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Designated Representatives in Immigration and Refugee Matters: Using Them to the Fullest Potential

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IMMIGRATION LAW SECTION**

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PREFACE

The Canadian Bar Association is a national association representing 36,000 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 CBA Immigration Law Section with input from the CBA Children's Law Committee and its UN Convention on the Rights of the Child subcommittee, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Immigration Law Section.

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EXECUTIVE SUMMARY

A. Introduction

In 2014, the CBA Immigration Law Section (the CBA Section) committed to exploring how to enhance justice for the more vulnerable immigrants and refugees who enter Canada with the intention of remaining. These vulnerable individuals include children and claimants whose mental state renders them incapable of understanding the legal process. The current legislative response to help them is to require the Immigration and Refugee Board (IRB) to appoint Designated Representatives (DRs) for them.

Section 167(2) of the *Immigration and Refugee Protection Act* (IRPA) states the law:

If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

B. Existing Models for Service

Children have extraordinary needs. At present, the DR for most young people who enter Canada with their family is a close relative – usually a parent.

There are three additional ways of providing DR assistance to young people. First, the IRB recruits lawyers, social workers and other individuals who have experience with vulnerable persons. It places their names on a roster and calls on them to represent young people, paying them a block fee.

Second, unaccompanied minors who arrive at Toronto's international airport intending to make refugee claims may receive *pro bono* services through the "Unaccompanied Minors Project" operated by lawyers from McCarthy Tétrault and the Royal Bank of Canada. The project is in partnership with Pro Bono Law Ontario and the IRB.

Third, in Quebec, a small government agency employs salaried social workers to assist unaccompanied children and immigrants of all ages who are identified at a POE as having capacity issues. The *Programme régional d'accueil et d'intégration des demandeurs d'asile* (PRAIDA) tries to address the needs of immigrants from the time they arrive until their immigration status is resolved. Agency staff gather evidence for immigration hearings, such as identity documents. They arrange for unaccompanied children to be referred to services for protection, health care and education. If needed, they contact the child's family. They gather evidence to support the claims of minors and people lacking capacity, attend hearings with them. If PRAIDA workers identify issues requiring lawyers, they secure legal counsel.

C. Areas for Change

None of these DR models satisfies all the needs of the vulnerable individuals identified in section 167 of IRPA. The Quebec model is the most comprehensive. Several deficiencies in the DR program remain:

Appointments

- Although many vulnerable claimants need DRs before they make statements to immigration officials, DRs are often not appointed by that stage.
- Claimants may have the services of a DR, but not those of a lawyer, despite the claimant requiring both to make a case effectively.
- The IRB identifies DRs for their specialization in working with a particular population, but in practice often appoints them to cases requiring a much different skill set.
- Few opportunities for training now exist for DRs on the IRB roster and the quality of their work is not monitored.

Funding

- Deficiencies in service by DRs are often attributed to a lack of money, but these deficiencies may also flow from the model for delivery of DR services.
- The IRB tariff for DRs pays block fees that are not directly linked to the quantity or calibre of work required in a given case.

Representation of young people

- The presumption is that an accompanied child will have a relative act as a DR. However, when there are issues such as forced marriage or the young person's identification as LGBT, a parent's values can impede the child from fully presenting a case.
- Under IRPA, people under 18 are entitled to representation by a DR. However, under legislation in some provinces (Ontario, for instance) social service agencies may protect children not living with their families only to age 16. Unless a DR is appointed, there may be nobody to support the child in securing housing or legal counsel.
- Unaccompanied minors without immigration status in Canada have acute needs for emotional and physical support beyond the help they need to present their case.

Detention

- Many young people are held in custody for irregular immigration status. Young people between 16 and 18 can be in detained for up to a year. They are detained on immigration matters too frequently.
- DRs appointed for detention reviews frequently do not have enough advance notice to meet the claimant and prepare a case, or to contact an immigration lawyer.

Claimants unable to understand the nature of proceedings

- As the law is presently interpreted, representatives bear the burden of convincing the IRB that a claimant cannot understand the nature of a proceeding, without the IRB necessarily sharing responsibility.
- Some IRB members appoint DRs for people whose mental health interferes with their ability to present a case. Others take a different approach and focus on the person's ability to understand what is happening, in the context of the hearing.
- Although there is a history of litigation guardians acting as witnesses in court and before tribunals, many IRB members are unwilling to hear evidence from DRs, preferring the evidence to come from the claimant.

D. Legal Guidance

The Federal Court

Since the Federal Court interprets immigration legislation, we sought guidance in the principles laid down its jurisprudence. The Court interprets section 167(2) more broadly than requiring DRs only for tribunal hearings.

Where a DR was not made available to a minor or a person who lacked capacity when they spoke with a border official at a Port of entry (POE), the Federal Court would not allow these statements to impeach the claimant's credibility at a later hearing.

As well, the Federal Court has been vocal on the need to train DRs and legal counsel. The Court identified a need for representatives to obtain an assessment of a troubled client's mental state and, in appropriate circumstances, to make it available to the IRB member hearing a case.

Charter of Rights

We also looked at the *Charter of Rights* – in particular section 7, on protection of life, liberty and security of person. The obligation to respect these guarantees rests with government officials. The onus to initiate inquiries into a person's mental state does not rest solely with the DR, but must also be a responsibility of the IRB.

International Conventions

We benefited from the insights of child protection lawyers knowledgeable about the UN *Convention on the Rights of the Child*. Long periods of waiting for immigration outcomes are especially difficult for children.

The obligation in the Convention to make the "best interests of the child" the primary consideration in all actions concerning children is not always taken into account in immigration and refugee matters. In many situations where children would benefit from having separate counsel, they do not receive this.

We conclude that a substantially enhanced DR system would resolve several concerns about Canada's compliance with the Convention.

The use of DRs must also respect the UN Convention on the Rights of Persons with Disabilities.

E. Recommendations

The CBA Section recommends viewing an inability to follow instructions or answer questions directly as a possible indicator that a person has poor mental health and therefore needs assistance from a DR. That is one example of how accessibility was prioritized, in keeping with the *Convention on the Rights of Persons with Disabilities*.

We identified other factors to consider in deciding whether to appoint a DR:

- the availability of expert evidence about the claimant's intellectual facilities or mental condition;
- medical history relating to possible brain injury or psychiatric history, including psychiatric disorders which could severely impair the claimant's ability to testify;
- educational history, including cognitive impairment; and
- whether the person had a DR before another Division of the IRB.

A claimant may appreciate the nature of the proceedings but suffer from mental health issues that make it difficult to present their case to best advantage. We recommend that the IRB issue guidelines specifying that the Board *must* appoint a DR for adults who are unable to appreciate the nature of the proceedings and that the Board *may* appoint a DR for adults if mental health issues are likely to impede the person from presenting their case to their best advantage.

We recommend ending the presumption that a parent serve as guardian for an accompanied child, in part because Canada would not be meeting its obligations under the UN *Convention on the Rights of a Child* to appoint separate representatives in appropriate circumstances. There are circumstances, such as where domestic violence is involved, where appointing a parent may silence a child.

We speak positively of the holistic services provided by PRAIDA. However, we also recommend that PRAIDA supplement its existing services with independent DRs, spreading the DR work among more people.

We endorse introducing salaried staff DRs for other provinces and territories, along the lines of the Quebec model, while maintaining their existing models.

We recommend that DRs be available *at the POE*, that DRs be given notice immediately when a minor or an immigrant lacking capacity is detained, and that DRs receive disclosure before hearings take place.

F. Further Steps

To implement these recommendations, the CBA Section needs to engage immigration officials – specifically, managers in policy and operations. The recommendations extend to all departments, tribunals and agencies making decisions about immigrants and refugees – the IRB, Canada Border Services Agency (CBSA) and Citizenship and Immigration Canada (CIC). This submission can serve as the basis for discussions.

Full implementation of the recommendations would require redrafting section 167 of IRPA to indicate that someone entitled to a DR is presumed also to need a lawyer. The revised section would also clarify that claimants with *either* cognitive or mental health problems are entitled to a representative.

Provincial governments must also be involved. Provincial child protection services can end at age 16. Those between 16 and 18 will have no adult to look out for them. The need for a guardian is even more compelling if they have no immigration status.

Lawyers should work with the IRB to establish a roster of culturally diverse and experienced professionals who are prepared to work as DRs, and to train them.

The work of DRs should be monitored by a body independent from the IRB and be subject to periodic review. Decisions by IRB members about whether to appoint a DR should also be subject to independent review.

I. INTRODUCTION

A justice system can be judged by how it treats its most vulnerable people. Children and youth under 18 and adults with cognitive, developmental or other mental health issues are among the most vulnerable people in the immigration and refugee system. DRs are intended to help. They perform many functions to assist vulnerable persons in immigration and refugee matters: deciding whether to retain counsel; instructing counsel; making decisions about the claim; advising about various stages and procedures in processing their case; helping to gather evidence; acting as witnesses and generally protecting the interests of the person.

However, the existing DR system is inadequate, fragmented and significantly flawed. For example, without appropriate social supports, including access to shelter and appropriate community and medical supports, it is difficult for people with mental health issues to present immigration and refugee cases to their best advantage. To a large extent, the DR system operates through the goodwill of its participants rather than by consistently applying objective standards.

This submission identifies ways to resolve these inadequacies.

This submission was formulated by immigration lawyers from across the country. It also benefits from the thinking of professionals whose expertise lies at the intersection of children's law and mental health with immigration law.

We look at how designated representatives (DRs) can better protect some of the most vulnerable persons in our refugee and immigration system: children and youth under the age of 18 and adults with cognitive, developmental or other impairments that limit their ability to appreciate the nature of immigration and refugee proceedings. We also call for consistent criteria for appointing DRs. Finally, the report looks at the special needs of vulnerable persons who are being detained.

"Designated representative" is the name given to those who perform any of a range of functions under the *Immigration and Refugee Protection Act* (IRPA) to assist vulnerable persons in the immigration and refugee process. The Immigration and Refugee Board (IRB, or Board) describes vulnerable persons as follows:

... individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals

who have been victims of persecution based on sexual orientation and gender identity.

This protection of vulnerable persons must be consistent with the principles of natural and fundamental justice, Canada's obligations under the *Charter* and the international human rights instruments to which Canada is a signatory.

This project includes analysis from Ontario, Quebec, British Columbia and other provinces. It was initially intended to address the use of DRs before the IRB alone, but it soon became clear that the Canada Border Services Agency (CBSA) and Citizenship and Immigration Canada (CIC) could also benefit from this analysis to respond more effectively to the interests of vulnerable persons.

It also became apparent that vulnerable persons require legal counsel to represent their interests in many dealings with the immigration and refugee system. Lack of representation by legal counsel and/or a DR was a frequent concern. The CBA Section makes several recommendations to ensure that vulnerable persons are adequately represented by counsel.

It calls for DRs to play a greater role in the refugee and immigration system. DRs are currently seen chiefly as litigation guardians for the persons concerned. The CBA Section proposes that DRs adopt a more holistic approach to addressing the person's needs.

The CBA Section recommends that DRs be made available to vulnerable refugee claimants and immigrants at the POE. This is typically the vulnerable person's first point of contact with immigration authorities. The DR would continue to represent the vulnerable person until the person's status is resolved or the person is required to leave Canada.

The CBA Section also calls for reform of existing DR programs at the IRB, CBSA and CIC and addresses how DRs can best assist vulnerable persons who are being detained.

II. THE LEGAL FRAMEWORK

Section 167 of the *Immigration and Refugee Protection Act* (IRPA) sets out the broad framework for appointing DRs and legal counsel:

(1) A person who is the subject of proceedings before any Division of the Board and the Minister may, at their own expense, be represented by legal or other counsel.

(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.

To fulfill its obligations under section 167(2), the IRB administers its own DR program. This program has deficiencies, including inconsistent criteria in determining when to appoint DRs, failure to appoint DRs with appropriate skills and qualifications for a given individual, and inconsistent decisions about the appropriate role of DRs. Vulnerable persons may require the assistance of both a DR and legal counsel, but the legislation does not reflect this.

III. EXPANDING ROLE OF DESIGNATED REPRESENTATIVES

A. Assigning Designated Representatives and Legal Counsel at First Point of Contact

Jurisdiction for appointing DRs currently lies with the IRB. The CBA Section recommends that DRs and legal counsel be appointed as early as possible in immigration and refugee proceedings, since delays can undermine vulnerable persons' cases.

Vulnerable persons requiring the assistance of DRs should have access to assistance at their first point of contact with Canadian immigration officials. That first point of contact is the POE, whether a land border, airport or inland office. Ideally, the same DR would remain with the person throughout the proceedings, unless a conflict arises or there is valid concern about whether the DR is able or willing to continue. A concern could be raised by counsel, a Board member or the vulnerable person. Vulnerable persons should also have the right to request a change in counsel, DR or both.¹

A first-point-of-contact DR system would not eliminate the possible need to appoint DRs later. The need for a DR may not always be apparent at the POE, or the person's circumstances – mental health issues, for example – may arise some time after arrival.

There are several ways to implement this system. Ideally, DRs would be physically present and available at every POE, along with duty counsel. Alternatively, DRs and duty counsel could be present at POEs and at detention facilities, as sometimes occurs in British Columbia. Duty counsel's responsibilities would include engaging a DR who is qualified to deal with the particular needs of the vulnerable person.

¹ *Loi sur les services de santé et les services sociaux*. See also *Convention on the Rights of Persons with Disabilities*, www.ccdonline.ca/en/international/un/canada/crpd-first-report; the *Quebec Charter of Human Rights and Freedoms*: www.cdpdj.qc.ca/en/droits-de-la-jeunesse/vos-droits/Pages/lesion-droits.aspx.

There are several reasons for making DRs and duty counsel available at the POE. The POE is where immigrants and refugee claimants are first interviewed by immigration officials about their circumstances. Without access to a DR, vulnerable claimants with capacity issues may act on “advice” of immigration officials without understanding the implications of this advice or that other choices might better serve their interests.

In one case, the Federal Court overturned a decision of the IRB that a young claimant was not credible, based on the absence of a DR to represent her at the border. In *Altenor v. Canada (Citizenship and Immigration)*,² Justice O’Reilly said:

With respect to the confusing answers she gave at the border ... I note that Ms. Altenor was only 17 years old at the time and had not been assisted by a designated representative as required by s. 167(2) of the *Immigration and Refugee Protection Act*.... In my view, the duty to appoint a designated representative arose prior to that interview and, therefore, the Board should not have used her answers to impugn her credibility: See *Duale v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 150.

As this case shows, notes taken at POE interviews are made available to decision makers in subsequent immigration proceedings. The IRB may make adverse credibility findings if there are inconsistencies or discrepancies between these notes and later testimony at immigration proceedings. Given the particular vulnerabilities of minors and adults with health or other impairments and the potentially serious (even life-threatening) consequences of a forced return to their country of origin, the lack of representation at the POE arguably engages section 7 and 15 *Charter* rights of these individuals. Those who require a DR to protect their interests must be able to secure this help as soon as possible at the POE.

DRs at the POE could also assist vulnerable persons to find competent counsel, emergency shelter, social service agency support and medical or mental health services, if needed. As a practical matter, it may also be easier for a DR to locate a person being held in immigration custody than for the DR to locate a person who has been released.

RECOMMENDATION:

- 1. DRs and legal counsel should be appointed as early as possible in immigration and refugee proceedings.**

² 2008 FC 570 at para. 9.

B. Expanding the Role of Designated Representatives

Besides making DRs available at the POE, their role should be expanded. The CBA Section examined the role of DRs in three environments – in dealing with the IRB, CBSA and CIC.

The Refugee Protection Division Rules set out the traditional view of the DR role in refugee and immigration matters:³

- deciding whether to retain counsel, and if counsel is retained, instructing counsel or assisting the represented person in instructing counsel;
- making decisions regarding the claim or application or assisting the represented person in making those decisions;
- informing the represented person about various stages and procedures in the processing of their case;
- assisting in gathering evidence to support the represented person's case and in providing evidence, and if necessary, being a witness at the hearing;
- protecting the interests of the represented person and putting forward the best possible case to the Division;
- informing and consulting the represented person to the extent possible when making decisions about the case.

This approach contemplates restricting DRs to being litigation guardians for their clients. However, this is not an optimal use of this resource.

RECOMMENDATION:

- 2. The role of DRs in the immigration and refugee context should be expanded, but not to duplicate the role of counsel. DRs should no longer be expected to act solely as litigation guardians, but should address all the needs of those with capacity issues, including access to housing, social welfare, education and medical specialists, as necessary.**

Separated child refugee claimants, or “unaccompanied minors,” have particular needs. As children, they require immediate and comprehensive assistance, not only for the process of refugee determination, but for all aspects of life normally supervised by a parent. Children require assistance with food, shelter, medical care and education. They need daily adult guidance and protection from those who might harm or exploit them.

³ See also *Duale v. Canada (Minister of Citizenship & Immigration)*, [2004] FCJ No 178 (FC).

In refugee matters, children also require emotional support because of their separation from family and experiences of trauma. They require specialized legal assistance since they are children.

In Ontario, unaccompanied minors under the age of 16 are referred to the child welfare authority having jurisdiction at the POE where the child arrives. If no family or community member is identified, the child will be admitted to the care of a children's aid society, where the child's essential needs will be met.

It is more difficult to help youth between 16 and 18 who have not been previously involved with a children's aid society. Child protection agencies in Ontario have no jurisdiction to seek legal guardianship in this situation. No child welfare agency takes responsibility for ensuring appropriate protection, care or proper assistance to secure legal status.

The UN Committee on the Rights of the Child (CRC) is the body of 18 independent experts that monitors implementation of the UN *Convention on the Rights of the Child* by its State parties. In its December 2012 Report about Canada's compliance with the Convention, the CRC expressed concern about Canada's treatment of children in immigration and refugee determination processes. The concerns included the lack of primacy of the best-interests-of-the-child principle, the lack of independent guardianships for unaccompanied minors in some cases and the detention of asylum-seeking, refugee or irregular migrant children. The CRC noted the following specific concerns, several of which could be addressed by a substantially enhanced DR system:

Special protection measures (arts. 22, 30, 38, 39, 40, 37 (b)-(d), 32-36 of the Convention)

Asylum-seeking and refugee children

73. ... [T]he Committee is gravely concerned at the recent passage of the law entitled, Protecting Canada's Immigration System Act, in June 2012 authorizing the detention of children from ages 16 to 18 for up to one year due to the irregular migrant status. Furthermore, the Committee regrets that notwithstanding its previous recommendation (CRC/C/15/Add.215, para. 47, 2003), the State party has not adopted a national policy on unaccompanied and asylum-seeking children and is concerned that the Immigration and Refugee Protection Act makes no distinction between accompanied and unaccompanied children and does not take into account the best interests of the child. The Committee is also deeply concerned about the frequent detention of asylum-seeking children ... being done without consideration for the best interests of the child. Furthermore, while acknowledging that a representative is appointed for unaccompanied children, the Committee notes with concern that they are not provided with a guardian on a regular basis. Additionally, the Committee is concerned about the deportation of Roma and other migrant children who previous to that decision often await, in an uncertain status, for prolonged periods of time, even years, such decision.

74. The Committee urges the State party to bring its immigration and asylum laws into full conformity with the Convention and other relevant international standards.... In addition, the Committee urges the State party to:

(a) Reconsider its policy of detaining children who are asylum-seeking, refugees and/or irregular migrants; and ensure that detention is only used in exceptional circumstances, in keeping with the best interests of the child, and subject to judicial review;

(b) Ensure that legislation and procedures use the best interests of the child as the primary consideration in all immigration and asylum processes, that determination of the best interests is consistently conducted by professionals who have been adequately applying such procedures;

(c) Expediently establish the institution of independent guardianships for unaccompanied migrant children;

(d) Ensure that cases of asylum-seeking children progress quickly so as to prevent children from waiting long periods of time for the decisions; and

(e) Consider implementing the United Nations High Commission for Refugees Guidelines on International Protection No. 8: Child Asylum Claims under articles 1(A)2 and 1(F) of the 1951 Convention. In implementing this recommendation, the Committee stresses the need for the State party to pay particular attention to ensuring that its policies and procedures for children in asylum seeking, refugee and/or immigration detention give due primacy to the principle of the best interests of the child and that immigration authorities are trained on the principle and procedures of the best interest of the child.⁴

[emphasis in original]

Unaccompanied adults with mental health issues face challenges like those of unaccompanied minors. They may also need immediate and comprehensive assistance, not only for the refugee determination process, but for other aspects of their lives, including finding appropriate shelter, medical care and community support. They may also require mental health services and legal assistance for their immigration and refugee proceedings.⁵

⁴ CRC/C/CAN/CO/3-4.

⁵ Canada has ratified the UN *Convention on the Rights of Persons with Disabilities*, A/RES/61/106. Article 3 sets out its general principles:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;

Proceedings before the IRB are extremely stressful for all litigants. Children and adults with mental health issues are particularly vulnerable. The destabilizing effects of a lack of access to housing and adequate social supports are likely to further compromise their ability to present their cases to their best advantage.

Failure to deal with all the unique needs of these particularly vulnerable individuals has serious consequences. They include negative immigration outcomes, thus potentially engaging the section 7 and 15 *Charter* rights of the individuals.

RECOMMENDATIONS:

- 3. The recommendations of the UN Committee on the Rights of the Child on asylum-seeking, refugee and migrant children should be implemented as set out in its December 2012 Report on Canada's compliance with the UN *Convention on the Rights of the Child*.**
- 4. Consistent with those recommendations, the principle of the best interests of the child should be given primacy in all immigration and refugee processes, including the expeditious institution of independent guardianships for unaccompanied minor children and the use of detention in only exceptional circumstances.**
- 5. Immigration authorities should be trained on the principles and procedures relating to the best interests of the child cases.**
- 6. Immigration authorities should be trained on the principles and procedures relating to the right of the child to be heard.**

C. The Search for an Acceptable Model

The CBA Section recommends that competent DRs experienced in working with children and vulnerable adults from different cultural and linguistic backgrounds be available to refugee claimants and immigrants. DRs should be available from when the individuals arrive to when their immigration status is resolved or they must leave Canada. One way to do this is to hire DRs

- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

as salaried staff through a separate social service agency, as currently operates in Quebec. (However, the system could be enhanced, as discussed below).

RECOMMENDATION:

- 7. Competent DRs experienced in working with children and vulnerable adults from different cultural and linguistic backgrounds should be available to refugee claimants and immigrants.**

Quebec Model

In Quebec, unaccompanied children and those identified at the POE as having capacity issues are referred to a social services agency – the *Programme régional d'accueil et d'intégration des demandeurs d'asile* (PRAIDA). The agency's salaried staff are skilled social workers able to work with children of different ages and persons with mental health issues.

The DRs at PRAIDA help gather evidence for hearings, such as identity documents. They arrange for unaccompanied children to be referred to services for protection and care, including foster or group home care, and ensure that the children have access to school and health care. They also assist children to contact family if needed. Similarly, DRs help vulnerable adults obtain appropriate housing and social and medical support if needed.

DRs continue to act until the person's immigration status is resolved. For refugee claimants, they assist successful refugee claimants in applying for permanent resident (PR) status. For unsuccessful cases, DRs arrange for counsel to proceed with applications to the Federal Court as needed, and with applications for PR on humanitarian and compassionate grounds, as well as with pre-removal risk assessments.

If all applications for status fail, DRs provide information and advice to clients about removal arrangements. This may include arranging appropriate reception for the person being deported. DRs also continue to represent vulnerable minors who still require assistance.

The Quebec PRAIDA model, at its optimum, is preferable to the system in Ontario for several reasons:

1. In Ontario, POE officials rarely seek the assistance of a DR;

2. In Ontario, unaccompanied youth between 16 and 18 and vulnerable adults are left to fend for themselves in finding shelter, social services and a lawyer to represent them;
3. In Ontario, decisions to appoint a DR – let alone an appropriately qualified DR – are inconsistent and dependent on shelter workers, social service agencies, the person’s lawyer, or the IRB itself subsequently identifying the need for a representative.

The CBA Section recommends that in all provinces and territories, as in Quebec, a DR be appointed when an applicant is served with a pre-removal risk assessment by CBSA or is eligible to make a humanitarian and compassionate claim to CIC. The basis of risk assessments and humanitarian and compassionate applications may be either mental illness or the best interests of the child. Yet vulnerable applicants may not be able to contact legal counsel or family members on their own. A DR could help them retain counsel.

RECOMMENDATION:

- 8. In all provinces and territories, as in Quebec, a DR should be appointed when an applicant is served with a pre-removal risk assessment by CBSA or is eligible to make a humanitarian and compassionate claim to CIC.**

Concerns about the Quebec Model

PRAIDA now largely occupies the DR field in Quebec, yet it is unable to handle the workload. The agency employs a full-time program manager and two other staff, one full-time and one part-time. Their caseloads are too onerous, particularly in the Immigration Division. Quebec needs to supplement PRAIDA’s services with independent DRs.

A second reason for introducing independent DRs, some legal counsel consulted for this submission suggest, is that non-PRAIDA social workers are closer to clients than PRAIDA staff and would be better suited to act as DRs.

Moreover, some Quebec counsel have expressed concern that the majority of cases referred by PRAIDA to counsel are sent to a small pool of lawyers.⁶ This may encourage high-volume practice

⁶ The Federal Department of Justice noted similar concerns in assessing the Quebec DR system, called SARIMM at the time. One source from Quebec told the Justice researcher that in choosing counsel for unaccompanied minors of some ethnic origins, the DRs did not vary their selection. See the entire assessment at www.justice.gc.ca/eng/rp-pr/other-autre/ir/rr03_la16-rr03_aj16/p4.html, and in particular footnote 29.

and a decline in quality of service. Clients should have greater choice in their selection of counsel. More lawyers should be on the roster.

However, the legal aid tariff for Quebec lawyers who handle immigration and refugee matters is very low. Salaried DRs are better paid than lawyers. This undermines the role of the legal professional and is inconsistent with protecting the rule of law. The tariff for lawyers in Quebec should be increased.

Quebec lawyers also express concern that funds which could be directed to increase legal aid tariffs are going instead to employed DRs. PRAIDA is funded by Quebec Health and Social Services, which in turn receives funding through federal transfer payments for assistance with refugees. These monies are supplemented by a *per diem* honorarium from the IRB to staff acting as DRs.

Quebec lawyers also believe that DRs should be available to assist clients other than those on legal aid certificates. Some clients may wish to retain counsel privately, but still require other assistance that PRAIDA can offer.

Other Jurisdictions

Both Ontario and B.C. have a system to appoint independent DRs. In some provinces, like Alberta, legal aid staff indicated they were unaware of DRs being appointed.

Ontario Model

In Ontario, the IRB advertises for, selects and hires individual DRs. The IRB places their names on a list after they sign contracts and obtain security clearances. The DRs are contacted case by case when a Board member decides that a DR is needed for a tribunal hearing, or when legal counsel identifies the need to the Board. Some of the DRs are immigration lawyers. The DRs are paid at IRB tariff rates. On occasion, the Board accepts a DR from the Canadian Schizophrenia Society or other social service agency.

In addition, the law firm of McCarthy Tétrault and the Royal Bank of Canada participate in the "Unaccompanied Minors Project" in partnership with Pro Bono Law Ontario and the IRB. The program matches lawyers from the firm and the bank, acting as DRs, with children who arrive alone at Toronto's international airport from other countries. As DRs, the lawyers assist children navigate the refugee claim process, but do not assist in other types of appeals before the IRB. The DRs' services include gathering evidence to support the child's claim, attending the hearing with

the child and retaining legal counsel. Although training on the refugee process is provided, these lawyers typically do not have a background in immigration or refugee law.

Conclusion

Having some salaried DR staff employed by a social services agency – similar to the Quebec model – is a good idea. However, these DRs could be supplemented by individually appointed DRs. This would be similar to the legal aid system in Ontario, where refugee and immigration clients may be represented by lawyers at legal aid-funded clinics or by lawyers in private practice who accept certificates for legal representation funded by legal aid.

In short, Quebec can benefit from having DRs appointed as in some other provinces, and other provinces and territories can benefit from incorporating elements of the Quebec model.

In every case, independent DRs and legal counsel should be available at the POE. Children between 16 and 18 should have as much protection as those who are younger, and DRs should be trained, available and evaluated on a consistent basis.

The CBA Section recommends that competent counsel and DRs be available to vulnerable refugee claimants and immigrants from the time they arrive to the point that their immigration status is resolved or they are forced to leave Canada.

The CBA Section recommends that for all issues involving legal status, the DRs should be immigration or refugee lawyers.

RECOMMENDATIONS:

- 9. Competent counsel and DRs should be available to vulnerable refugee claimants and immigrants from the time they arrive to the point that their immigration status is resolved or they are forced to leave Canada.**
- 10. For all issues involving legal status, DRs should be lawyers competent in immigration or refugee matters.**

IV. REFORMING THE IRB'S DESIGNATED REPRESENTATIVE PROGRAM

Having a DR at the POE does not preclude the need for one later in the process. The balance of this submission focuses on the appropriate process for administering the DR program at the IRB and for introducing it at CBSA and CIC.

A. Consistent Criteria for Appointing Designated Representatives

As noted earlier, section 167(2) of IRPA requires the IRB to appoint DRs for those under 18 and for adults who are unable to appreciate the nature of the proceedings.

Board members from all four Divisions of the IRB consistently appoint DRs for many claimants who are minors. However, the Board should review its policy of appointing parents as DRs. A parent may not be an appropriate DR, since the interests of the parent and child sometimes conflict. For example, a parent may have been abusive to the child or unable to protect the child from an abusive situation. In many instances, the children have no independent legal representation. Parents in these situations should not act as DRs for their children. Board members have an obligation to ensure that DRs understand their duties to a child and must assess their ability to fulfill those duties. In short, Board members should fully respect IRB Chairperson Guideline 3, which deals in part with the appointment of DRs for child claimants.⁷

For adult claimants, Board members apply criteria for appointing DRs inconsistently. Some require evidence that the person concerned is unable to appreciate the nature of the proceedings before appointing a DR. Others interpret IRPA and the applicable Division Rules permissively. Acting on the principle that the Board can control its own process, they apply a less stringent test and appoint DRs where cognitive or psychiatric impairment is likely to impede the person from presenting their case to their best advantage.

To the extent possible, those appearing before the IRB should receive the same procedural protections no matter which member hears their case. The CBA Section recommends that Board members follow IRB Chairperson Guideline 8⁸ and accept the recommendations of counsel to appoint a DR. Paragraph 7.3 of Guideline 8 states that counsel for a person who may be considered vulnerable is best placed to bring the vulnerability to the attention of the IRB, and is expected to do so as soon as possible. Others associated with the person or who have knowledge of facts indicating that the person may be vulnerable (counsel for the Minister or any other

⁷ Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues.

⁸ Chairperson Guideline 8: Procedures With Respect to Vulnerable Persons Appearing Before the IRB.

person) are encouraged to do the same. If reasonably possible, independent credible evidence documenting the vulnerability must be filed with the IRB. [Appendix A](#) lists agencies in Ontario that can help DRs and legal counsel to document people with cognitive disorders and to obtain treatment.

RECOMMENDATION:

11. Board members should follow IRB Chairperson Guideline 8 and accept the recommendation of counsel to appoint a DR.

B. Legislative and Constitutional Framework

Vulnerable persons are more likely than others to have their equality and other rights violated, especially during administrative proceedings.

The Charter

Section 7 of the *Charter* provides for the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Removing vulnerable persons from Canada and returning them to a country where they may face risk may violate their right to life, liberty and security of the person. When section 7 rights become engaged, meaningful procedural protections must be afforded. The need for procedural fairness is heightened for children and youth and for adults with mental health issues, given their particular vulnerabilities. Procedural fairness may be interpreted to include the appointment of a DR, as well as the right to legal representation. In *A.M.R.I. v. K.E.R.*,⁹ the Ontario Court of Appeal identified the right to representation as one of the necessary procedural protections:

Where the proposed return [from Canada to a foreign jurisdiction] engages the child's s. 7 *Charter* rights, as in this case, meaningful procedural protections must be afforded to the child. In our view, these include the right to (1) receive notice of the application; (2) receive adequate disclosure of the case for an order of return; (3) a reasonable opportunity to respond to that case; (4) a reasonable opportunity to have his or her views on the merits of the application considered in accordance with the child's age and level of maturity; and (5) the right to representation.

⁹ 2011 ONCA 417, at para. 120.

Section 15 of the *Charter* guarantees equality before and under the law and the right to the equal protection and equal benefit of the law without discrimination. Age and mental or physical disability are enumerated grounds of discrimination.

UN Convention on the Rights of the Child

Article 12 of the Convention gives children a right to be heard in any judicial and administrative proceeding affecting them, either directly or through a representative or appropriate body. Article 3 states that the best interests of the child shall be a primary consideration in all actions concerning children. Article 22 requires that a child who is a refugee or is seeking refugee status receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights in the Convention and other international human rights or humanitarian instruments.

In part, Article 12 states:

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

IRPA

Section 167(2) requires the relevant IRB Division to designate a person to represent someone under 18. For adults, the Division must appoint a representative for those unable to appreciate the nature of the proceedings. The challenge is to have consistent interpretations of this provision among Board members in all Divisions.¹⁰

¹⁰ Accommodating asylum seekers with disabilities first requires identifying the person's disability. The *Convention on Rights of Persons with Disabilities*, A/RES/61/106, which Canada has ratified, does not have an exhaustive definition of disability, which its preamble describes as "evolving concept." Article 1

IRB Guidelines

IRB Chairperson Guideline 8 refers to “vulnerable persons” as:

...including, but ... limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity.

C. Application of the Legislative Framework

The legislative framework is meaningless if not purposively applied. Parties to a proceeding must be given equal and meaningful opportunities to present and have their positions fully and fairly considered. With a vulnerable adult, this implies that an assessment of their inability to appreciate the nature of the proceedings must be sound and based on a careful review of the person’s circumstances. All players in the immigration decision-making system are expected to understand and consider the applicable legislative framework. However, the particular complexities of cases of those with mental health issues – and the reality that capacity issues may not always be readily apparent – create the risk of a decision based on insufficient information. This jeopardizes the claimant’s interests and may be procedurally and substantively unfair. A decision maker who is not aware of or sensitive to the potential vulnerabilities may misunderstand important aspects of the claim. In turn, the claimant may be frustrated by a process that is difficult to understand. The claimant may become impatient, anxious and, sometimes, aggressive – exacerbating an already difficult situation.

With a mental health assessment in hand, an officer or Board member can better understand a claimant’s particular vulnerabilities and how they might affect the presentation of the claimant’s

defines persons with disabilities to include, at least, persons with a range of long-term impairments (physical, sensory, intellectual or mental). The starting point, therefore, is that the definition of disability is not closed and should be broadly conceived. Procedures for identifying persons with disabilities must be sufficiently flexible to accommodate this diversity. The International Association of Refugee Law Judges (IARLJ) has produced useful *Judicial Guidelines on Procedures with Respect to Vulnerable Persons*. They state that applicants or their representatives should have the opportunity to make submissions on the nature of their disability and its impact on the procedural or substantive aspects of their claim. The Guidelines recommend attempting to identify disability as early in the proceedings as possible, but that adjudicators also be prepared for the possibility of disabilities being identified later in the proceedings. This is particularly important because not all persons with disabilities identify as having a disability.

case. A better appreciation of the claim or humanitarian and compassionate or other application might lead to a different outcome.¹¹

While the IRB has no obligation to verify a person's capacity, a DR would ensure that the IRB consider this issue and recommend an assessment prior to a hearing. Otherwise, vulnerable persons are precluded from advancing their rights as fully and completely as others. This gives rise to systemic discrimination in the adjudicative process on the grounds of age or disability, violating section 15 of the *Charter*.

The Federal Court decision in *FAM v. Canada (Citizenship and Immigration)*¹² highlights the significance of a DR familiar with the legislative and procedural context – that is, a lawyer.

In *FAM*, a request was made for an assessment and the resulting report was deposited at the IRB. When the IRB failed to consider the vulnerability of the applicant during the hearing, the Court granted the application for judicial review and referred the case back to the decision maker:

[I]t is obvious from the transcript that the claimant was not rational throughout the course of the hearing. In my view, the applicant was denied procedural fairness when it became apparent that he was unable to give coherent testimony about the issues raised by his claim for refugee status and protection. The Presiding Member should have stopped the hearing at that point and considered alternative procedures to determine the claim. I am also satisfied that the Member did not demonstrate in her analysis that the applicant's mental state was taken into consideration in determining the merits of the claim and, in particular, of his explanations.¹³

It is inappropriate to shift the obligation to raise the capacity issue and adduce relevant evidence to legal counsel or the DR. The potential *Charter* implications of a failure to consider capacity oblige the State to address it as well. In doing so, all Board members should rely on the more permissive interpretation of "unable to appreciate the nature of the proceedings" already adopted by some Board members.

¹¹ Canada has ratified the *Convention on the Rights of Persons with Disabilities*. Its principles should permeate all aspects of government and judicial decision making, including refugee status determination. Key provisions of the *Convention*, such as the obligation to provide reasonable accommodation, should guide decision makers as they try to ensure that the rights of asylum seekers with disabilities are upheld. See discussion paper prepared for the Vulnerable Persons Working Group International Association of Refugee Law Judges World Conference Bled, Slovenia, 7-9 September 2011: www.iarjlj.org/general/images/stories/bled_conference/papers/Disability_and_Displacement-background_paper.pdf.

¹² *FAM v. Canada (Citizenship and Immigration)*, 2013 FC 574.

¹³ *Ibid.*, at para. 16.

Many times a claimant may appreciate the nature of the proceedings but suffer from mental health issues that make it very difficult for them to present their cases to best advantage, whether at the pre-hearing stage (collecting appropriate documents to support their case) or the hearing stage (presenting evidence orally). In such cases, the Board should have discretion to appoint a DR, even though the technical legislative requirements requiring appointment may not be met.

The CBA Section recommends that the IRB issue guidelines that the Board *must* appoint a DR for adults who are unable to appreciate the nature of the proceedings, and that the Board *may* appoint a DR for adults if mental health issues are likely to impede the person from presenting their case to their best advantage.

The guidelines should also set out the relevant factors for Board members to consider in exercising this discretion. The CBA Section recommends that Board members take the following factors into consideration:

- the person's statements at the proceedings, especially if the statements indicate confusion, incoherence, lack of connection with reality or simply an inability to comprehend and respond to the questions asked;
- the person's behaviour, both verbal and non-verbal, at the Board, especially if the behaviour indicates confusion or a lack of connection with reality or an inability to follow basic instructions;
- expert evidence, if any, on the person's intellectual faculties or mental condition;
- medical history relating to possible brain injury;
- psychiatric history, including evidence of all psychiatric disorders which could severely impair the claimant's ability to testify – for example, panic or anxiety disorder, post-traumatic stress disorder and evidence of serious mental illness such as schizophrenia or bi-polar disorder;
- educational history, especially if this indicates cognitive impairment; and
- whether the person had a DR for a proceeding in another Division of the Board.

RECOMMENDATIONS:

12. The IRB should issue guidelines that the Board must appoint a DR for adults who are unable to appreciate the nature of the proceedings, and that the Board may appoint a DR for adults if mental health issues are likely to impede the person from presenting their case to their best advantage.

13. Board members should take the following factors into consideration in exercising this discretion:

- **the person's statements at the proceedings, especially if the statements indicate confusion, incoherence, lack of connection with reality or simply an inability to comprehend and respond to the questions asked;**
- **the person's behaviour, both verbal and non-verbal, at the Board, especially if the behaviour indicates confusion or a lack of connection with reality or an inability to follow basic instructions;**
- **expert evidence, if any, on the person's intellectual faculties or mental condition;**
- **medical history relating to possible brain injury;**
- **psychiatric history, including evidence of all psychiatric disorders which could severely impair the claimant's ability to testify – for example, panic or anxiety disorder, post-traumatic stress disorder and evidence of serious mental illness such as schizophrenia or bi-polar disorder;**
- **educational history, especially if this indicates cognitive impairment; and**
- **whether the person had a DR for a proceeding in another Division of the Board.**

D. Appropriately Qualified Designated Representatives

For appointment as a DR, the Rules of the Refugee Protection Division (RPD), Immigration Division (ID), Immigration Appeal Division (IAD), and Refugee Appeal Division (RAD) require only that candidates:

- be 18 years of age or older;
- understand the nature of the proceedings before the IRB;
- be willing and able to act in the best interests of person concerned;
- not have interests that conflict with that person.

Beyond this, the IRB makes no effort to match the qualifications of DRs with the person's needs. This is not sufficient. The IRB should choose DRs whose experience and expertise match the needs of the person concerned.

The IRB's Child Guidelines explicitly recognize that children cannot present evidence with the same precision as adults about timing, importance and details, and that they may have difficulty trusting or opening up to strangers. Children may also be affected by emotional, psychological or psychiatric issues, including anxiety, depression and post-traumatic stress. Ideally, DRs chosen for minors should be professionals with recognized experience in working with and relating to children.

Similarly, DRs appointed to assist those with mental health issues should be professionals with recognized mental health work experience.

The CBA Section recommends that the IRB establish a roster of culturally diverse and experienced professionals to act as DRs. Efforts should be made to ensure that DR appointments are individualized, reflecting the need to match the expertise of the DR with the needs of the individual they help. Counsel and the community groups listed in [Appendix B](#) could be approached as potential sources of DRs. The IRB should develop and apply more effective Guidelines for DRs to help match the qualifications of DRs with the needs of claimants.

RECOMMENDATION:

14. The IRB should establish a roster of culturally diverse and experienced professionals who are prepared to act as DRs. Efforts should be made to ensure that DR appointments are individualized, reflecting the need to match the expertise of the DR with the needs of the individual they help.

E. Appointing Designated Representatives for Accompanied Minors

As outlined above, children have a right to be heard in refugee proceedings, under both international and domestic law.

IRPA must be construed and applied in a manner that complies with international human rights instruments to which Canada is a signatory.¹⁴ The Board Designated Representative Guide, as well as Guideline 3 on child refugee claimants, provides that where a child is accompanied by

¹⁴ *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 3(3)(f).

parents, one parent is usually appointed as the child's DR. This presumption to appoint a parent may be appropriate in some instances, but may not always protect the child's interests or ensure that the child's voice is heard.

For example, in domestic violence cases, the interests of mother and child may differ. The mother may not want to seek state protection on behalf of her child, so the child needs to be explicit in advancing a claim. Appointing the mother as DR may silence the child, whose interests will not be fully advanced in proceedings where fundamental rights are at stake. Still, the Board routinely appoints mothers as DRs in such cases.

Claimants may come from countries where forced marriage and honour- or gender-based violence are common, or where lesbian, gay, bisexual or transgendered (LGBT) youth do not have parental support in addressing actual or potential persecution. As with domestic violence cases, it will generally be inappropriate to appoint a parent as the child's DR. Parents may not identify these reasons for persecution on behalf of the child.

The CBA Section recommends no longer presumptively appointing a parent as the DR of minor children in all refugee cases. Instead, whether the parent is an appropriate DR for a minor child should be determined case by case. To be consistent with Article 12 of the UN *Convention on the Rights of the Child*, this determination should include a consideration of the views of the child, particularly if the child has the age and maturity to express those views. The CBA Section recommends that the IRB develop Guidelines for Designated Representatives reflecting this change and that it is generally inappropriate to appoint a parent as DR in the following situations:

- cases involving domestic violence;
- where forced marriage or gender- or honour-based violence may be at issue; or
- where a youth's sexual orientation or gender identity may be a source of persecution and parental support is not forthcoming.

RECOMMENDATION:

15. The presumptive appointment of a parent as the DR of accompanied minors should cease, especially in cases of domestic violence, where gender or honour-based violence or forced marriage are at issue, or where a youth's sexual orientation or gender identity may be a source of persecution and

parental support has not been forthcoming. The IRB should promulgate guidelines reflecting this change.

F. Training for Designated Representatives

DRs currently receive no basic training about the substantive legal requirements relating to the issues facing the person they assist. Similarly, the IRB assigns DRs without giving any basic training about procedures at the applicable IRB Division.

DRs who lack this knowledge cannot provide informed assistance. Their appointment may formally discharge the IRB's statutory duty to appoint a DR to assist minors and those with capacity issues. However, it violates the spirit of the law, which requires providing meaningful assistance.

The CBA Section recommends that, before appointment, all DRs receive basic training on legal and procedural matters relevant to the IRB Division dealing with the person they represent. To avoid a conflict of interest and enhance quality, training, selection and performance reviews should be provided independently, not internally by the IRB.

The federal government would fund the training. It could be a joint endeavour of the IRB, the private immigration and refugee law Bar and those with expertise in working with children, vulnerable adults and immigrant and refugee communities. Eligibility to work as a DR should require completing the training. If DRs are not immigration or refugee lawyers, they should be expected to consult and retain lawyers through an independent process, with funding made available for this. At a minimum, it would be preferable to have an immigration lawyer available at all times to advise DRs, akin to a duty counsel or "on-call" lawyer.

RECOMMENDATIONS:

16. Specialized training in both procedural and substantive aspects of the relevant law should be provided to all seeking to act as DRs. The training should be a joint endeavour of the IRB, the immigration and refugee law Bar and those with expertise in working with children, vulnerable adults and immigrant and refugee communities. Cross-cultural experience and training in working with children, youth and vulnerable adults should also be required.

- 17. To avoid a conflict of interest and enhance quality, training, selection and performance reviews should be provided independently, not internally by the IRB.**

G. Disclosure of Relevant Information to Designated Representatives

The IRB is required to disclose to counsel all information to be relied upon to determine a litigant's case. However, there is no requirement to disclose information to a DR. This is particularly problematic if the litigant does not have counsel. The litigant may lack important information that could influence the case outcome. This is contrary to basic principles of due process and fundamental justice. As noted in *Baker v. Canada (Minister of Citizenship & Immigration)*,¹⁵ “[t]he values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their cases fully and fairly ...”

The CBA Section recommends that, when appointed and at other times as necessary, DRs be given all material in the IRB file that would normally be sent to counsel.

RECOMMENDATION:

- 18. When appointed and at other times as necessary, DRs should be given all material in the IRB file that would normally be sent to counsel.**

H. Need for the Board to Cooperate with Counsel when Appointing Designated Representatives

The Board appoints DRs, but the initiative for appointment may come from the Board or from counsel representing the person concerned. The Rules of all four IRB Divisions require that if counsel believes that the person concerned requires a DR, they must inform the Division in writing without delay.

Because counsel meet regularly with their clients, counsel are often best placed to identify the need for a DR. Closely working with the client frequently also puts counsel in the best position to

¹⁵ [1999] S.C.R. 817 at para. 28.

identify a DR who could work effectively with the client and with counsel. Indeed, a good relationship between counsel and the DR may be essential to put the vulnerable client at ease and to represent the client to best advantage. This is because counsel and the DR work hand in hand to ensure respect for the client's rights and the proper presentation of the case.

Where counsel are involved, their views would be taken into account in the appointment of a DR.

This is not the current situation. For example, in one case brought to our attention, counsel had proposed appointing a respected DR with experience in mental health issues to represent a client diagnosed with schizoaffective disorder. The Board ignored counsel's proposal, appointing a DR with no experience representing clients with serious mental health issues. Counsel should be consulted in the selection of an appropriate representative.

RECOMMENDATION:

19. Counsel should be consulted in the selection of an appropriate DR.

I. Appealing Board Appointments of Designated Representatives

A Board member's decision about appointing a DR is an interlocutory decision. As a matter of practice, the Federal Court is reluctant to review interlocutory decisions, preferring that the case be finally determined first. As a result, if a Board member makes a flawed decision in appointing a DR, the decision may not be legally challenged until the case is completed. This can be especially prejudicial for those who require a DR but do not have one; the case may not be adequately presented, and delays in the final disposition of the case may be particularly unsettling for those with mental health issues or trauma histories.

The CBA Section recommends that interlocutory decisions about appointing DRs be subject to an independent review process and that regulatory changes be made to effect this change if necessary.

RECOMMENDATION:

20. Interlocutory decisions about appointing DRs should be subject to an independent review process and regulatory changes should be made to effect this change if necessary.

J. Allowing Designated Representatives to be Witnesses

The IRB permits DRs to be witnesses for the person they are helping. However, Board members are reluctant to allow DRs to provide *viva voce* evidence. This is problematic. Diligent DRs meet regularly with the person, know the case, observe the person's behaviour and are familiar with their mental health/cognitive abilities and limits. The DR's evidence does not have to be accepted, but it should at least be heard. The CBA Section recommends that the IRB introduce guidelines to this effect.

RECOMMENDATION:

21. The IRB should introduce guidelines to facilitate DRs acting as witnesses.

K. Monitoring the Work of Designated Representatives

The IRB is responsible for appointing DRs. However, it makes no attempt to monitor their work or determine whether those on its DR roster perform their duties properly.

This failure to monitor has resulted in serious concerns about the quality of work of some DRs on the Board's roster. We learned of cases where DRs failed to meet with the person concerned, offered no assistance in collecting evidence to substantiate claims and did little other than to collect the Board's honorarium. The rights of those the DRs are supposed to help are not protected and a disservice is done to the administration of justice.

If the Board continues to manage DRs, the Board should take a more active role in monitoring them to ensure they do the work they are supposed to do. The roster of DRs should be reviewed regularly to remove those for whom quality concerns are identified.

RECOMMENDATIONS:

22. If the Board continues to manage DRs, the Board should take on a more active role in monitoring DRs to ensure they do the work they are supposed to do.

23. The roster of DRs should be reviewed regularly to remove those for whom quality concerns are identified.

L. Improving Payment of Designated Representatives

The IRB pays DRs a low tariff rate (set out in [Appendix B](#) to this submission), with some exceptions. One exception is the *pro bono* work by McCarthy Tétrault and RBC through a joint initiative with Pro Bono Law Ontario and the IRB. The lawyers act as DRs for unaccompanied minors in refugee claims. A second exception is the DRs in Quebec who work for PRAIDA. They receive a salary; the IRB pays the tariff rate to the employer.

Ontario IRB representatives state that through advertising they are able to find and hire DRs with specialized skill in mental health and child protection. However, when DRs discover the amount of work involved for the limited tariff, they do not necessarily make themselves available. That accounts for some of the failure to provide DRs who can address the particular needs of their clients.

The amount of work by a DR may vary dramatically from case to case. The CBA Section recommends that payment of DRs be prorated according to the extent of work by the DR and that a process for evaluation be created.

RECOMMENDATION:

24. Payment of DRs should be prorated according to the extent of work by the DR and a process for evaluation should be created.

M. Consistency among Divisions in Appointing Designated Representatives

Rules in both the RPD and the RAD provide that one consideration in determining whether to appoint a DR is whether a DR has helped the claimant in any other Division. The Rules for the ID and IAD make no mention of this.

Appointing a DR in one IRB Division should trigger a presumptive appointment of a DR in all other Divisions. For consistency and continuity, where possible there should also be a presumption that the same DR represent the claimant in all Divisions, unless the claimant requests a change. Guidelines should be developed to explain this presumption.

RECOMMENDATION:

25. The criteria for appointing DRs should as far as possible be consistent in all Divisions of the IRB.

N. Training of Registry Staff

Each IRB Division has its own registry staff and each treats DRs differently. The CBA Section recommends training appropriate staff in each Division on the DR's role to ensure consistency across all four Divisions.

One suggestion is to establish a pool of specialist DR case officers in each Division. If DRs were appointed independently of the IRB, case officers would receive enhanced training on the roles and responsibilities of DRs, ensure that referrals for appointing DRs occur as soon as the recommendation for a DR is received, and ensure that DRs receive proper disclosure. If the person represented was also appearing before other Divisions, the case officer would advise those Divisions that a DR has been appointed.

With this structural change, the IRB can then standardize the information sent to and received by the DR. Standard information disclosed should include the following:

- letter of assignment and returned copy completed by the DR;
- Minister's disclosure;
- Board's disclosure; and
- all documents submitted by the person concerned.

RECOMMENDATION:

26. Appropriate staff in each IRB Division should be trained on the DR role to ensure consistency across all four Divisions.

V. DESIGNATED REPRESENTATIVES AND DETAINED PERSONS

A. Timely Delivery of Notice of Appointment to Designated Representative

IRPA requires that all detained immigrants and refugee claimants have their first detention review within 48 hours after being taken into custody and, if they are not released at that time, within seven days of the initial review.

Review within 48 hours means that, if a DR is required for a vulnerable person, the DR should ideally be contacted by the ID at the time of detention and no later.

However, the ID practice is to give the Notice of Appointment to the DR the day before, or the day of, a detention review. This is too little time for the DR to prepare the detained person for the review. The DR may not even be able to get access to the person before the detention review. This is particularly a problem if the person is in a provincial jail, which typically requires two days' notice to process a request for visitors, including visits by DRs.

The CBA Section recommends, for detention reviews occurring within 48 hours, the ID issue a Notice of Appointment to the DR at the time of detention. The CBA Section further recommends that the ID issue a Notice of Appointment at least three days before subsequent detention reviews.

RECOMMENDATION:

27. For detention reviews occurring within 48 hours, the Immigration Division should issue a Notice of Appointment to the DR at the time of detention. For subsequent detention reviews, the Immigration Division should issue a Notice of Appointment at least three days before the review.

B. Adequate Payment of DR Disbursements

DRs are now paid only the tariff for representing persons in detention. If the drive to the detention facility takes at least an hour-and-a-half each way, DRs may request disbursements to cover the cost of travel and meals. If the ID approves the visit, travel costs are covered. DRs must submit a disbursement authorization for each visit. Meal disbursements and travel to places closer and marginally faster to reach are not included. Nor does the ID reimburse DRs for

necessary national and international calls to a detained person's relatives to verify information or to try to secure an appropriate bondsperson.

The CBA Section recommends that, for detained claimants, DRs be reimbursed for travel costs and meals for at least one visit. DRs should be required to apply for further travel costs and meal allowances. The ID should also cover the cost of necessary calls by DRs for detained persons.

RECOMMENDATION:

28. For detained claimants, DRs should be reimbursed for travel costs and meals for at least one visit. DRs should be required to apply for further travel costs and meal allowances. The Immigration Division should also cover the cost of necessary calls by DRs for detained persons.

C. Timely Disclosure to Designated Representatives

The CBA Section has learned that the Minister¹⁶ is not giving DRs timely disclosure about the behaviour of some persons in detention. This impedes DRs in making appropriate release plans for claimants and may result in longer detention than necessary. This violates due process and the vulnerable person's *Charter* rights.

The CBA Section recommends that the ID issue guidelines stressing the importance of timely disclosure by the Minister's counsel to the DR.

RECOMMENDATION:

29. The Immigration Division should issue guidelines stressing the importance of timely disclosure by the Minister's counsel to the DR.

¹⁶ This submission was prepared before the October 2015 federal election. The reference to "Minister" means the Minister who held office before the 2015 election.

VI. SUMMARY OF RECOMMENDATIONS

The CBA Section recommends that:

- 1. DRs and legal counsel should be appointed as early as possible in immigration and refugee proceedings.**
- 2. The role of DRs in the immigration and refugee context should be expanded, but not to duplicate the role of counsel. DRs should no longer be expected to act solely as litigation guardians, but should address all the needs of those with capacity issues, including access to housing, social welfare, education and medical specialists, as necessary.**
- 3. The recommendations of the UN Committee on the Rights of the Child on asylum-seeking, refugee and migrant children should be implemented as set out in its December 2012 Report on Canada's compliance with the UN *Convention on the Rights of the Child*.**
- 4. Consistent with those recommendations, the principle of the best interests of the child should be given primacy in all immigration and refugee processes, including the expeditious institution of independent guardianships for unaccompanied minor children and the use of detention in only exceptional circumstances.**
- 5. Immigration authorities should be trained on the principles and procedures relating to the best interests of the child cases.**
- 6. Immigration authorities should be trained on the principles and procedures relating to the right of the child to be heard.**
- 7. Competent DRs experienced in working with children and vulnerable adults from different cultural and linguistic backgrounds should be available to refugee claimants and immigrants.**
- 8. In all provinces and territories, as in Quebec, a DR should be appointed when an applicant is served with a pre-removal risk assessment by CBSA or is eligible to make a humanitarian and compassionate claim to CIC.**
- 9. Competent counsel and DRs should be available to vulnerable refugee claimants and immigrants from the time they arrive to the point that their immigration status is resolved or they are forced to leave Canada.**

- 10. For all issues involving legal status, DRs should be lawyers competent in immigration or refugee matters.**
- 11. Board members should follow IRB Chairperson Guideline 8 and accept the recommendation of counsel to appoint a DR.**
- 12. The IRB should issue guidelines that the Board must appoint a DR for adults who are unable to appreciate the nature of the proceedings, and that the Board may appoint a DR for adults if mental health issues are likely to impede the person from presenting their case to their best advantage.**
- 13. Board members should take the following factors into consideration in exercising this discretion:**
 - the person's statements at the proceedings, especially if the statements indicate confusion, incoherence, lack of connection with reality or simply an inability to comprehend and respond to the questions asked;**
 - the person's behaviour, both verbal and non-verbal, at the Board, especially if the behaviour indicates confusion or a lack of connection with reality or an inability to follow basic instructions;**
 - expert evidence, if any, on the person's intellectual faculties or mental condition;**
 - medical history relating to possible brain injury;**
 - psychiatric history, including evidence of all psychiatric disorders which could severely impair the claimant's ability to testify - for example, panic or anxiety disorder, post-traumatic stress disorder and evidence of serious mental illness such as schizophrenia or bi-polar disorder;**
 - educational history, especially if this indicates cognitive impairment;**
and
 - whether the person had a DR for a proceeding in another Division of the Board.**
- 14. The IRB should establish a roster of culturally diverse and experienced professionals who are prepared to act as DRs. Efforts should be made to**

ensure that DR appointments are individualized, reflecting the need to match the expertise of the DR with the needs of the individual they help.

- 15. The presumptive appointment of a parent as the DR of accompanied minors should cease, especially in cases of domestic violence, where gender or honour-based violence or forced marriage are at issue, or where a youth's sexual orientation or gender identity may be a source of persecution and parental support has not been forthcoming. The IRB should promulgate guidelines reflecting this change.**
- 16. Specialized training in both procedural and substantive aspects of the relevant law should be provided to all seeking to act as DRs. The training should be a joint endeavour of the IRB, the immigration and refugee law Bar and those with expertise in working with children, vulnerable adults and immigrant and refugee communities. Cross-cultural experience and training in working with children, youth and vulnerable adults should also be required.**
- 17. To avoid a conflict of interest and enhance quality, training, selection and performance reviews should be provided independently, not internally by the IRB.**
- 18. When appointed and at other times as necessary, DRs should be given all material in the IRB file that would normally be sent to counsel.**
- 19. Counsel should be consulted in the selection of an appropriate DR.**
- 20. Interlocutory decisions about appointing DRs should be subject to an independent review process and regulatory changes should be made to effect this change if necessary.**
- 21. The IRB should introduce guidelines to facilitate DRs acting as witnesses.**
- 22. If the Board continues to manage DRs, the Board should take on a more active role in monitoring DRs to ensure they do the work they are supposed to do.**
- 23. The roster of DRs should be reviewed regularly to remove those for whom quality concerns are identified.**

- 24. Payment of DRs should be prorated according to the extent of work by the DR and a process for evaluation should be created.**
- 25. The criteria for appointing DRs should as far as possible be consistent in all Divisions of the IRB.**
- 26. Appropriate staff in each IRB Division should be trained on the DR role to ensure consistency across all four Divisions.**
- 27. For detention reviews occurring within 48 hours, the Immigration Division should issue a Notice of Appointment to the DR at the time of detention. For subsequent detention reviews, the Immigration Division should issue a Notice of Appointment at least three days before the review.**
- 28. For detained claimants, DRs should be reimbursed for travel costs and meals for at least one visit. DRs should be required to apply for further travel costs and meal allowances. The Immigration Division should also cover the cost of necessary calls by DRs for detained persons.**
- 29. The Immigration Division should issue guidelines stressing the importance of timely disclosure by the Minister's counsel to the DR.**

APPENDIX A

Ontario Agencies that may Assist in Providing Designated Representatives for Adults with Capacity Issues

Several agencies listed below provide services in Toronto or across Ontario. Similar lists could be compiled for equivalent organizations in other areas of Canada.

For developmentally delayed adults

Developmental Services Ontario: www.dsontario.ca

Community Living Ontario: www.communitylivingontario.ca

For adults with mental health issues

COTA Health (Toronto): <http://www.cotainspires.ca/>

Canadian Mental Health Association: <http://www.cmha.ca/>

LOFT Community Services: www.loftcs.org

Margaret's: www.margarets.ca

For adults with an acquired or traumatic brain injury

Ontario Brain Injury Association: www.obia.ca and <http://obia.ca/directory-of-abi-services/>

Brain Injury Association of Canada: <http://biac-aclc.ca/>

Neurological Rehabilitation Institute of Ontario: <http://www.nrio.com/>

Toronto Rehabilitation Institute: www.uhn.ca/TorontoRehab

APPENDIX B

Revised Remuneration Schedule for Designated Representatives

We are pleased to inform you that the Revised Remuneration Schedule for Designated Representatives will come into effect on April 1, 2015. The revised schedule addresses issues stemming from the Remuneration Schedule of 2012, which sets out remuneration for cases concluded on the merits. The new schedule takes into account cases concluded for reasons other than on the merits, as well as interlocutory or other proceedings attended by designated representatives. It also provides guidance on the timing of payment of the remuneration.

Mario Dion, Chairperson
Greg Kipling, Director General, Policy, Planning and Research Branch
Rebecca McTaggart, Director General, Registry and Regional Support Services

Revised Remuneration Schedule for Designated Representatives ^{Note 1}

Remuneration for cases concluded on the merits (2012)	
Immigration Division - Detention Review	\$250
Immigration Division - Admissibility Hearing	\$350
Immigration Division - Detention Review and Admissibility Hearing	\$450
Immigration Appeal Division - Hearing	\$550
Refugee Protection Division - Hearing	\$550
Refugee Appeal Division - Paper Process	\$450
Refugee Appeal Division - Hearing	\$550

Remuneration for cases concluded on non-merits (“conclusions on non-merits”)

Cases may be concluded for reasons other than on the merits, for example, appeals dismissed for lack of jurisdiction or perfection, cases withdrawn, cases declared to be abandoned, cases suspended and terminated. Remuneration will be paid according to the work performed by the designated representative, as detailed on their invoice submitted to the Immigration and Refugee Board of Canada (the “Board”), but not exceeding the remuneration for cases concluded on the merits, as shown in the table above “Remuneration for cases concluded on the merits (2012)”.

Interlocutory or other proceedings attended by the designated representative

Designated representatives may have to attend proceedings other than the hearing on the merits. Remuneration shown in this table will be paid **when the designated representative attends** the following proceedings as detailed on their invoice. **These proceedings are held either pursuant to the Rules of a Division or as directed by a Division.** They do not include meetings between the designated representative and the subject of the proceeding.

Interlocutory or other proceedings				
	Immigration Division	Immigration Appeal Division	Refugee Protection Division	Refugee Appeal Division
After the hearing on the merits is concluded , parties are directed to reappear to clarify certain points <small>Note 2</small>	\$100	\$100	\$100	\$100
Alternate Dispute Resolution conference (whether the Minister consents or not)	not applicable	\$250	not applicable	not applicable
Conference (scheduling, to narrow down issues, etc.)	\$100	\$100	\$100	\$100
Special hearing to show cause / Show cause conference	not applicable	\$100	\$100	\$100
Interim reconsideration of stay of removal order	not applicable	\$250	not applicable	not applicable
Proceeding postponed due to operational reasons without a 48-hour notice by the Board to the designated representative	\$100	\$100	\$100	\$100
Designated representative shows up (either at the Board or other sites, for example, detention centre) to attend a proceeding that is postponed due to issues not related to the designated representative (for example, absence of subject of proceeding and/or counsel)	\$100	\$100	\$100	\$100

Pre-authorized travel expenses

Designated representatives may also be paid for pre-authorized reasonable travel expenses, supported by original receipts, incurred by them directly engaged in the performance of the work, calculated in accordance with the National Joint Council Travel Directive in effect at the time of travel, without any allowance for overhead or profit. All travel expenses must be pre-authorized by the Project Authority. More information is available in the designated representative's contract with the Board.

Timing of payment of remuneration

The payment process will be initiated upon receipt of the designated representative's invoice by the Board. The designated representative can submit their invoice immediately after having completed the work, that is, at the conclusion of the hearing on the merits Note 3 or after various other steps in the process that conclude a case ("conclusions on non-merits"). Designated representatives' services are considered rendered:

- when the final hearing is concluded AND the member reserves their decision ("conclusion on merits").
- when the final hearing is concluded AND the member delivers a bench decision ("conclusion on merits").
- when the final hearing is "adjourned" for written submissions (when it is clear that the hearing is concluded, that is, the evidence is complete and no mention to resume the hearing is made) ("conclusion on merits"). Note 4
- when the final hearing is "adjourned" for post-hearing documents (when it is clear that the hearing is concluded, that is, the evidence is complete and no mention to resume the hearing is made) ("conclusion on merits"). Note 4
- in the cases decided on the basis of the record (paper process), when the member signs the decision ("conclusion on merits").
- in the cases of conclusions on non-merits, when the member signs a decision that confirms that the case is concluded or when the Registry of the Board confirms that a case is concluded ("conclusion on non-merits").

Notes

Note 1

A representative designated for more than one person because files have been joined receives remuneration for one case only, unless otherwise directed by Common Services or a Division. The applicable criteria would be whether the designated representative has to devote supplementary time because of the number of persons. Generally, the number of persons represented is not a determinant of the remuneration because cases heard or decided jointly [do] not require more time and effort.

Note 2

A hearing that is adjourned, that is, **not** concluded, and therefore involves multiple sittings does not fall into this category. It is the same hearing that continues. Additional remuneration of \$100 will be paid only if parties are directed to reappear (and the designated representative attends) after the hearing is **concluded**.

Note 3

This means after the hearing is concluded, at the end of the last sitting, if applicable.

Note 4

Should the member decide at a later date to resume the hearing, a remuneration of \$100 would be paid if the designated representative attends this additional proceeding, as set out in the section above, "Interlocutory or other proceedings attended by the designated representative," under "After the hearing on the merits is concluded, parties are directed to reappear to clarify certain points".