THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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Via email: Ashley.Bressette-Martinez@irb-cisr.gc.ca

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Dear Ms. Bressette-Martinez:

Re: Proposed Amendments to Immigration Appeal Division Rules

The Immigration Law Section of the Canadian Bar Association (the CBA Section) welcomes the opportunity to comment on the Immigration Appeal Division's (IAD) discussion document, proposing six areas where the IAD Rules can be amended to simplify the appeal process and promote early resolution.

The CBA is a national association of over 36,000 members, including lawyers, notaries, academics and law students, with a mandate to seek improvements in the law and the administration of justice. The CBA Section comprises lawyers with an in-depth knowledge of citizenship and immigration law issues, including legislative changes, administration and enforcement.

The CBA Section comments on the IAD's six proposals, and makes additional recommendations for changes to the IAD Rules.

1. Rewriting the Rules in Plain Language

As the Rules currently stand, there do not appear to be any significant issues with the language used. The CBA Section notes that a bigger issue is how the Rules are put into practice.

2. Encouraging Appellants to Consult with a Lawyer

The CBA Section recommends that appellants be given the opportunity to consult with a lawyer at the earliest stages of the appeal process. Many of our recommendations cannot be effectively implemented unless appellants are duly represented.

We understand that, in 2015-2016, 44% of appellants before the IAD did not have legal representation. A person who is unable to understand a process or what is expected of them cannot navigate through it efficiently on their own. Unrepresented appellants with excellent grounds may be unsuccessful due to lack of proper guidance and legal representation. For example, they may miss deadlines for filing disclosure, or fail to appear at a hearing or ADR conference. On the other hand, unrepresented appellants with no chance of success may unduly clutter the appeals process.

The IAD website does not encourage appellants to seek legal representation or legal advice, and the CBA Section would welcome the opportunity to discuss ways of doing so. For example, the IAD might consider providing appellants with a list of counsel through a link to lawyers' associations and law societies across Canada.

3. Enabling Electronic Communication

Enabling electronic communication would improve the appeal process. In many instances paper disclosure, notices, and correspondence are not received by the parties. Electronic communication would resolve this issue.

Rule 34 sets out how a document is to be provided by a party, and allows for the use of electronic mail "with permission from the Division." However, it is not clear how a party obtains that permission, so it is rarely used. The CBA Section recommends that electronic communication be the preferred method of communication for the appeal process, and permission of the Division not be required. In fact, electronic communication should be a requirement, unless an appellant does not have access to this form of communication, which could be indicated on the Notice of Appeal.

The CBA Section would also welcome the ability to file documents over 5 MB in a secure manner, as well as the ability for counsel to 'sanitize' sensitive information filed electronically on behalf of appellants, and to bring originals with sensitive information to the hearing.

4. Getting More Information Earlier in the Process

The CBA Section believes it is in all parties' interest to resolve more appeals without oral hearings. However, unless the Minister has the resources necessary to respond and deal with cases earlier in the process, this will be difficult to achieve.

The only types of cases likely to be resolved successfully at an early stage without an oral hearing include:

- cases dismissed when not authorized under the Rules to submit an appeal;
- residency appeals where clear and cogent evidence is presented to establish the appellant meeting their residency obligations;
- cases where there are only legal issues, and no evaluation of evidence is required.

The Minister will need to evaluate the evidence in each case to determine if there is a possibility for early resolution, and documentary evidence alone may not suffice for this purpose. For any case where credibility or humanitarian and compassionate (H&C) factors are evaluated, either an ADR or a full hearing will be required.

A. Require an expanded notice of appeal

The CBA Section does not recommend implementing an expanded notice of appeal. It is difficult to know which documents and witnesses will be relevant at this early stage without knowing the particular reasons for a refusal. Refusal letters are generally standardized, and do not give the detailed reasons from the Global Case Management System (GCMS) system which is provided later in the process with the Tribunal record.

B. Shorten the time for filing appeal records

The CBA Section agrees that a shorter time for filing records would enhance the appeal process. The delay for the Minister is usually the time it takes for the overseas files to be received and reviewed at the local hearings office. If electronic GCMS notes could be provided by the Minister without having to include the paper file from the visa office, it would give parties earlier access to more meaningful reasons for refusals, and allow them to identify issues sooner.

The CBA Section recommends that Appeal Records for overseas refusals consist of:

- the notice of appeal;
- the refusal letter;
- GCMS notes containing the history of the file.

The remaining documents, including a copy of the application and supporting documents, should be provided subsequently by the Minister as soon as possible in the process. This would streamline the process for the Minister and allow appellants to receive their GCMS printout earlier in the process.

C. Require disclosure from the appellant in a period following receipt of the appeal record

Early disclosure by an appellant is only possible after the GCMS notes are available to them. The CBA Section recommends that early disclosure only be required if a decision – in the form of ADR, a decision in chambers, or an actual hearing – can be expected as a result. If no action is taken on an appeal following early disclosure, then this requirement would likely not be useful, and would create an extra burden on all parties.

D. Disclosure as the doorway into ADR

The availability of ADR should not be limited to certain types of cases. Giving appellants the opportunity to request ADR in appropriate cases would be preferable. An appellant should not be disadvantaged, however, in scheduling a full hearing if ADR is unsuccessful and a full hearing is required.

5. Comprehensive definition of Early Informal Resolution Processes and the role of the ERO

Generally, the Minister‘s opinion determines whether a case will be settled early at the ADR stage, or whether a full hearing is required. Having an Early Resolution Officer (ERO) give an opinion on the likelihood of success of a particular case would not be useful. Having an ERO participate more fully without any authority to decide whether a case will require an appeal would delay the process.

6. Active Adjudication

The CBA Section believes that the proposed rule on active adjudication set out in the discussion document codifies how the process currently functions, and is unnecessary.

7. Applications

IAD Rules 42 to 45 governing the application process are clear and do not require rewording.

Additional Recommendations

The CBA Section makes six additional recommendations for the IAD Rules.

i. Require higher standards for individuals to be certified as interpreters. The current standard is not high enough. In many instances, cases must be postponed or commenced *de novo* due to the poor quality of interpreters.

ii. Permit appellants to choose the location of their appeal hearing without requiring an application. The tribunal is a federal board, and appellants should have the option of having their case heard in a location of their choice, without the need for a formal application.

iii. Postpone or suspend cases involving legal issues that are pending appeal before the Federal Court of Appeal or Supreme Court of Canada until a decision is made. The FCA has a history of suspending cases pending a decision from higher courts to avoid contradictory decisions.

iv. Look at H&C factors first to save time and resources. This would allow board members to hear more cases instead of scheduling a case for the whole day. If the H&C factors are insufficient, another hearing could be scheduled at the Appellant's request to contest the legality of the decision before the IAD.

v. Give board members a more active role in early informal resolution processes, as with judicial tribunals.

vi. Recognize that telephone interviews are not adequate to assess a party's credibility.

We appreciate the opportunity to comment, and would be pleased to discuss this in more detail.

Yours truly,

(original letter signed by Kate Terroux for Vance P. E. Langford)

Vance P. E. Langford
Chair, CBA Immigration Law Section