THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 28, 2010

Paula Thompson
Director, Business Process Design Reform Office
Immigration and Refugee Board of Canada
Room 14011, 344 Slater Street
Ottawa, ON K1A 0K1

Dear Ms. Thompson:

Re: Changes to the Rules of the Refugee Protection Division (RPD) and Rules for the Refugee Appeal Division (RAD)

I am writing on behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (CBA Section) in response to the August 9, 2010 letter from Thomas Vulpe of the Immigration and Refugee Board. Thank you for the opportunity to comment on changes to the rules of the RPD and the new RAD rules required as a result of Bill C-11, the *Balanced Refugee Reform Act* (the *Act*). The *Act* states that the changes to the RPD must take effect by June 29, 2012, though we understand from the Minister of Citizenship, Immigration and Multiculturalism that the intent is to complete implementation by July 2011.

Without the proposed wording of the rules, the CBA Section's ability to provide detailed comments is limited. We make general comments below. However, we would be pleased to respond to any proposed rule changes. We also comment on qualifications of IRB members. These may be outside the ambit of the rules, but are nevertheless of pressing importance for a fast and fair refugee determination process.

Information Gathering Interview

Subsection 100(4) of the *Immigration and Refugee Protection Act* (IRPA) now states that the IRB must schedule the information-gathering interview no earlier than 15 days after the claim is referred. We understand from Citizenship and Immigration Canada that there will be a requirement for the IRB, at the time of the interview, to schedule the RPD hearing within 60 days for Designated Country of Origin (DCO) claims or 90 days for regular claims. The *Act* has entrenched the right to counsel at this interview.[1]

[1] Clause 23 of the *Act*, amending s.167 of IRPA.

500-865 Carling Avenue, Ottawa, ON, Canada K1S 5S8
tel/tél : 613.237.2925 | **toll free/sans frais** : 1.800.267.8860 | **fax/téléc :** 613.237.0185 | **info@cba.org** | **www.cba.org**

The IRB will have the following challenges in implementing this change:

- Counsel and their staff typically spend between eight to twelve hours on the Personal Information Form (PIF) setting out the basis of the claim, given the cultural, linguistic and psychological challenges of working with refugees from diverse backgrounds. Using the interview as a complete replacement for the PIF risks becoming an administrative quagmire. Fairness would require that the time allocated for the interview reflect the complexity of the task at hand and the stressful situation in which claimants find themselves.
- Given the statutory right to counsel, the process must allow for sufficient flexibility to ensure that individuals are able to retain counsel of their choice and have counsel meaningfully represent them at the time of the interview.
- Unaccompanied minors and many other claimants have difficulty articulating their fears and knowing what is relevant in the early stages of the process. This could lead to evidence being revealed piecemeal and the need to revisit or clarify previous testimony, if the timeline is unreasonably compressed. It could also lead to appeals if claimants are prejudiced in being able to give complete and accurate testimony due to time constraints.
- The interview should be used to identify vulnerable claimants, particularly those who require designated representatives. Rushed interviews would interfere with the ability of IRB officials to make judicious assessments in this regard.

The CBA Section recommends that:

- The IRB rules articulate a clear purpose for the first interview. It is neither in the interests of claimants nor of the IRB's administrative efficiency to have this interview used to assess the claimant's credibility. The rules should state that the interview is to:
    - Designate representatives;
    - Identify vulnerable claimants;
    - Give claimants information about the process;
    - Allow them to briefly articulate a reason for their fear; and
    - Schedule a hearing.
- The interview be scheduled, wherever possible, 28 days following the initiation of the refugee claim. The *Act* provides only that there be a minimum 15 day delay. This additional time would ensure claimants have a reasonable opportunity to involve counsel of their choice, and minimize the number of postponements.
- The rules state that unaccompanied minors and claimants who are unable to appreciate the nature of the proceedings must be represented by a designated representative and by counsel at the interview.
- Guidelines be developed to allow for postponements in deserving cases, including to permit claimants to meet with their designated representatives prior to the interview and to permit claimants reasonable opportunity to have counsel of their choice present at the hearing (consistent with existing RPD Rule 48).
- If there is no mandatory PIF, the rules allow claimants and their counsel a reasonable opportunity to submit a full, written statement of the basis of the claim, with evidence. We suggest providing an amendment form and allowing claimants and their counsel to

amend or correct their written statement up until twenty days before the RPD hearing, consistent with the current practice.

- The rules include disclosure deadlines similar to RPD Rule 29.
- The rules provide for equal weight being given to corrections and clarifications to point-of-entry (POE) or IRB forms or recordings, where there is a reasonable explanation for a prior inconsistency.
- The rules state no opinions on the claim shall be expressed by the interviewer, either during the interview or in any report that emanates from the interview.
- There be a procedure in the rules to address any dispute between the claimant and IRB, CBSA or CIC officials, regarding the content of the questionnaire or the interview.
- The rules specify that IRB assumes the costs for producing transcripts for the interview, particularly if it is to be a complete replacement for the PIF.
- The rules require the interview to be recorded and that an electronic copy be provided *sur place* to the claimant or their counsel.
- The IRB official conducting the interview be required to assess if the claimant requires a designated representative and if the claimant should be designated as a vulnerable person. If necessary, the official should make referrals to legal aid.
- A federally funded duty counsel be made available to claimants to ensure availability of competent counsel.
- The 60 or 90 day delay for the RPD hearing be considered a minimum time line. The rules should provide for maximum flexibility for vulnerable claimants, and also for all claimants filing medical, psychological and other claimant-specific, expert evidence. An obsession with speed over fairness will ultimately result in more appeals and wasted resources.

Further, no matter what procedure is established, we urge the IRB first to launch the changes as a pilot project. This would allow the IRB to spot any problems before they result in wasted resources and further backlogs to the entire system.

Refugee Appeal Division

There are suggestions that appellants to the RAD would be allowed only 15 days to file the appeal and the record, including written arguments. In comparison, current Federal Court Immigration Rules provide 15 days for filing a notice of a leave application for judicial review of an IRB decision. Once the notice is served and filed, applicants have 30 days to file their record. The Federal Court Rules provide for applications for extensions of the delay.

Within that time frame, counsel must:

- Listen to the CD of the hearing and order transcripts;
- Submit affidavits signed by the applicant; and
- Submit coherent and concise, yet comprehensive, written arguments.

Accordingly, these time lines are already extremely tight, but workable. If leave is granted, counsel also has the opportunity to make supplemental written arguments and oral argument at the hearing.

Unreasonable time frames will beget applications for extensions, which in turn would consume valuable IRB resources. Decision-makers should be focused on the merits, not on a needless flood of procedural applications. The fact that the *Act* does not provide for oral arguments except in certain prescribed circumstances makes the need for reasonable time frames to prepare written argument even more important.

The CBA recommends that:

- The existing time frames for judicial review be adapted to the RAD, that is, there should be 15 days to file an appeal, and a further 30 days to file the appellant's record.
- The rules permit the granting of reasonable requests for extensions, consistent with Federal Court case law. Appellants should be required to show a constant intention to file an appeal, and that they have been reasonably diligent.

RPD Members

The hearing before an RPD member should be a full hearing, and not a summary procedure based on information from the disclosure interview and the Board's internal information. Given the life and death potential of IRB hearing decisions, it is imperative that there be sufficient IRB members available to engage in substantive hearings without unreasonable delay. Job classifications should be high (minimum PM-6), and only qualified people should be eligible.

The CBA recommends that:

- There be sufficient number of RPD members to allow for quality decisions at the hearing (at least 200).
- RPD members possess a classification of at least PM-6 and be qualified when chosen.

RAD Members

We believe that the list of competencies for RAD members should not be the same as for RPD members. Since the RAD is an appeal and since its decisions are binding on the RPD, there should be a different standard.

The CBA recommends that:

- The skill level, experience, and pay scale for RAD members should be higher than for RPD members.

Recommendation for Stakeholder Group

In your letter, you ask for recommendations for membership in a stakeholder group with whom you will consult more extensively in the fall. We understand that members of the group will be consulted in their personal capacity and not as representatives of the organizations recommending them. We are pleased to recommend that Mitchell Goldberg from Montreal be added to this group. Mitch is a senior practitioner with a wealth of experience representing applicants before the IRB,

and we are sure he would be an excellent addition. While we understand your timing constraints, the CBA Section would also appreciate the opportunity to provide more focused written comments once the rule change proposals become more concrete.

Conclusion

Thank you for the opportunity to give input on changes to the rules at this early stage of the drafting process. We would be pleased to respond to any proposed rule changes as they are developed.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section