



June 7, 2016

Via email: Mario.Dion@Irb-cisr.gc.ca

Mario Dion
Chair
Immigration and Refugee Board of Canada
344 Slater Street, 14th Floor
Ottawa, ON K1A 0K1

Dear Mr. Dion:

Re: IRB reply to Canadian Bar Association on Use of Designated Representatives

Thank you for your letter of May 4, 2016, responding to our submission on the use of designated representatives (DR). The CBA Section is grateful for the opportunity to discuss these important issues and we appreciate your openness to receive further submissions on the issue of appointment of parents as the DR of minors, particularly when the minor is accompanied by only one parent.

This letter is structured to respond to the substantive issues in your letter.

General comment on definition of vulnerable persons

The CBA Section agrees that not all persons identified as vulnerable under *Chairperson Guideline 8: Procedures with Respect to Vulnerable Persons Appearing Before the IRB* (Guideline 8) require a DR. However, persons with cognitive, developmental or other mental health issues often fail to appreciate the nature of the proceedings, especially if their intellectual capacity equates to that of a minor. The *UN Convention on the Rights of Persons with Disabilities*, which Canada ratified in 2010, includes protections for persons who have long-term physical, mental, intellectual or sensory impairments.¹ Canada promotes efforts to provide services and procedures for resettlement applicants and asylum seekers with disabilities in its *First Report of Canada on the Convention on the Rights of Persons with Disabilities*.² These steps include procedures for refugee determination hearings involving those with disabilities, such as requiring a designated representative or interpreter.

¹ www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-1-purpose.html

² www.pch.gc.ca/DAMAssetPub/DAM-drtPrs-humRts/STAGING/texte-text/fINALForPdfAccessibleConversion-CRPD-FirstReportOfCanadaKatherineChanges_QA_Finalpdf_1395327558604_eng.pdf?WT.contentAuthority=3.1

The CBA Section believes that persons with cognitive, developmental or other mental health issues fall under the protections in the UN Convention and deserve the appointment of a DR under s. 167(2) of the *Immigration and Refugee Protection Act* (IRPA). This interpretation harmonizes the UN Convention with section 15 of the *Canadian Charter of Rights and Freedoms* as applied in section 3 of IRPA.

The CBA Section wishes to work with the IRB to assist in complying with Canada's obligations under international law. The first step in the right direction is allowing persons with cognitive, developmental or other mental health issues who have an intellectual capacity equivalent to a minor to have a DR pursuant to s. 167(2) of IRPA.

Appointment of DR for vulnerable persons

Determining the ability of a person to "appreciate the nature of the proceedings" is a difficult task. Officials of Immigration, Refugees and Citizenship Canada and the Canadian Border Services Agency may not be able to identify at first meeting whether a person requires a DR. IRB members who are not experts on persons with disabilities may struggle to assess the ability of a person to appreciate the nature of the proceedings. Counsel may not be adequately trained on these issues and may lack time and financial resources to obtain a psychological assessment of a person's ability to appreciate the nature of the proceeding in time to support a motion to designate a DR. Many parties with responsibility to protect vulnerable persons could benefit from expert advice.

The CBA Section welcomes ongoing discussions about the factors IRB members should consider when assessing if a person is unable to appreciate the nature of the proceeding. In our view, the standard short questions used by IRB members to determine if a person understands the nature of the proceeding are inadequate to assess adult persons with disabilities. We suggest that a working group be formed to review those standard questions. The questions should be reviewed by a group of psychologists or psychiatrists to gain a greater understanding of various perspectives and to develop well-informed and effective guidelines to apply to persons with disabilities.

Number and Qualifications of DR for Children and Vulnerable Applicants

The CBA Section agrees that the issue of the limited number of DRs should be addressed. The CBA Section proposes to create for the IRB an additional roster of volunteer DR lawyers from different backgrounds to better serve vulnerable person. A larger roster of DRs should increase availability of qualified DRs from which to select and end the practice of requesting nearby lawyers who are unfamiliar with the role of the DR or the specifics of the case to act as DR. The CBA Section proposes to work with the IRB to train these new DR volunteer lawyers. Also, we agree that the decision to appoint a DR should be reviewed regularly throughout the duration of the case. Some persons who initially need a DR may be able to proceed unassisted at a later stage of their case.

Best Interest of the Child: Appointment of DR

The CBA Section appreciates the IRB's efforts to give primary consideration to the best interests of the child. However, the IRB's current practice of immediately appointing a parent as DR in all cases may not be the best option for children in situations where the interests of the parent and child may conflict. For example, a parent may have been abusive to the child, or unable to protect the child from an abusive situation, or the child may not trust the parent.

Additionally, DRs often appoint counsel but there are no guidelines allowing children to seek a change of DR. Likewise, there are no guidelines allowing children accompanied by one or both parents to seek to appoint a different lawyer and to modify their DR.

Mechanisms should be in place to make sure the child's best interests are protected. One way to prevent conflict of interest is to allow the child's voice to be heard through the appointment of an independent lawyer for the child. In provincial courts children are able to choose their own lawyers if they have the maturity to do so.

The CBA Section suggests forming a working group to review IRB guidelines to ensure that children before the IRB are given the same rights as children before provincial family tribunals, including the right to be heard and to appointment of their own lawyer. Additionally, the CBA Section would welcome statistics on the detention of unaccompanied, accompanied and partly accompanied children who appear before the IRB to ensure that children are protected. We recommend that CBSA and IRCC collaborate with the IRB to provide these statistics.

Best Interest of the Child: Additional Category to the List Refugee Claimants

Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues (Guidelines 3) only mentions three categories of children who make refugee claims at the IRB:

- accompanied minors
- children who arrive in Canada with, or are being looked after in Canada by, persons who purport to be members of the child's family, and
- unaccompanied minors.

The CBA Section identifies a fourth category of children that should be included in the guidelines to ensure that the best interests of the child are given primary consideration: children alienated from parents, abducted, or in some cases, in the custody of child protection authorities. In cases where the child is in protective custody, a representative of the child protection authority should be appointed DR to stand in place of parents. This DR is mandated by statute to take the best interests of the child into consideration. Appointment of a DR from a child protection agency resolves potential conflict about who represents the child and ensures compliance with the statutory mandate to consider the best interests of the child.

Sometimes children placed in the care of a child protection agency are prevented from communicating with their parents without their consent. For example, the Quebec *Commission des droits de la personne et des droits de la jeunesse* will review complaints made by children but not for refugee claimants or children without status. In our view, the Board should pay a closer look at the particular situation of these vulnerable children and provide a mechanism so they can be heard.

We look forward to continuing discussions with the IRB to improve the guidelines.

Training on the role and responsibilities of DR

The CBA Section is aware that some counsel who act as DR have not received specialized training on roles and responsibilities, not have some on the appointment list ever acted as DRs. The CBA Section proposes increasing the DR roster and working with IRB to train DR lawyers. We agree that substantive legal matters are handled by counsel. However, in certain cases DRs and counsel need specialized training in situations when a vulnerable person wishes to proceed without a DR and also when a vulnerable person fires counsel and refuses all legal representation.

Matters with which the CBA agrees:

- Case by case handling of DR requests for reimbursement of travel cost and meal allowance.
- The IRB members should consider any submissions or recommendations made by counsel that there should be a DR, or that a previously appointed DR is no longer appropriate.
- Counsel should bring an application requesting disclosure of a person's behavior in an institution because this information may be subject to confidentiality or privacy considerations.
- The IRB's recent revised remuneration Schedule for DR.
- The IRB cannot take a position on the additional voluntary roles that DR may take on matters for which the IRB has no jurisdiction.

The CBA Section is grateful for the opportunity to discuss these important issues relating to the use of DRs. This is a first step in the right direction to improve the protection of children and persons with disabilities who are unable to appreciate the nature of the proceedings.

We look forward to continuing discussions with the IRB.

Yours truly,

(original letter signed by Kellie Krake for Stéphane Duval)

Stéphane Duval
Chair, Immigration Law Section