Federal Court | Cour fédérale

Federal Court Practice
Immigration Judicial Review

Hon. Mr. Justice Henry S. Brown
Federal Court, Ottawa

May 3, 2019
Ottawa Immigration Law Conference
Richelieu Vanier Community Centre
300 Ave des Pères-Blancs
Ottawa, Ontario

Overview

1. Best Practices – Written Submissions
2. Best Practices – The Hearing
3. Common Reviewable Errors
4. Recent/Ongoing Matters of Note

1. Best Practices – Written Submissions

1. **Focus on strongest issues – top 3?**
2. **Don’t compromise credibility/integrity**
3. **Use headings and sub-headings – organize**
4. **Always deal directly with weaknesses disclosure up front**
5. **Ensure relevant facts are sufficiently described**

6. **Provide support – law or evidence - for central submissions**

7. **Ensure references to jurisprudence are up-to-date and on point**

8. **Add quotes from key cases – memo self-contained**

9. **Avoid ‘we rely on the affidavits’ or ‘the facts are in the affidavits’ – cut and paste instead**

10. On stays, the tests are well-known:

- **serious issue, irreparable harm and balance of convenience per *Toth v. Canada (Minister of Citizenship and Immigration)*, [1988] FCJ 587, 86 NR 302 (FCA), and Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311**

- **where refusal to defer. the serious issue must meet a higher threshold pursuant to *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, which requires the Court to take a hard look at the Applicant's case, is it likely to succeed**

- **note recent SCC decision in *R v. Canadian Broadcasting Corp.*, 2018 SCC 5, where SCC raises the bar for mandatory injunctions, see para 18 for modified test: a strong *prima facie* case that underlying application will succeed at the JR. Like *Baron*?**

- **Q. How to tell if mandatory (higher threshold) or prohibitive?**

  A. examine in substance the overall effect, para 16 of *CBC*

11. Avoid last minute stays or may not be heard, disservice to client, rush for Court, 42 not heard in recent 12 mo. period

12. **CBSA must give sufficient notice of removal to allow counsel to be retained – note especially if in detention**

13. **Likewise CBSA must decide deferrals in time to allow motion to stay at general sitting provided request to defer made in timely manner: more to come:**

14. **In application for JR and memo on JR itself, set out standard of review:**

    - **Explain how application leads to your result– if standard is reasonableness, ensure arguments do not read like appeal on a correctness standard**

15. **Must note on COVER PAGE that your supplementary *replaces* your original filing – 30 vs 60 pages – MUST REPLACE – See parts 8 and 9 of Schedule « A » - supplemental memos no longer allowed**

16. **Make reply submissions brief and punchy – avoid repetition of initial submissions…. but remind why you are here**

17. **Proofread your memo and cull irrelevant material**

18. **With the rare larger case, consider providing a compendium that includes relevant documents and jurisprudence**

19. **Some judges will ask for WORD or PDF e-readable memorandum before hearing a JR (wait for request)**

20. **Avoid last minute motions**

2. Best Practices – The Hearing

1. **Prepare for the allocated time and focus on your most important arguments – 45 minutes per side all inclusive: leave time for Reply – likely cases following yours**

2. **Know your case cold, be ready to deal with unexpected**

3. **Consider if your client should be present**

4. **Provide a road-map at the outset – 'I will deal with the following 3 issues'**

5. **Pace yourself and tell Court when moving to next issue**

6. **Don’t speak too quickly – take cue from the judge**

7. **Assume the Court has carefully read the decision and your submissions – almost always the case - be prepared to refer to para numbers of decision – Court bench books**

8. **Do more than regurgitate written submissions – be confident, but be fair to law and facts**

9. **Avoid reading large quotes – set out principles in memorandum – read where central**

10. **Please be courteous and civil**

11. **Pay attention to the judge:**

- **Listen carefully to what the judge has to recommend about how you may wish to spend your time**
- **Answer questions directly – the sooner the better**
- **Move onto other things if the Court signals it has heard enough, or if you are not making headway**

12. **Never interrupt the Judge**

13. **Avoid hyperbole – e.g. “outrageous”, “ridiculous”**

14. **Non-verbal reactions are easy to see – and may be perceived as unprofessional**

15. **Think before objecting**

3. Common Reviewable Errors

***Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55:**

[55] In reasonableness review, the reviewing court is concerned mostly with "the existence of justification, transparency and intelligibility within the decision-making process" and with determining "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, at para. 14).

When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). Reviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker (*Khosa*, at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.

1. **Failure to properly state or apply the appropriate legal test: i.e., decision not defensible on the law per *Dunsmuir***

2. **Failure to address one or more elements of the legal test, or statutory assessment factors: decision not defensible on the law**

3. **Failure to explain basis for conclusions regarding the legal test and its application: decision not transparent and intelligible per *Dunsmuir***

4. **Insufficient explanation for factual or credibility findings – special rules not met?**

5. **Failure to ground findings/conclusions in the evidence: not defensible on the facts per *Dunsmuir***

6. **Misapprehension of the evidence – not defensible on the facts**

7. **Failure to "come to grips" with important evidence going the other way; does all evidence need to be assessed?**

8. **Basing important findings on speculation ample jurisprudence**

9. **Plausibility findings – ample jurisprudence**

10. **Failure to take account of cultural, socio-economic or other potentially relevant differences in making implausibility findings**

11. **Fettering of discretion?**

12. **Failure to accord procedural fairness – often fatal error:**

- **Reliance on new or unavailable extrinsic evidence**
- **Breach of right to be heard**
- **Failure to permit submissions to be made**

- **Denial of right to an accurate interpreter**
- **Statements/actions reflecting bias, *cf* interlocutory rulings**
- **Denial of right to be represented by counsel**
- **"This was not fair"**

N.B. In determining content of duty of fairness, review factors in *Baker v. Canada (Minister of Citizenship and Immigration)*[1999] 2 S.C.R. 817, at paras 21-28

13. **The Supreme Court of Canada instructs judicial review is not a line-by-line treasure hunt for errors. The decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 S.C.C. 34**

14. **A reviewing court must determine whether the decision, viewed as a whole in the context of record, is reasonable: *Construction Labour Relations v. Driver Iron Inc.*, 2012 S.C.C. 65; see also *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labradror (Tresury Board)*, 2011 S.C.C. 62**

4. Recent/Ongoing Matters of Note in the Federal Court

- **New appointments over the last year and a half:**

  - **Justice Roger Lafrenière (09/06/17)**
  - **Justice William Pentney (23/06/17)**
  - **Justice Shirzad Ahmed (15/09/17)**
  - **Justice Paul Favel (11/12/17)**
  - **Prothonotary Kathleen Ring (19/12/17) (Vancouver)**
  - **Justice Elizabeth Walker (26/2/18)**
  - **Justice John Norris (26/2/18)**
  - **Prothonotary Alexandra Steele (15/5/18) (Montreal)**
  - **Prothonotary Sylvie Molgat (22/11/18) (Ottawa)**
  - **Associate Chief Justice Jocelyne Gagné (13/12/18)**
  - **Prothonotary Angela Furlanetto (8/3/19) (Toronto)**

- **Vacancies - Québec (4 - MSGL) and Ontario (1)**
- **Upcoming departures – Justice Harrington and Justice Mandamin**

Proceedings Commenced
Immigration – Leave applications

Instances introduites
Immigration - Demandes d'autorisation

	2016	2017	2018	
Refugee	1,969	2,027	2,814	Réfugié
Non-refugee	3,342	3,537	3,708	Non-réfugié
Total	**5,312**	**5,564**	**6,522**	**Total**
Refugee	37 %	36 %	43%	Réfugié
Non-refugee	63 %	64 %	57%	Non-réfugié
Total	**100 %**	**100 %**	**100 %**	**Total**

Leave grant rate
- Immigration
As a percentage of Proceedings Commenced

Autorisations accordées
- Immigration
par rapport aux instances introduites

	2016	2017	2018	
Applications for Leave Granted	1,257	1,197	1,236	Demandes d'autorisation accordées
Proceedings commenced	5,312	5,564	6,522	Instances introduites
Grant rate	**24%**	**22%**	**19%**	**% Accordé**

Leave grant rate
- Immigration
As a percentage of "perfected" leave applications determined

Autorisations accordées
- Immigration
par rapport aux demandes d'autorisation « mises en état »

	2016	2017	2018	
Applications for Leave Granted	1,258	1,195	1,236	Demandes d'autorisation accordées
Perfected leave applications determined	3,188	3,069	3,358	Demandes d'autorisation mises en état tranchées
Grant rate	**39%**	**39%**	**37%**	**% Accordé**

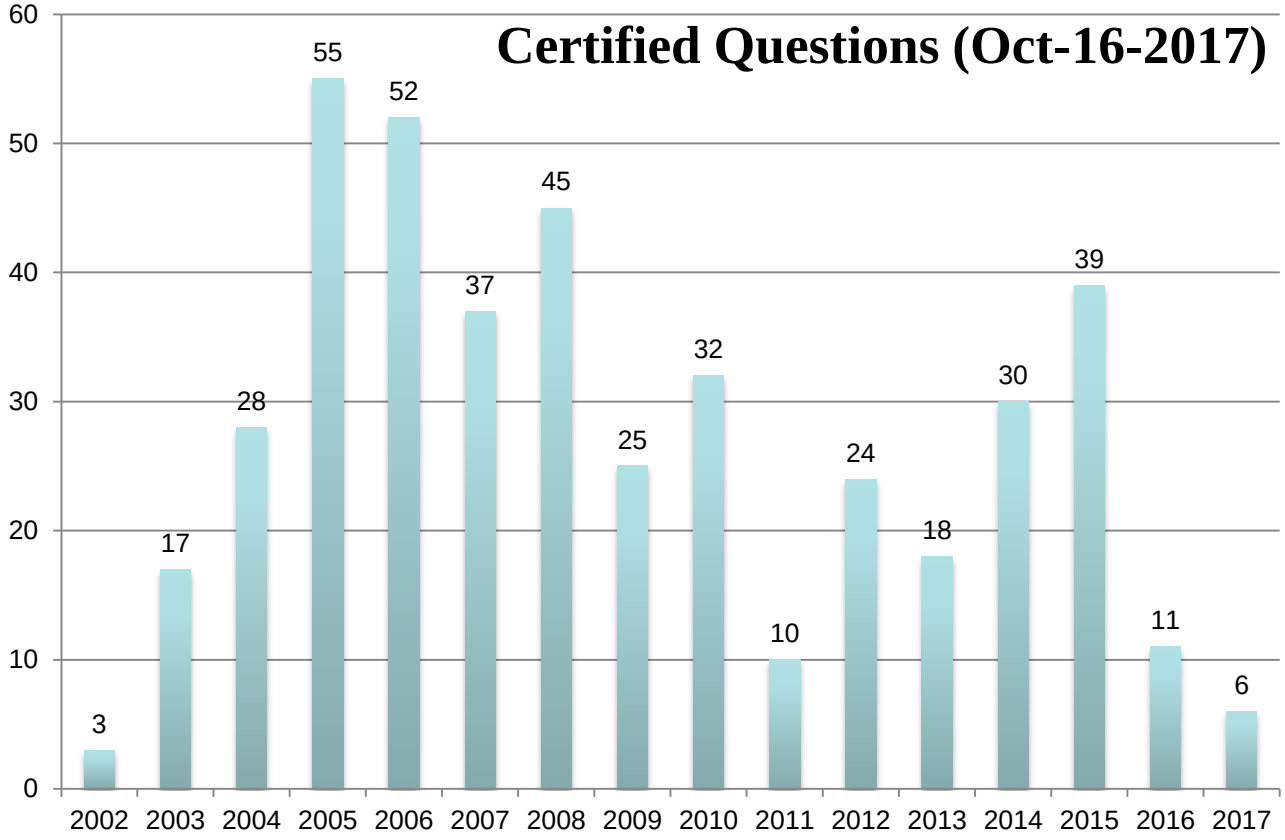
Stays
- Immigration

Sursis
- Immigration

	2016	2017	2018	
Granted	145	122	117	Accordé
Dismissed	243	223	196	Refusé
Other	15	12	2	Autre
Total	403	357	315	Total
Grant rate	**36%**	**34%**	**37%**	**% Accordé**

IMM Anonymization Requests

- **Please also make anonymization requests *when requesting Leave.***
  - **Important to provide basis for request**
  - **Requests made as a matter of course are discouraged**
  - **Motion may in any event be required**
  - **See Amendments to *Citizenship, IMM and Refugee Protections Rules*, published in Gazette, Part 1 in September 2017**
  - **Consider removing personal identifiers from memorandum**



NB: some judgments have multiple questions

Certified Questions, cont.

Please see:

- ***Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 F.C.A. 130 at para. 26**
- ***Navdeep Kau Sran v. Canada (Minister of Citizenship and Immigration)*, 2018 F.C.A. 16, at para 2**
- ***Lunyamila v. Canada (Public Safety and Emergency Preparedness)*, 2018 F.C.A. 22, at paras 44 to 47**
- ***Mahjoub (Re)*, 2017 F.C. 334, at paras 9 to 14**

Schedule “A”

Federal Court Cour fédérale

Federal Court Cour fédérale

Date: YYYYMMDD

Docket: IMM-XX-YY

City, Province, (long date format, e.g. November 10, 2015)

PRESENT: The Honourable Mr. Justice XX

BETWEEN:
XXXXXX
Applicant
and
THE MINISTER OF CITIZENSHIP AND IMMIGRATION
Respondent

ORDER

UPON APPLICATION for leave of the Court to commence an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada, dated April 17, 2013;

AND UPON READING the material filed;

THIS COURT ORDERS that:

1. The application for leave is granted and the application for judicial review is deemed to have been commenced.

2. The hearing of the application for judicial review is hereby fixed for Wednesday, April 15, 2015, to commence at 9:30 a.m., at the Federal Court, 30 McGill Street, in the City of Montréal, in the Province of Quebec, for a duration not exceeding 90 minutes.

3. The hearing shall be conducted in the English language, unless counsel for either party notifies the Registry of the Court otherwise.

4. The Tribunal shall send certified copies of its record to the parties and to the Registry of the Court on or before February 2, 2015.

5. Further affidavits, if any, shall be served and filed by the applicant on or before February 16, 2015.

6. Further affidavits, if any, shall be served and filed by the respondent on or before February 25, 2015.

7. Cross-examinations on affidavits, if any, shall be completed on or before March 9, 2015.

8. The applicant's further memorandum of argument, if any, shall replace the applicant's memorandum of argument filed pursuant to Rule 10 and reply memorandum, if any, filed pursuant to Rule 13, and shall be served and filed on or before March 17, 2015.

9. The respondent's further memorandum of argument, if any, shall replace the respondent's memorandum, if any, filed pursuant to Rule 11, and shall be served and filed on or before March 27, 2015.

10. The transcript of cross-examinations on affidavits, if any, shall be filed on or before March 27, 2015.

11. Notwithstanding the above, parties may consent to an alternate timeline for completing the steps in paragraphs 5 and 6 (further affidavits), 7 (cross-examinations), 8 and 9 (further memoranda for applicant and respondent), and 10 (transcript of cross-examinations on affidavits), in which case a joint amended schedule shall be filed with the Registry of the Court. All steps shall be completed no later than the date set under paragraph 10 for submission of the transcript of cross-examinations, if any.

"XXXX"
Judge