

# **HOW TO DRAFT AN EXCELLENT SUBMISSION**

**April 25, 2016**

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Desloges Law Group**

# OVERVIEW

1. **Tips, Tactics, and Best Practices**
2. **Common errors**
3. **How to avoid complaints and errors**
4. **How to do great H&C submissions**
5. **Tips for researching**



# TIPS, TACTICS, AND BEST PRACTICES

## 1. What is the Legal Test?

What factors will be considered?

What factors may be considered?

## 2. What are your Facts?

Identify strengths (points to emphasize)

Identify weaknesses/ bad facts up front – develop strategy address them

## 3. What is your Proof?



# TIPS, TACTICS, AND BEST PRACTICES

4. Are there any Gaps?
5. What does Common Sense Say?
6. Structure Submission so that it is Easy to Read

Make good use of headings and footnotes

Give the reader a roadmap to follow

***Always assume reader will skim – so make it easy to spot key points***



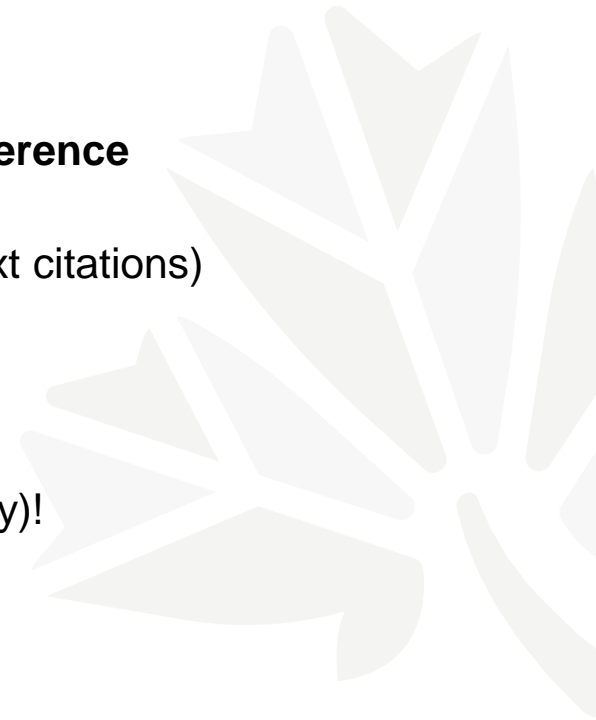
# TIPS, TACTICS, AND BEST PRACTICES

## 7. **Organize Submissions so that Officer can Easily Reference Evidence**

- Use effective references/citations (footnotes or in-text citations)
- Cross-reference citations to clear table of contents

## 8. **Don't Ignore your Weaknesses**

- Take the sting out by addressing it first (and your way)!



# TIPS, TACTICS, AND BEST PRACTICES

## 9. Be Succinct

## 10. Know your Audience

- Court submissions → formal
- Tribunal submissions → less formal
- Submissions to officer → informal but professional and well-written!

# TIPS, TACTICS, AND BEST PRACTICES

## 11. Don't use Jargon or Flowery Language

## 12. Get in the Flow (Break the Ice) by Starting to Write!

- Especially with complicated cases
- Start writing the section that comes easiest and work from there (don't feel as though you have to draft in order – you can spend days on introduction!)

# TIPS, TACTICS, AND BEST PRACTICES

## 13. Have Someone Review Your Draft

- Fresh eyes to catch mistakes (you will never see all the mistakes in your own work – mind sees what should be there!)
- No matter how good you are, you're never too good for a second opinion

## 14. Always Order Reasons for Decision

- Never argue blind!
- Never make submissions without knowing the case to be met



# TIPS, TACTICS, AND BEST PRACTICES

## 15. Think Critically about the Case

- You are counsel, not cheerleader
- Put yourself in the officer/opposing counsel's shoes
- Identify bad facts or issues with client's case, address or develop arguments to respond to these concerns
- Try to head off any apparent arguments that might be raised against clients (if you can)
- However, beware of making case for other side if you can't head off/defuse the argument!

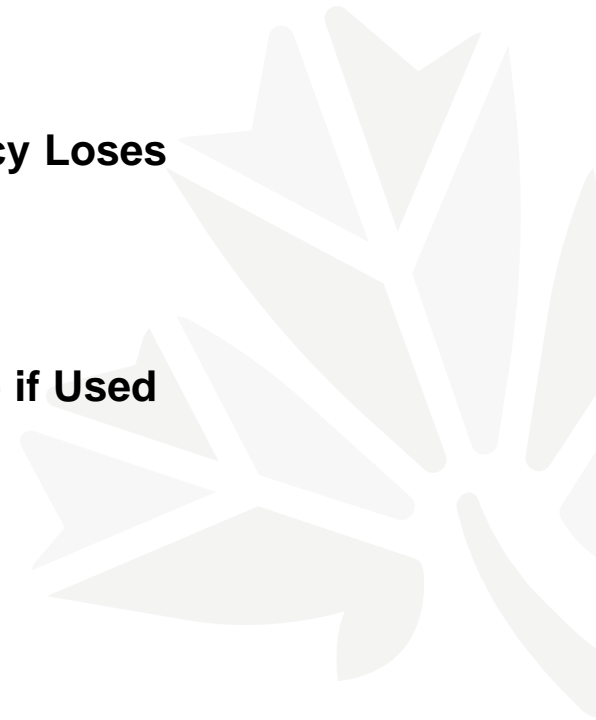
# TIPS, TACTICS, AND BEST PRACTICES

## 16. Ask Critical Questions to Client

- ‘Cross-examination mentality’
- Clients rarely tell you everything at outset
- Either
  - Hiding ‘bad’ facts (consciously or subconsciously) OR
  - Not bringing out good facts that they don’t realize are relevant
- Effective questioning at the outset is critical

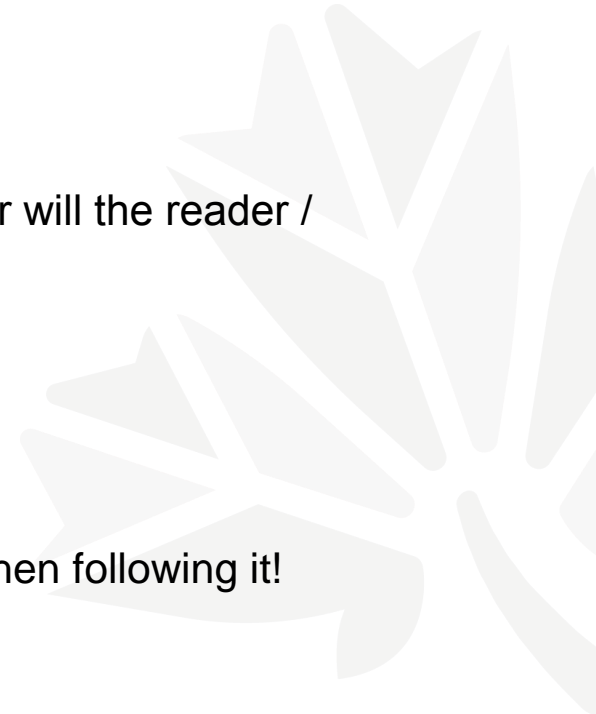
# TIPS, TACTICS, AND BEST PRACTICES

- 17. Be Passionate but Reasoned (Over-the-top Advocacy Loses Credibility)**
- 18. Avoid Excessive Bold or Underline (Can be Effective if Used Judiciously)**



# COMMON ERRORS

1. **Lack of a clear sense of what your argument is**
  - If you're not sure what your argument is, then neither will the reader / decision-maker be sure
2. **Unclear understanding of the basic legal principles**
3. **An incoherent argument that does not flow logically**
  - Recall the importance of laying out a roadmap and then following it!



# COMMON ERRORS

## 4. **Losing sight of the overall argument(s) within the submissions**

- Every point/section should tie back to your overall message/argument
- Always be clear on why you are including evidence or argument

## 5. **Poor spelling and grammar**

- Presentation and style matters!
- If submissions are unprofessional, they are less persuasive (will not be taken seriously)

# COMMON ERRORS

6. **Statements and arguments without evidence to back them up**
  - You should be able to prove everything you say in a submission
  
7. **Mass of evidence with no clear organization or coherent argument**
  - For each piece of evidence, explain: (a) significance; (b) how it substantiates argument
  - E.g. BIOC in H&C is more than 100 pictures of cute child!

## 8. Crowded, disorganized formatting

- Make effective use of Table of Contents and tabs (organize evidence in a logical way)
- Use your Table of Contents to help reader understand why evidence is being submitted
- Remember reader is new to the facts/case; organize everything to make it easy to follow and absorb quickly

# COMMON ERRORS

## 9. No value added for client!

- Counsel is more than a document collector and submitter
- Always ask yourself what you bring that client does not?

## 10. Careless errors

- Officers/members/judges often less forgiving of mistakes when client is represented (no excuse!)



# COMMON ERRORS

## 11. Failure to apply law to the facts (law, facts, but missing analysis!)

- Not a legal paper OR a recitation of facts
- Submissions should not be “canned” section on legal principles, followed by an outline of the facts
- Value of counsel is analysis that shows how the law requires a certain outcome in light of the facts and client’s personal circumstances

## 12. Failure to stay updated with most recent changes

- E.g. still using language of “risk” in H&C or “undue, undeserved or disproportionate hardship
- Make sure you are using latest operational manual and bulletins
- Always check online version of *IRPA/Regs* to confirm provision has not changed (provisions coming in force at different times)
- Keep updated on most recent Federal Court decisions
- No substitute for your own research – the Listerve cannot run your practice

# HOW TO AVOID MISTAKES...AND COMPLAINTS!

## 1. Do not leave it until the last minute!

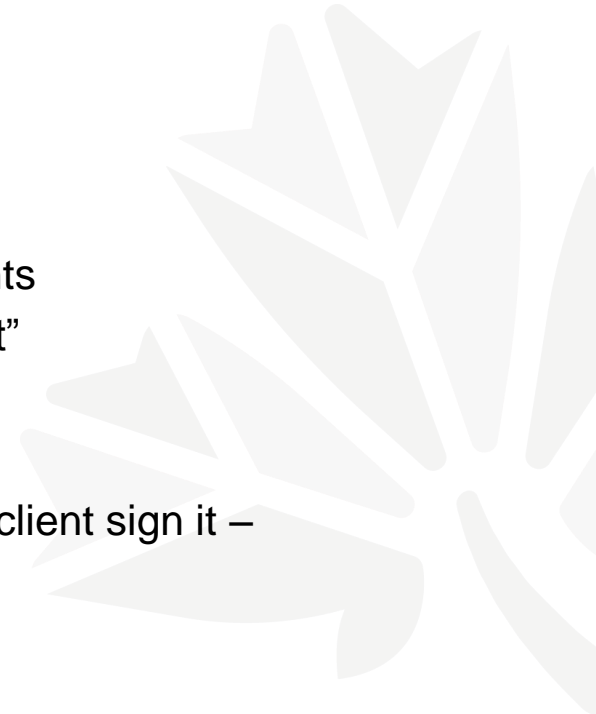
- Haste leads to errors
- No matter how well you prepare, often there is a piece of evidence/angle that comes up as you are writing; if you left it to the last minute it's too late to pursue!
- Put aside dedicated time in your calendar to work on the submissions – don't work on it in between other tasks, as they will quickly take over your day

## 2. Make time to have someone review your work

# HOW TO AVOID MISTAKES...AND COMPLAINTS!

## 3. **Make a written document checklist**

- Helps you as counsel to avoid missing any documents
- Helps avoid claims that “you never asked me for that”
- Update document list if any additions
- Make list early (document collection takes time)
- Keep a log of client-submitted documents and have client sign it – especially original documents



# HOW TO AVOID MISTAKES...AND COMPLAINTS!

4. **Schedule reminders in calendar/practice management software for follow up on documents**
  - Almost always have to push clients to collect documents
  - Don't send out the list and wait for them to be submitted...only to realize a few days before deadline that stuff is missing!

# HOW TO AVOID MISTAKES...AND COMPLAINTS!

## 5. Document everything

- Keep detailed notes of conversations
- Have clients sign handwritten drafts of forms
- Follow up verbal conversations with summary e-mail if possible (no confusion about discussion); especially on key points of argument/case

## 6. Send copy of submissions to client with clear instructions to review carefully and point out any errors – preferably before submitting, but at minimum after

# HOW TO AVOID MISTAKES...AND COMPLAINTS!

## 7. **Communication, communication, communication**

- Don't just have one meeting with client and then draft submissions with no further contact
- Issues with client communication is #1 cause of LawPro complaints
- Client will not understand nuances of legal argument; however needs to understand the theory of the case in simple terms
- Client may be confused by your submissions.... but should never be surprised!

# HOW TO AVOID MISTAKES...AND COMPLAINTS!

## 8. **Read the rules for submission...and follow them!**

- Many lawyers/counsel who are unfamiliar with simple procedural rules
- Nothing more embarrassing than making a mistake by not following rules
- Everything is posted online – no excuse for being ignorant on the rules



# HOW TO AVOID MISTAKES...AND COMPLAINTS!

9. **Know your deadlines and maintain effective reminder system**
- Most counsel juggle heavy caseload – easy to forget a deadline
  - Multi-stage reminder system (e.g. 2 week, 1 week, 1 day warning)
  - Redundancy is key! (e.g. Outlook calendar + reminder system in practice management software/database program)

**Missed deadlines can be disastrous!**

# HOW TO AVOID MISTAKES...AND COMPLAINTS!

## 10. Stay up to date!

## 11. Don't take on work outside your area of expertise

- Learning / growing practice vs. being out of your depth!
- You are always learning; client should never suffer
- Consult experienced counsel
- Co-counsel first case to gain experience (e.g. consultant referring to lawyer but shadowing process)

# HOW TO DO GREAT H&C SUBMISSIONS

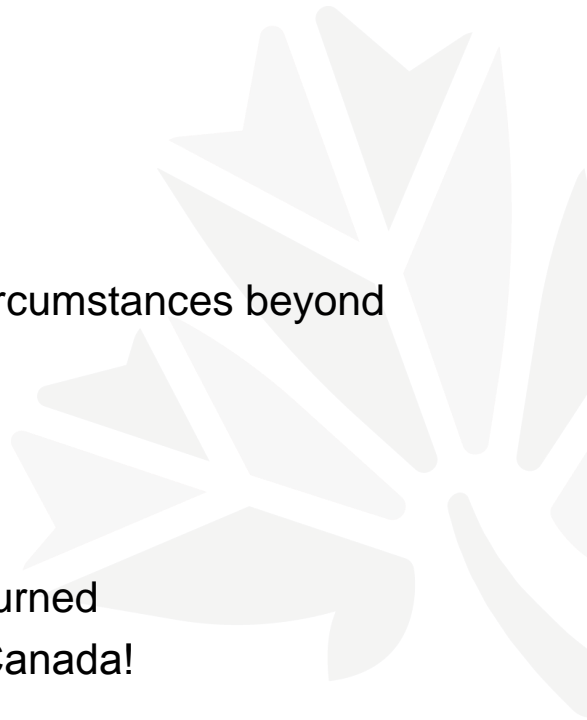
## 1. **Make sure you have the correct and most recent forms**

- the forms change on a regular basis; always check the CIC website to ensure that you are working with the most recent version before spending time on filling out the forms!
- Take time to ensure that the client has thoroughly reviewed and approved info in forms
- Compare content against previous applications if applicable

# HOW TO DO GREAT H&C SUBMISSIONS

## 2. Identify the H&C factors present in client's case

- Use CIC operational manual IP-5 for guidance
  - Children – Best Interest of the Child
  - Presence of spouse or common law partners
  - Establishment in Canada, particularly if due to circumstances beyond applicant's control
  - Health concerns
  - Discrimination
  - *De facto* family members
  - Other compassionate elements of hardship if returned
- Remember it's not about better standard of living in Canada!



# HOW TO DO GREAT H&C SUBMISSIONS

## 3. **Create a document checklist with client**

- Ideally there should be supporting documents for each argument / point raised in submissions
- Identity docs for the Applicant and any dependents
- Establishment in Canada documents:
  - Employment / good financial records
  - Volunteer work
  - Letters from family, friends and community members (legally residing in Canada)
  - Membership in Community + religious organizations
  - Education / training records and letters

# HOW TO DO GREAT H&C SUBMISSIONS

## 3. Create a document checklist with client (cont'd)

- Health / mental health concerns: i.e. letters from doctors, medical records
- Violence / abuse: i.e. police records, letters from family, shelters, court records
- Human rights or discrimination concerns: i.e. proof of sexuality, religion, disability
- Lack of support in country of origin: letters from friends/ family in country; death certificates of family members
- Employment: Letter from employer indicating damage to employer if applicant removed

# HOW TO DO GREAT H&C SUBMISSIONS

## 4. Collection of country documentation

- Test to meet is Chirwa
- Use as wide a range of information as possible i.e. original documents, newspapers, reports from human rights organizations, affidavits from persons in country
- Don't rely on only one or two sources
- Credible sources i.e. government or reputable non-governmental reports, NOT personal blogs or wikipedia
- Use recent documentation (within past 4 years if possible)

# HOW TO DO GREAT H&C SUBMISSIONS

## 5. Drafting submissions

- Create “roadmap” for officer to follow: clearly identify H&C elements raised in application at outset of submissions and clear headings throughout
- Provide list of supporting documents
- Each argument or point should be supported by documentation with corresponding citation/footnote
- Quote from supporting documents to illustrate points
- Reference helpful passages in IP-5 or case law (but don’t be patronizing or put long quotes)



# HOW TO DO GREAT H&C SUBMISSIONS

## 6. Addressing Kanthasamy/Chirwa in subs

- Application submitted on or after June 29 2010 will not consider s. 96 / s. 97 risk (tip – call it something else)
- “Hardship” test is not totally gone and will likely linger
- Compassionate factors more than that incidental to being deported from Canada
- How applicants would be impacted due to personal situation

# HOW TO DO GREAT H&C SUBMISSIONS

## 6. Addressing the test in submissions (cont'd)

- Raise compassionate factors related to other persons, not just applicants if removed from Canada ... their friends, family, employers; identify specific hardship elements
- Tie the country documentation to personal circumstances of applicants

# TANGENT ON RISK IN H&C

*Kanthasamy v MCI*, 2014 FCA 113 at para 75:

Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment – factors under sections 96 and 97 – may not be considered under subsection 25(1) by virtue of subsection 25(1.3) but the facts underlying those factors may nevertheless be relevant insofar as they relate to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship

# HOW TO DO GREAT H&C SUBMISSIONS

## 7. **Best Interest of the Child**

- BIOC is not about hardship or denial of fundamental rights for the child; BIOC is about what is in the best interests of the child
- Clearly identify in submissions what is in the best interests of the affected child and how that would not be met if removed from Canada
- Remind officer of obligations through reference to IP-5 and case law in regards to assessing BIOC factor: “alert, alive and sensitive”

# HOW TO DO GREAT H&C SUBMISSIONS

## 7. **Best Interest of the Child (cont'd)**

- FC litigation over BIOC has been active – important to be up to date with latest cases
- Reference to FC cases that are supportive – similar facts or circumstances to those of your client or if strong statements of what an officer should consider when assessing BIOC factor

# HOW TO DO GREAT H&C SUBMISSIONS

## 8. Final thoughts

- Remember that there is no one factor that will lead to a successful H&C application
  - Presence of BIOC does not guarantee approval!
  - Combination of positive factors and personal circumstances of applicants
- End with a clear conclusion repeating H&C factors present in application
- Proofread for grammatical and spelling errors



# TIPS FOR CASE LAW RESEARCH

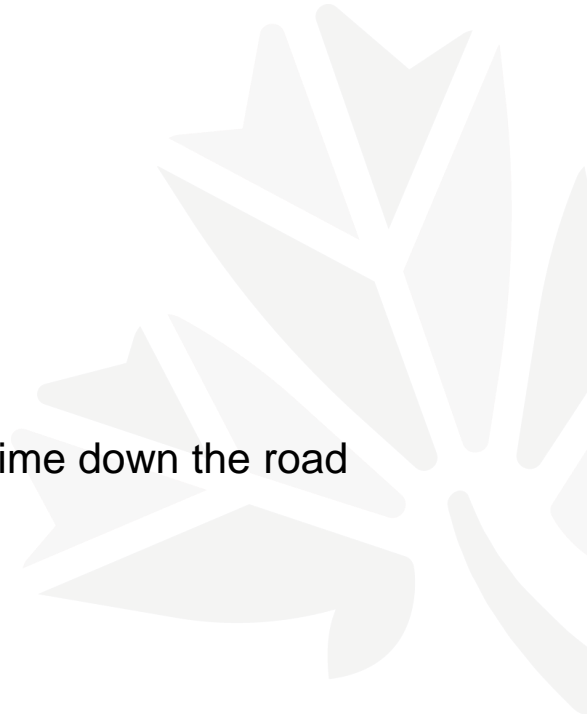
## **Keep a database of useful cases**

Should be easily searchable

Should be organized

Don't redo same research twice!

Takes a bit of extra time up-front, but it will save hours of time down the road





# TIPS FOR CASE LAW RESEARCH

## Stay up to date with latest FC/FCA cases

- 30 minutes of daily reading will save you hours of research
- Subscribe to e-mail update of new decisions (links to full text of all new decisions): <https://lists.lexum.org/mailman/listinfo/fctcf>
  - Early morning e-mail – can scan to see if anything new in areas relevant to your practice
  - New cases often have summary of older jurisprudence (easy way to catch up)

# TIPS FOR CASE LAW RESEARCH

## **Beware of danger of taking 1 case out of context**

- Read cases that your decision relies on
- Note up cases that cite your decision (instructions on noting up in CanLII to follow)
- Find out if case is majority or minority opinion (or total outlier)
- Unless decision from SCC or FCA...one decision does not make a legal principle!
- Rare exception: FC case that is followed so extensively it is *de facto* binding

# TIPS FOR CASE LAW RESEARCH

## Beware of multiple, competing lines of 'good' case law

- Double-edged sword: scope for creative advocacy BUT member/officer can often find case to support whatever position they want to take
- Need to be aware of competing lines of cases so you can distinguish if possible

# TIPS FOR CASE LAW RESEARCH

**Learn how to quickly skim for relevance; only read entire case when on point**

Quickly identify:

- Whether facts are analogous to your situation
- Decision (JR allowed or denied)
- Key reasons
- What is *obiter*?

# TIPS FOR CASE LAW RESEARCH

## Make a research plan before starting

- Don't just plunge right in and start blindly wading through case law
- Have a preliminary list of issues/arguments (more may emerge as you research)
- Organize notes in headings and sub-headings
  - Will often come across cases that are helpful for multiple issues
  - Allows you to file a case away under another issue for later reading without getting sidetracked

# TIPS FOR CASE LAW RESEARCH

## Make a research plan before starting (cont'd)

- Develop a list of keywords for research
  - Think of as many synonyms for key words as possible
  - Identify key 'catch-phrases' and variations – judges often adopt common jargon
  - Add commonly recurring words and phrases as you go (come back to later and do a new search using those words/phrases)

# TIPS FOR CASE LAW RESEARCH

## Key to effective search strings

- Be clear on what you are looking for before you start
- Search strings should match the thought process in your mind: if you are organized, your search will be organized...if not...
- Make effective use of “”, OR, AND, and () functions (see next slide for overview)
- Be creative and try different combinations
- Take time to experiment with different search string and styles
- Keep notes about effective searches

# TIPS FOR CASE LAW RESEARCH

## Key to effective search strings (cont'd)

- Start with your 'home run' search string
  - Very specific
  - Complex search operators
  - Narrowing down to exact phrase and key words
- If that fails, broaden out the search by removing operators and allowing more cases





# TIPS FOR CASE LAW RESEARCH

## **Invest the time to learn the advanced search functions of your database of choice (e.g. CanLII)**

- We all have limited time; effective research skills are critical to crafting the most effective argument possible
- ‘Technical’ skills (use of Boolean operators, case sorting functions, etc.) save time and allow you to focus on key decisions
- Best researchers are not the smartest: most organized and most efficient at using technology

# TIPS FOR CASE LAW RESEARCH

## **Use sorting functions to sort results strategically**

- First sort by “Relevance” to find cases most on point; then sort by “Most Recent” to find the most recent cases
- Sort to leave only Appellate decisions first; then broaden out to all decisions
- Include tribunal results to see how first-instance decision-makers have applied case/principle
- Omit tribunal results to focus only on binding authority

# TIPS FOR CASE LAW RESEARCH

## CanLII Tutorials and Search Help Page

Most people only use a fraction of CanLII's capability

<https://www.canlii.org/en/info/search.html>

<https://www.youtube.com/playlist?list=PLohtL2qhPsWCzkOAaw28Wm5fMgqM9B131e> (intro videos)

# NOTING UP CASES

-  ?

?

?

Type case name or citation into “Noteup” box to find all cases referencing that decision

# NOTING UP CASES

## Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817

Date: 1999-07-09 (Docket: 25823)

Parallel citations: 1999 CanLII 699 (SCC); 174 DLR (4th) 193; 14 Admin LR (3d) 173

Citation: Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699 (SCC), <<http://canlii.ca/t/1fqlk>>  
retrieved on 2014-07-10

[Cited by 3,976 documents](#)

[Show headnotes](#) ▼

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From inside a case, click on the “Cited by \_\_\_\_\_ documents” link in the case header

# SORTING RESULTS

- Document text ?

Case name, legislation title, citation or docket ?

Citing Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 x ?

or Noteup: cited case names, legislation titles, citations or docket ?



All CanLII (3,976)

Cases (3,976)

Legislation (0)

Commentary (0)

All jurisdictions ▾

By Relevance ▾



<input type="checkbox"/> Canada (Federal)	2,519
<input type="checkbox"/> British Columbia	272
<input type="checkbox"/> Alberta	228
<input type="checkbox"/> Saskatchewan	58
<input type="checkbox"/> Manitoba	41
<input type="checkbox"/> Ontario	291
<input type="checkbox"/> Quebec	340
<input type="checkbox"/> New Brunswick	43
<input type="checkbox"/> Nova Scotia	95
<input type="checkbox"/> Prince Edward Island	14
<input type="checkbox"/> Newfoundland and Labrador	47
<input type="checkbox"/> Yukon	10
<input type="checkbox"/> Northwest Territories	17
<input type="checkbox"/> Nunavut	1

beaux-arts du Canada, 2005 CanLII 80621 (ON SCDC) – 2005-03-23

*e délai – objection – convention collective*

Baker c. Canada (Ministre de la Citoyenneté et de l'immigration), **1999 CanLII**

S. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22; Blanchard c.

1984 CanLII 27 (CSC), [1984] [...] [7] Dans l'arrêt Baker v. Canada (Ministre de

igration), **1999 CanLII 699 (SCC)**, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39,

-Dubé disait [pp. 845-46 S.C.R.] et je cite : [...]

reur général), 2007 QCCS 4592 (CanLII) – 2007-07-18

*e – sub-saharienne – expérience – immigration*

bleness was also the norm adopted by the Supreme Court in Baker (**1999 CanLII**

. 817) an immigration case). [...] [18] **1999 CanLII 699 (CSC)**, [1999] 2

# SORTING RESULTS

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Citing  x ?

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All CanLII (3,976)

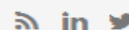
Cases (3,976)

Legislation (0)

Commentary (0)

All jurisdictions ▾

By Relevance ▾



1. [Hemphill c. Musée des beaux-arts du Canada](#), 2005 CanLII 80621 (ON SCDC) – 2005-03-

Divisional Court – Ontario

*arbitre – grief – proroger le délai – objection – convention collective*

[...] Autres causes citées Baker c. Canada (Ministre de la Citoyenneté et de l'immigration), **1999 CanLII 699 (CSC)**, [1999] 2 R.C.S. 817, [1999] S.C.J. No. 39, 174 D.L.R. (4th) 193, 243 N.R. 22; Blanchard c. Control Data Canada Ltd., 1984 CanLII 27 (CSC), [1984] [...] [7] Dans l'arrêt Baker v. Canada (Ministre de la Citoyenneté et de l'Immigration), **1999 CanLII 699 (SCC)**, [1999] 2 S.C.R. 817, [1999] S.C.J. No. 39, l'Honorable juge L'Heureux-Dubé disait [pp. 845-46 S.C.R.] et je cite : [...]

- Sort by document relevance
- Sort by most recent
- Sort by most cited
- Sort by court level

# SORTING RESULTS

-  ?

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Citing  x ?

or  ?

All CanLII (3,976) **Cases (3,976)** Legislation (0) Commentary (0)

All jurisdictions ▾ All courts and tribunals ▾ Any date ▾

By Relevance ▾ 

- | Rank | Case Name   | Courts and Tribunals                 | Count | Date                           |
|------|---|--------------------------------------|-------|--------------------------------|
| 1.   | Hemp Division of Arbitration [...]<br>699 (Contr la Cit l'Honc                            | All courts and tribunals             | 3,976 | (ON SCDC) – 2005-03-23         |
|      |   | All courts                           | 2,857 |                                |
|      |   | Appeal courts                        | 578   |                                |
|      |   | All tribunals                        | 1,119 |                                |
|      |   | Labour                               | 159   | l'immigration), 1999 CanLII    |
|      |   | Privacy                              | 25    | 43 N.R. 22; Blanchard c.       |
|      |   | Human rights                         | 27    | èt Baker v. Canada(Ministre de |
|      |   | Discipline                           | 40    | . 817, [1999] S.C.J. No. 39,   |
|      |   | Securities                           | 5     |                                |
| 2.   | Chazi Super<br>pays – directive ministérielle – sub-saharienne – expérience – immigration | Select specific courts and tribunals |       | – 2007-07-18                   |







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