct of large, sophisticated litigants.

We agree that the rules for the calculation of costs are unduly complex, and the amount available (i.e. the tariff rate) is totally outdated.

In immigration law, the general principle is that costs are not awarded, because in most cases this would discourage litigation by the immigrant. This means, however, that immigrants who

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[2] In the civil context see Erik Knutson, "The Cost of Costs: The Unfortunate Deterrence of Everyday Civil Litigation in Canada" (2010) 36 Queen's LJ 113 at 115 where the author concludes that the risk of adverse costs awards is "disproportionately driving the civil litigation system for everyday litigants, leading to the over-deterrence of litigation in the name of settlement and to concerns about access to the civil justice system."

have no means to hire a lawyer have difficulty finding counsel to act pro bono. Where an exception to this general principle is made, argument over costs often comes at the end of the substantive judicial review, when neither counsel nor the judge have much time left for it. A result is that both argument and decision making on costs is often arbitrary (such as a low lump sum).

Another hurdle is the Court's general reluctance to award costs for pro bono counsel. This encourages the other party not to settle. If the Court were to take requests for costs seriously in pro bono cases, it would enhance the ability for lawyers to take on more pro bono work. For example, there could be a special rule on cost awards for individuals of modest means represented by counsel who declare and maintain in the notice of application, the memorandum and at judicial review that they act pro bono (defining "pro bono" as no payment of fees, but permitting payment of disbursements). Counsel acting pro bono should itself be a basis for an award of solicitor-client costs if the litigation is successful, or if the issues were of such importance that the lawyer should be compensated despite a lack of success in the ultimate outcome.

Another suggestion is to permit the calculation of costs by assessment officers at a separate hearing, after the judicial determination allowing costs. This would permit a specialized court officer to devote specific time and attention to costs assessments, without expending judicial resources. This would also allow counsel to prepare dockets etc., for the costs assessment rather attempting to do so at the same time as preparing for the judicial review. In our view, to be workable, this should be accompanied by the other revisions to the costs regimes that have been suggested (such as simpler rules on costs).

5. CASE MANAGEMENT WORKING WELL

The CBA Section agrees.

6. UNIFORM PROCEDURES OVER SPECIAL PROCEDURES

As noted throughout our comments, there are nuances in the immigration context we hope this Global Review will address.

7. NEED FOR PROPORTIONALITY AND PREVENTION OF ABUSE IN RULE 3

Please see our comments under Recommendation 2. We recommend that any proportionality principle in the *Rules* include a statement that the *Rules* are to be interpreted as encouraging early settlement talks to shorten litigation.

8. STAND-ALONE FEDERAL COURT POWER OF INTERVENTION IN RULE 3

Please see our comments under Recommendation 2 on a potential court power to find pleadings or other use of the *Rules* abusive on its own motion.

9. REGISTRY TO REFER ABUSE

In 2010, the CBA Section wrote the Federal Courts about the use of "care of" addresses.[3] Our purpose was to suggest ways of reducing the unauthorized practice of law by "ghost" representatives. In our view, the *Rules* should directly address the heart of the problem of abusive pleadings in immigration cases, namely, pleadings being drafted by those who have no responsibility to comply with ethical and procedural requirements as officers of the court.

Where abusive pleadings have obviously been "ghost written," the question is whether the rules against abusive pleadings or abusive use of the *Rules* should be used against applicants who may not be well-educated or familiar with the court system. It may be unjust to penalize the applicant, and we recommend that some acknowledgement of these circumstances be incorporated in any change to the *Rules*.

10. PROPORTIONALITY GENERALLY

Please see our comments under Recommendation 2.

11. VEXATIOUS LITIGANT APPLICATIONS TO BE DISCUSSED AT BENCH AND BAR

We welcome the opportunity to discuss the problem of vexatious litigants in the context of the Federal Courts Bench and Bar Committee. In the immigration context, we would again draw

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[3] See "Use of "Care of" Addresses on Leave Applications: Letter to Federal Court of Canada", online: http://www.cba.org/CBA/submissions/2010eng/10_32.aspx).

the court's attention to "vexatious litigators," unauthorized representatives who "ghost write" pleadings or incompetent counsel who routinely take advantage of unsophisticated clients. In one example, a CBA Section member reviewed a dozen cases dismissed due to improper filings. Many were strong cases but the applicants had fallen prey to incompetent or unscrupulous representatives, and the Department of Justice applied for dismissal. If in multiple cases a representative files what appear to be incompetent pleadings, it should be possible for the Court to appoint amicus counsel to help ensure an injustice is not done to the individuals.

There may also be cases where an unrepresented litigant appears to raise issues with merit, but seems unable to articulate or litigate this effectively. A related issue is litigation by ungovernable unrepresented litigants, such as a mentally ill litigant who should be entitled to litigate but causes difficulties for the Court itself. The Court could adopt rules permitting the Court to provide either the individual with a lawyer, or the Court with amicus counsel, and to pay the lawyer a reasonable rate which would ensure that a lawyer qualified to practice in this area would accept the appointment.[4] In some circumstances, amicus counsel may also assist the Court in mediating with the unrepresented litigant who is ill-advised or has unrealistic views on what can be achieved in litigation.

12. METHOD FOR CHANGING RULES DOES NOT REQUIRE MODIFICATION

We agree with this recommendation.

13. CODIFY POWER OF CHIEF JUSTICES TO MAKE PRACTICE DIRECTIONS

We agree with this recommendation.

14. *RULES* COMMITTEE SHOULD REVIEW PRACTICE DIRECTIONS

We would ask that the Immigration and Refugee Law Bench and Bar Liaison Committee be permitted to provide input on practice directions.

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[4] See, for example, *Bon Hillier v. Milojevic,* 2010 ONSC 435.

15. INFORMAL PRACTICES SHOULD BE CODIFIED

We would ask that the Immigration and Refugee Law Bench and Bar Liaison Committee be permitted to provide input on the codification of informal practices.

We agree with the Global Report's general suggestion to reduce the need for motions and the cost of filing them. We recommend that further changes be considered to streamline procedures and reflect technological advancements. For example, we recommend eliminating the rule limiting service of motions by fax to those less than 20 pages, unless the opposing party and Court administrator permit. We also recommend changing the requirement for a motion for minor procedural issues to which both parties agree, such as changing the style of cause. Similarly, the Court should consider reducing documents that require process server delivery. Currently, the *Rules* require motion records to be filed in person even on relatively minor matters, unless the Court administrator allows filing by fax.

The requirement to reproduce Rule 317 materials in application records is wasteful and has often led to confusion. In *Attorney General of Canada v. Canadian North Inc. et al*,[5] the Federal Court of Appeal held that, when materials are provided in response to a Rule 317 request, they must be reproduced in an affidavit. Counsel cannot presume that, because they were filed with the Court, they will be before the judge who hears the matter. The Court of Appeal noted, at paragraph 15, per Sharlow J.:

> I am advised that this is not the first time that counsel practicing in procurement matters have failed to understand the *Rules* summarized above. If those *Rules* present special problems in procurement matters, it is open to anyone to make a proposal to the *Federal Courts Rules* Committee for an amendment to the *Federal Courts Rules*. However, as long as the *Rules* are as they are, all counsel should be prepared to abide by them.

It is not only wasteful to require reproduction of Rule 317 materials, but it also means the judge hearing judicial review will not necessarily have the entire file. This could be problematic if both parties neglected to draw the Court's attention to an important aspect of the file. Rule 317 should also require that material be page numbered when filed with the Court, that it is presumed to be before the Court upon filing, and need not be recopied to be referred to in a memorandum.

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5 2007 FCA 42.

16. PRACTICE DIRECTIONS NEED TO BE MORE VISIBLE

We agree with this recommendation.

17. WHOLESALE REORDERING OF *FEDERAL COURT RULES* NOT REQUIRED

We agree with this recommendation.

18. TABLE OF CONTENTS OF THE *FEDERAL COURT RULES* TO BE ACCESSIBLE AND COMPREHENSIVE

We welcome this initiative.

19. USER FRIENDLY INFORMATION ON FEDERAL COURTS' WEBSITE

The CBA Section welcomes this initiative but with caution as it may require a delicate balancing of access of justice, issues of self-representation and ghost representatives. Additional guidance may provide a false sense of security about litigants' ability to conduct proceedings without counsel, or with the initial assistance of "ghost consultants" in drafting pleadings. While guides can be helpful in putting together the format and following the appropriate litigation path, they cannot provide the legal advice needed to put forth credible, arguable and meritorious arguments in fact and law.

20. JUDGES' MEETINGS TO DISCUSS AND DISSEMINATE IDEAS ON ACCESS TO JUSTICE

We welcome this initiative.

21. DUTY COUNSEL ROSTER IN EACH PROVINCE

We ask that the Immigration and Refugee Law Bench and Bar Liaison Committee be permitted to provide input on this initiative. It should be accompanied by other changes that would permit lawyers working with the poor in areas of Federal Court practice to be better resourced to do the work. As noted above, this could include a costs regime that better compensates counsel litigating pro bono, or appointment of funded amicus counsel by the Court.

As well, the following questions should be considered in relation to the duty roster:

- Will the duty counsel be paid or not? If paid, where will the funds come from? Will the fee be a block fee or based on time? Will there be a tariff setting out fees depending on the nature of the matter before the Court?
- How will the duty counsel be selected? Will it be on a rotational list as done by a Law Society or Lawyer Referral Service, or will certain counsel be given priority? Does counsel need a minimum years of experience to qualify, practice in a particular area of immigration, or merely do immigration work? Will there be a large enough pool of duty counsel should the volume of applicants seeking duty counsel grow large?
- How much notice will be provided to counsel that they must act as duty counsel? Will there be sufficient time for preparation in accordance with lawyers' professional responsibilities?
- Will the existence of duty counsel have a negative effect on applicants' seeking counsel?
- Who will be eligible to receive the services of duty counsel? Must a threshold be met to be eligible? Will there be sufficient time and resources allocated to assess whether an applicant meets the threshold to qualify for duty counsel services?
- Will certain matters be ineligible for duty counsel representation?
- Will an assessment be performed to determine merit of a case to be eligible for duty counsel? Will certain kinds of matters be covered by blanket ineligibility?

22. ATTEMPTED SIMPLIFICATION OF *RULES* FOR SELF REPRESENTED LITIGANTS

We welcome this initiative; however, please see our comments under Recommendation 19.

23. WELCOME FEEDBACK ON RECOMMENDATIONS

We would ask the Federal Courts Rules Committee to consider rule changes similar to those in section 166 of *the Immigration and Refugee Protection Act* to ensure that all identifying information of a person who is the subject of the proceedings listed below is removed from publicly accessible materials for applications for leave and judicial review from decisions of:

- the Refugee Protection Division of the Immigration and Refugee Board; and
- the Minister of Citizenship and Immigration on
  - pre-removal risk assessment applications;
  - humanitarian applications with a risk component; and

- applications for permanent residence at visa posts abroad as members of the Convention refugee abroad class or the humanitarian protected persons abroad designated class; and

subsequent appeals or related proceedings.[6]

We also ask that the rules reflect the immigration bar's ongoing desire for the potential to e-serve materials on the Department of Justice to complement e-filing at the Federal Courts.

24. ESTABLISH IMPLEMENTATION SUBCOMMITTEE

We would ask that the Immigration and Refugee Law Bench and Bar Liaison Committee be permitted to provide input on this initiative.

25. ONE OR MORE MEMBERS OF SUBCOMMITTEE TO WORK WITH COURTS ADMINISTRATION SERVICE

We agree.

26. NEXT GLOBAL REVIEW NO LATER THAN 10 YEARS

We agree.

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6 See the resolution passed at the Canadian Bar Association's 2012 Annual meeting, entitled "Confidentiality of Refugee Proceedings in Federal Court, online: http://www.cba.org/cba/resolutions/2012res/.