



February 6, 2019

Via email: Engagement@irb-cisr.gc.ca

Lori Simpson
Senior Director, Policy, Outreach and Engagement
Immigration and Refugee Board of Canada
344 Slater Street
Ottawa, ON K1A 0K1

Dear Ms. Simpson:

Re: Proposed Amendments to Immigration Appeal Division Rules of Procedure

The Immigration Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the proposed amendments to the Immigration Appeal Division (IAD) Rules, following a 2016 consultation in which the CBA Section commented on six proposed amendments at a preliminary stage and made additional recommendations.¹

The CBA is a national association of over 34,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers with an in-depth knowledge of citizenship and immigration law issues, including legislative changes, administration and enforcement.

The CBA Section supports changes to the IAD Rules that streamline processes and improve overall processing times, while maintaining the independence of the IAD and protecting the rights of vulnerable applicants. We agree with many of the proposed amendments that advance those objectives, such as enabling electronic communication and allowing video-conferencing. We comment on specific provisions in the attached Appendix and offer additional input here with those objectives in mind.

Reducing delay

Delays are the result of a myriad of factors. There is no one cause and the burden of finding solutions should not be carried by the IAD alone. All stakeholders must consistently work together to find viable, effective and durable solutions, so appellants see the results of their appeals in as timely a manner as possible. It is particularly critical in family-class sponsorship matters, where close family members (including children) are often kept apart for long periods awaiting resolution

¹ CBA Immigration Law Section submission, [Proposed Amendments to Immigration Appeal Division Rules](#) (November 25, 2016)

of their appeal. Prompt processing is critical to a core objective of the *Immigration and Refugee Protection Act* under subsection 3(1)(d) – to see that families are reunited in Canada.²

To this end, we support the proposal to issue Certified Records (CR) in a shorter time (45 rather than 60 days) but believe that this can be achieved only in collaboration with the CBSA. As the Minister of Public Safety is responsible to marshal, prepare and disclose CR material, the CBSA is fundamental to any proposal to tighten CR issuance timelines.

This applies equally to the proposal to pursue Early Resolution (ER), a form of mediation, to reduce lengthy delays (at times approaching two years) in scheduling certain appeal hearings. CBSA input and participation is essential since the parties to ER include the Minister of Public Safety’s counsel.

Our members have reported that the current ER process is inconsistent, depending on the Minister’s counsel assigned to the matter. We recommend that a special unit of Minister’s counsel be created and trained in the unique circumstances of the ER process; and we encourage dialogue among the Appellant, the Minister’s counsel and the IAD Member to achieve the objective of early resolution and to address issues with respect to IAD practice and procedure. Collaboration, and ideally consensus, will ultimately yield the best results.

Above all, the primary driver is access to justice. Tighter timelines do not necessarily meet the needs of particularly vulnerable litigants, such as minors, those with mental health conditions and self-represented litigants. There is no “one size fits all” solution and the individual circumstances of the most vulnerable must be borne in mind when considering IAD practice and procedure. We propose that the IAD Rules clearly indicate that the *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*³ apply to all divisions of the IRB including the IAD, and the application of that Guideline be reflected in the flexibility of timelines.

Consulting with a Lawyer at an Early Stage

We agree with the IAD that the stakes for appellants are high and the consequences of the result potentially severe. For that reason, appellants should be discouraged from representing themselves in this context. Many speak neither English nor French, are illiterate, or otherwise vulnerable and unable to understand the rules. With this in mind, the CBA Section is troubled that, in 2015-2016, 44 percent of appellants before the IAD were self-represented. The IAD backlog is partly due to the high volume of self-represented litigants. These vulnerable clients should be encouraged to seek counsel for help at an early stage.⁴ The Federal Court recommends that clients not represent themselves because of the complexity of the procedures.⁵ The CBA Section urges the IAD to do the same.⁶ We would be pleased to assist by preparing and distributing to IRB offices a list of counsel by

² [Immigration and Refugee Protection Act](#), SC 2001, c. 27

³ *Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB*, available online at <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir08.aspx>.

⁴ Via resources including CBA [Find-A-Lawyer Tool](#).

⁵ [Federal Court FAQ #12](#)

⁶ The CBA Section continues to urge the Government to restrict paid representation before all IRB divisions (not just IAD) to lawyers and Quebec notaries, who bring the education, training, effective regulation and client confidentiality needed by highly vulnerable clients to achieve justice in a highly complex area of law. See [CBA Section December 2017 letter](#).

province and territory who specialize in litigation before the IAD. Giving applicants information to reach a lawyer quickly will streamline the process and reduce the backlog.

Plain Language

The 2016 stakeholder consultation revealed a consensus view that, while plain language is important, the current language in the Rules is not especially problematic. Given the high stakes in this context, and the absence of an identified problem with the current language, the goal of access to justice would be better achieved by encouraging clients to seek legal representation at an early stage, as discussed above. The plain language effort will provide a false sense of security. No matter how clear the procedural rules, given the high stakes and vulnerability of the clients, appellants need to be represented by a lawyer before the IAD to secure access to justice.

File Scheduling and Management

In the interests of reducing delay, the CBA Section offers the additional recommendation that the IAD adopt the practice of inviting counsel to volunteer to have their cases heard at an earlier stage, where they are ready to proceed before the suggested date. This practice was employed successfully in a pilot project by the Refugee Protection Division (RPD) in Toronto and has the potential to reduce the backlog. Many cases will continue to be postponed due to change of counsel or for other administrative reasons, but there should be flexibility to prioritize cases which are ready to proceed.

In addition, the CBA Section proposes that:

- 1) in all circumstances clients and counsel be copied on electronic communications sent to the IAD by the CBSA and that these communications become part of the tribunal record; and
- 2) IAD be allowed to anonymize the client's name or other case information on a case by case basis, helping to protect privacy rights in cases dealing with children and youth, for example.

We appreciate the opportunity to comment on the proposed amendments to the IAD Rules, and would be pleased to discuss our recommendations in more detail.

Yours truly,

(original letter signed by Sarah MacKenzie for Marina Sedai)

Marina Sedai
Chair, CBA Immigration Law Section