THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

December 20, 2010

Via email: Paula.Thompson@irb-cisr.gc.ca

Paula Thompson
Director, Business Process Design Reform Office
Immigration and Refugee Board of Canada
Room 13 027, 344 Slater Street
Ottawa, ON K1A 0K1

Dear Ms. Thompson,

Re: Draft 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 your letter of November 24, 2010 enclosing draft Rules for the Refugee Appeal Division and the Refugee Protection Division. We appreciated the early opportunity to provide general comments on the proposed rule changes and to attend the stakeholder consultation sessions throughout Canada. We are pleased that many of the suggestions in our September 28, 2010 letter have been incorporated. Below are our specific comments on and recommendations for the draft Rules.

REFUGEE PROTECTION RULES

Rule 1 – Definitions

As a general comment, the Rules should provide throughout for transmission, filing and service of representations and evidence electronically.

We have two recommendations to improve the definitions in Rule 1:

- The definition of "contact information" should specifically set out "residential (street) address and residential postal address (if different)" to ensure claimants understand that their residential addresses must be provided. This will assist in preventing individuals who are not authorized counsel from listing "care of" addresses and that any counsel is clearly listed separately under counsel contact information.
- Given the importance of the interviewer position, we suggest that the designation level be included in the definition of "interviewer."

Rule 3 – Claims for Refugee Protection

In Rule 3(2)(b)(iv), the interviewer is to advise that the claimant may be represented by legal or 'other counsel.' The latter term should be clearly defined in a manner consistent with those entitled to advise or represent on matters before the Board pursuant to the *Immigration and Refugee Protection Act* and *Regulations* .

Rule 5 – Counsel Not "Authorized Representative"

We agree with the requirement that counsel who are not 'authorized representatives' sign a Schedule 3 declaration that counsel is not charging a fee, and recommend that the Schedule refer explicitly both to direct and indirect fees.

Rule 6 – Interview

This Rule should articulate the purpose of the interview. As we said in our September 28, 2010 letter:

> 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 rule should therefore further state that the interviewer shall refrain from confronting or challenging the claimant's credibility.

Claimants under the age of six should be excused from attending interviews or proceedings (similar to the existing exception of children under 6 from filing a Personal Information Form).

Rule 6(4) allows joined claimants to be interviewed separately. Rules 6(6) and (7) indicate that the interview constitutes sworn evidence and will be relied on at the hearing. Barring a claimant from being present when a witness is providing evidence would be a violation of natural justice principles. The Rules should be revised to take into account these principles. However, as we recommend below, there should also be the possibility of *ex parte* applications for separation of claims in cases of abuse.

We recommend an amendment to Rule 6(8) regarding the right to counsel, to ensure that counsel are permitted to ask the claimant clarifying questions. Counsel should be able to question claimants as of right, and not just at the discretion of the interviewer. This is a practical matter, allowing claimants to present all aspects of their claim rather than just those elements about which the interviewer asks.

Currently, the credibility of claims is sometimes in doubt because the claimant raises elements of the claim at the hearing not raised at the initial Canada Border Services Agency interview. In many cases, the Board has indicated that it is no answer for the claimant to say that he or she was not asked about the matter at the interview. We contemplate that this explanation may be also rejected when the claimant is now asked about his or her interview report.

Permitting clarifying questions by counsel is also a legal matter. The *Balanced Refugee Reform Act* (S.C. 2010, ch. 8, formerly Bill C-11) gives claimants a right to counsel at interviews (section 23, amending subsection 167(1) of IRPA). Preventing counsel from questioning the claimant is itself a denial of the right to counsel. It would be perverse to interpret the provision to mean only a "bare" right to have counsel present in the interview room without any right for counsel to participate in the interview process. For the right to counsel to be meaningful, it must include the normal incidents to that right, including a right to question, a right to lead evidence and a right to make submissions. Further, having counsel ask questions would assist in fulfilling the purpose of the interview, namely to garner sufficient information to allow the Board member deciding the claim to identify the issues. Counsel will be intimately familiar with the nature of the claim. Without the assistance of the claimant's counsel, the interviewer will in many cases have to engage in a fishing expedition.

We understand that, in part, the information to be collected under Rule 7(1) (a) (interview report), Rule 3(5) (b) (interview recording) and Schedule I ("Information to be Provided About a Claimant by an Officer") will include information gathered when the claimant initiated the claim. We recommend that the Rules encourage interviewers to confirm the accuracy of the information already in the form which initiated the referral process and any changes since the initial claim.

Claimants should be encouraged to come to the interview with their completed form that initiated the referral and an additional form established by the Board answering additional, relevant questions. The interviewer would then be tasked with checking if the written answers are complete.

Rule 7(7) – Changing the interview report

Rule 7(7) allows for a change of information provided at the interview. It is unclear whether this Rule would allow for corrections to the interview report. In some cases, a correction may be to reflect more accurately what happened at the interview, rather than a "change" to the information provided.

The interview report is the document of the interviewer and not the person interviewed. The interviewer may have misunderstood what was told, recorded it incompletely, or unintentionally left a misleading impression. Rule 7 requires the interview report to be read back to, and then signed by, the person interviewed. This procedure should catch obvious interviewer mistakes, but not necessarily all mistakes. The rule should allow for correction of the interview report as well as change to information provided at the interview.

Rule 7(8) – Notice of Hearing

The rules should provide that the Board must make a reasonable effort to consider counsel's availability for the hearing.

Rule 18 – Need for an Interpreter

Rule 18(1) provides that a claimant must specify the need for an interpreter at the time of the referral of the claim. Claimants are often unaware of the complexity, sophistication and detail of refugee hearings. The relative simplicity of the referral interview may lead them to believe that they can carry on the hearing without an interpreter. Rule 18(2) allows for a change of language of interpretation. However, it does not specify any entitlement for a claimant to change their position about the need for an interpreter.

While it is certainly advisable that claimants indicate the need for an interpreter at the earliest possible opportunity, preventing them from accessing an interpreter if they have not indicated a need for one at the time of referral is a recipe for unfairness. Section 14 of the *Canadian Charter of Rights and Freedoms* provides: "A party ... in any proceedings who does not understand or speak the language in which the proceedings are conducted ... has the right to the assistance of an interpreter."

The *Charter* test is ability to understand proceedings and speak in their chosen language, not timeliness of the request. This rule would violate that *Charter* provision. Something similar can be said about other components of this rule. For these reasons, we recommend that this rule be deleted.

Rule 19 – Designated Representatives

We agree with the provisions regarding designated representatives, and believe the details about the representative's qualifications and responsibilities are important additions.

Rule 30 – Two-sided Documents

This rule requires documents to be two sided, a change from existing Rule 27(1) which requires one-sided documents. From a practical perspective, mandatory two-sided documents may create a conflict with Rule 37(d), which allows service by fax. Many fax machines cannot fax two-sided documents.

Rule 33(1)(b) – Transcript of the Interview

Rule 33(1)(b) requires parties who wish to rely on the recording of the interview, to provide a transcript at their expense. Requiring a full transcript in every case where the interview recording is relied on would create an unfair and costly burden on claimants and legal aid agencies. This would have the unfortunate consequence of limiting access to justice. We recommend that claimants and their counsel have the option of providing partial transcripts. The IRB or the Minister's counsel should have the right to present the full transcripts into evidence if they believe the partial transcripts are misleading. On leave applications before the Federal Court, partial transcripts of proceedings are admissible.

Rule 34 – Evidence Filed Late

Usually, a relevant consideration when allowing or disallowing the late filing of evidence is prejudice to the other party. In the case of refugee protection hearings where the Minister intervenes, prejudice to the other side should be one of the listed relevant factors. We recommend the same for calling witnesses without witness information being provided, pursuant to Rule 42(5).

Rule 51 – Changing the Location of a Proceeding

We understand that the IRB is exploring service options for claimants not residing in large urban centres. This is of critical importance to claimants generally and particularly those with children who must travel to attend an interview under compressed timelines.

Rules 53 and 54 – Claims Joined and Applications for Separation of Claims

Rules 53 provides for a claim to be joined by that of the claimant's spouse or common-law partner, child, parent, brother, sister, grandchild or grandparent, unless an application for separation of the claims is made under Rule 54. Rule 54(3)(a) requires service on any person affected. This requirement does not make allowances for situations of spousal or parental abuse and may deter abused claimants from making separation applications. There should be a possibility for the Board

to consider applications to separate *ex parte*. Claimants should have the opportunity to make such applications at any time, including prior to the interview.

Rules 62 and 63 – Abandonment for Failure to Attend Interview and Opportunity to Explain

These rules are not clear. Rule 62(1) starts by referring to a declaration of abandonment where the claimant fails to attend the interview. Rule 63 starts by referring to abandonment in every other case, presumably referring to situations where the claimant attends the interview. Rule 63 then goes on to say that the Division must give the claimant an opportunity to explain why the claim should not be declared abandoned. Why should a claimant who attends an interview be put to an explanation why the claim should not be declared abandoned? It seems that something has been omitted, as the rules, as written, do not appear to make sense.

The phrase "every other case" may have been intended to refer to every proceeding other than an interview where the claimant fails to attend. Or it may refer to situations where the claimant fails to communicate with the Board. Whatever the nature of these other cases, they should be specified.

Rule 62 requires an explanation for non-attendance within five days of the interview. Sometimes non-attendance is the fault of the Board because the Board gets the address wrong and sends the notice to an improper address. When the Board in error has sent the notice for interview to the wrong address, it may take more than five days for the claimant to become aware of the error. The rules need to take this possibility into account.

REFUGEE APPEAL DIVISION RULES

Our general comment regarding electronic filing under the Refugee Protection Division rules also applies to the Refugee Appeal Division (RAD).

Rule 1 – Definitions

Our recommendation for an amendment to the address portion of the definition of “contact information,” also applies to the Refugee Appeal Division.

Rule 5 – Not Authorized Representatives

The comment in response to Rule 5 of the Refugee Protection Division rules also applies here.

Rule 9 –Filing and Perfecting an Appeal

Our recommendation for rule 33(1)(b) of the Refugee Protection Division rules also applies here. We recommend an amendment to Rule 9(5)(v)(b) so that an appellant can be permitted to rely on a partial transcript or references to partial portions of the proceedings. For appellants to obtain and pay for an entire transcript to perfect their appeal will undermine access to justice and may be unnecessarily prejudicial to appellants. Claimants seeking leave at the Federal Court can rely on portions of the transcript by way of affidavit evidence. The Refugee Appeal Division was proclaimed to alleviate constraints on reviews of Refugee Protection Division decisions at the Federal Court. Rules for appeals at the RAD should not be more burdensome than the rules applicable to Federal Court judicial reviews.

REFUGEE APPEAL DIVISION MEMBERS

As a final comment, we indicated in our September 28, 2010 letter that the list of competencies for RAD members should not be the same as for Refugee Protection Division members, given the status of the former as an appellate body whose decisions are binding on the RPD. We reiterate our recommendation that the skill level, experience, and pay scale for RAD members should be higher than for RPD members.

CONCLUSION

Thank you for the opportunity to give input on changes to the Rules at this stage of the drafting process. We would be pleased to provide further responses as the drafts progress.

Yours truly,

(original signed by Chantal Arsenault)

Chantal Arsenault
Chair, National Citizenship and Immigration Law Section