



THE CANADIAN  
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Via email: Bruce.Scofield@cic.gc.ca and Fraser.Valentine@cic.gc.ca

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Dear Mr. Scofield and Mr. Valentine:

**Re: Policy and Legislative Options for Asylum Seekers**

The Immigration Law Section of the Canadian Bar Association (CBA Section) would like to offer input on policy and legislative options to address the issue of asylum seekers entering Canada.

The CBA is a national association representing over 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvement in the law and in the administration of justice. The CBA Section has over 1,000 members who are lawyers practising all aspects of immigration law. Our members deliver professional advice and representation in the Canadian immigration system to thousands of clients in Canada and abroad.

The Canadian government has currently faced a recent influx of asylum claimants arriving in Canada from the United States, which is likely to continue in the uncertain climate for immigration policy-making in the US. The Immigration and Refugee Board of Canada (IRB) predicts 40,000 new refugee claims by year's end.<sup>1</sup> In addressing this influx, the government must balance protecting the integrity of the border and the security of Canadians with providing refuge to people in need of our protection. Our comments on policy and legislative options reflect this context.

**1. Increase funding to IRB Refugee Protection Division**

The CBA Section recommends that the IRB Refugee Protection Division (RPD) be allocated more funding to manage the increase in asylum claimants arriving in Canada. This increase in claimants

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<sup>1</sup> Radio Canada International, Article by Terry Haig, *Refugee claimants continue to pour into Canada with no end in sight* (September 20, 2017), available [online](http://ow.ly/KHGm30fUJ1) (<http://ow.ly/KHGm30fUJ1>).

comes at a time when the RPD is still struggling to process the backlog of thousands of legacy claims that were made prior to the introduction of its new determination system in December 2012.

Increased funding would allow for the appointment of more high-quality decision-makers who are subject-matter experts. These appointments would support fair and efficient processing without placing undue pressure on current IRB members. Significantly fewer claims would likely be remitted for redetermination by the Refugee Appeal Division (RAD) and the Federal Court (the majority of litigation currently before the Federal Court is immigration related).<sup>2</sup> These redeterminations result in unnecessary costs – for the Minister, the IRB and legal aid agencies – in both the appeal process and rehearing the claims *de novo*.

## **2. Increase funding to legal aid programs**

Additional funding for I&R legal aid societies is crucial in the present environment. Demand for immigration and refugee (I&R) legal aid services continues to increase across Canada. Without additional funding to meet this demand, legal aid services will be unable to keep providing effective representation to refugee claimants. Refugee claimants represented by a lawyer have a greater chance that their claim will be approved, and the availability of legal aid is central to access to justice for some of the most vulnerable members of our society.<sup>3</sup>

The CBA Section recently wrote to the Minister of Justice, expressing concerns over the alarming trend of budget cuts and lack of funding for these services in Canada.<sup>4</sup> Both Ontario and British Columbia (BC) have indicated that financial pressures may require them to reduce or suspend legal aid funding for refugee services. While the federal government recently committed some more money for immigration legal aid services, consistent and sustainable funding for the program is needed.

The current crisis is a shared responsibility between the federal government, the provincial governments and the legal aid societies. We believe that a collaborative approach by all stakeholders offers the best prospect for development of sustainable solutions.

## **3. Provide accurate information on legal and social services**

When new asylum-seekers attend their initial eligibility interview, they speak with an officer and are given information on their rights. The materials they receive convey the message that *all* refugee claimants are entitled to access government-funded legal and social services. These materials should be amended to accurately reflect available options for legal services in Canada.

Refugee claimants should be advised that they are eligible for free legal representation through legal aid services only if they do not have the financial means to retain counsel. They should also be advised that retaining legal counsel on their own is an option where financial eligibility requirements for legal aid services are not met, and that there may be legal consequences for accessing legal aid by misrepresenting income and access to funds. Claimants should also be informed that they are entitled to apply for a work permit as soon as they are found to be eligible to claim, and do not necessarily need to wait for their claim to be heard.

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<sup>2</sup> Courts Administration Services, *2016-2017 Annual Report*, available [online](http://ow.ly/JpQa30fUJNi) (<http://ow.ly/JpQa30fUJNi>).

<sup>3</sup> Sean Rehaag, *The Role of Counsel in Canada's Refugee Determination System*, *Osgoode Hall Law Journal*, Volume 49, Number 1 (Summer 2011), available [online](http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1073&context=ohlj) (<http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1073&context=ohlj>).

<sup>4</sup> Canadian Bar Association, *Immigration and Refugee Legal Aid Services Across Canada* (October 2, 2017), available [online](http://ow.ly/L5jm30fUJSU) (<http://ow.ly/L5jm30fUJSU>).

This information would help refugee claimants understand that there are options for legal services beyond legal aid, and that they do not necessarily need to rely on government-funded social services while they wait for their claims to be heard. It would also help to decrease the financial strain on legal aid and other public services, and decrease fraudulent reporting of access to funds – ensuring government-funded services are available to those claimants who need them.

#### **4. Conduct an outreach campaign about refugee claims**

Inaccurate information about the prospects of success in the Canadian asylum system disseminated through social media and other channels may be contributing to the recent influx of irregular border crossings.

An outreach campaign with accurate information on the requirements of a successful refugee claim and alternatives to refugee claims could assist in correcting misinformation. Potential alternatives could include the Federal Skilled Worker (FSW), the Federal Skilled Trade Program (FSTP), Quebec skilled worker programs, as well as work permits under free trade agreements, the Mobilité Francophone program, or Labour Market Impact Assessment (LMIA) based programs.

With a better understanding of Canadian asylum law and procedures, potential asylum-seekers may be more likely to choose options that are better-suited to their unique circumstances. The CBA Section would be pleased to assist in developing outreach materials and disseminating information through our networks and in collaboration with other groups.

#### **5. Engage duty counsel at the border**

Qualified duty counsel should be available to advise refugee claimants – immediately on entry to Canada and free of charge – at relevant refugee intake offices, either in person, by video or by phone. With accurate legal information at the earliest stage, claimants would benefit from insight into the likely success of their claims, and information about other immigration programs that might be more suitable to their circumstances (such as an H&C or an economic class application). This could stop potential irregular border crossers from making uninformed decisions and proceeding with meritless refugee claims.

The cost of this service would likely be outweighed by the cost savings to the RPD in handling unfounded claims. For the service to be effective, the removal of claimants who opted out of the refugee system in favour of another type of application would need to be temporarily deferred – otherwise, claimants would be incented to remain in the refugee determination system to benefit from a statutory stay of removal.

#### **6. Remove barriers to immigration**

It is reasonable to assume that most people entering Canada would prefer an orderly and secure immigration process over the risks associated with irregular border crossings. However, significant barriers exist for current and potential refugee claimants who may otherwise qualify for economic immigration under a variety of programs from both inside and outside of Canada. By removing these barriers, Canada would benefit from the contributions of qualified new applicants under a skilled immigration program, and more resources would be available for claimants in need of them.

## **7. Remove unnecessary prohibitions on provincial nomination applicants**

### **a. Remove prohibition on provincial nomination applicants who are current or potential refugee claimants**

The federal government should work with provinces to remove unnecessary prohibitions on provincial nomination applicants who are current or potential refugee claimants. For example, in British Columbia a person cannot be nominated if they have not been lawfully admitted in their country of current residence, have an unresolved refugee claim in Canada, or are under a removal order in or outside of Canada. American ‘dreamers’, including Deferred Action for Childhood Arrivals (DACA) recipients, as well as those with outstanding refugee claims languishing in the IRB backlog, cannot apply to the program. Similarly, the Ontario Immigrant Nominee Program (OINP) explicitly bars current or former refugees from applying, regardless of whether they would otherwise merit nomination. In contrast, barriers against refugee claimants, or individuals who do not have status in the country where they reside, do not exist in federal economic immigration programs. The result is that individuals who would otherwise qualify for provincial immigration programs are forced to claim refugee protection in Canada to immigrate to Canada, or continue their claim and contribute to the current backlog, as they cannot access other immigration programs.

### **b. Amend federal law to exempt refugee claimants who otherwise qualify for immigration**

Section 25 of the *Immigration and Refugee Protection Act* (IRPA) should be amended to allow an exemption to permit current refugee claimants who otherwise qualify for immigration pursuant to Express Entry, Entrepreneur, or other programs, to become landed in Canada despite being under a conditional departure order.

An exemption should also be made to allow refugee claimants who have legally accumulated work experience in Canada with a valid work permit to count that experience toward qualification under the Canadian Experience Class. Currently, refugees do not have ‘temporary resident status’, and their work experience does not count for the purposes of that program. Allowing current legacy refugee claimants to qualify for permanent residence as a skilled or economic immigrant is compassionate, economically advantageous, and would reduce the backlog of refugee claimants.

### **c. Give clear direction to officers on processing US applications for temporary economic programs**

For temporary economic programs, officers should receive clear direction on processing applications from individuals in the US, or who are otherwise without regular status. This includes applicants who would otherwise qualify as NAFTA Professionals, Intra-Company Transfers, Global Skills Program applicants and LMIA holders, whose Canadian employers have demonstrated a need for their skills and contribution. To refuse these applicants because they may lack temporary intent due to their previous immigration history outside Canada is unreasonable, and leaves them with no alternative but making irregular claims for protection across the border. It is also contrary to Canada’s economic benefit, and IRPA’s clear allowance for those who have a dual-intent in section 22.

**d. Give clear direction to officers on processing US applications for temporary economic programs**

The legislation does not preclude an applicant outside Canada from requesting permanent residence based on H&C grounds, but with the introduction of Express Entry, there is no mechanism to file a direct application. The request must be made in conjunction with an existing Canadian Experience Class (CEC), FSW, FSTP or Provincial Nominee Program (PNP) application. If applicants with compelling H&C grounds could apply directly to IRCC from outside Canada, they might be less inclined to make a refugee claim that might have less merit and chance of success.

**8. Develop opportunities for in-demand low-skilled workers**

Some people currently entering Canada as asylum-seekers are long-term US residents who are low-skilled workers with experience in demand by Canadian employers. The federal government should work in collaboration with the provinces and employers to develop new work opportunities and programs geared to these workers – particularly where a path to permanent residence exists.

**9. Amend Express Entry criteria to give points for dreamers**

Many American dreamers seeking stable alternatives to the political climate in the US would be highly-desirable economic immigrants and valued by Canadian employers. Canada should consider embracing this opportunity to attract talent by adjusting the Express Entry Comprehensive Ranking System criteria to give additional points for US experience or education. This adjustment would give these applicants the necessary Express Entry points to secure an ITA.

**10. Permit family class members to be processed in Canada**

In addition to economic migrants, parents, spouses, children and other members of the family class should be permitted to be processed in Canada if they arrive at the Canadian border and give proof of relationship. While this usually occurs for spouses and children already, there are cases where it does not – and it rarely happens for parents. This would reduce workload at the border and demonstrate compassion to those who merit it.

**11. Expand eligibility for self-supporting refugees**

It is in Canada's interests to attract applications for permanent residence from refugees who are self-supporting and will not require significant government resources on entry to Canada.

The *Immigration and Refugee Protection Regulations* allow for 'self-supporting refugees'. Section 139 of the Regulations permits a permanent resident visa to be issued to a foreign national in need of refugee protection, without a sponsor, if they have "sufficient financial resources to provide for the lodging, care and maintenance, and for the resettlement in Canada, of themselves and their family members included in the application for protection." However, this section is severely limited by subsection 140.3(1), which requires individuals without a sponsor to have a referral to the program. In practical terms, self-supporting refugees still require a sponsorship group, despite their own financial resources. For many (even those with significant resources), finding a willing sponsorship group is an insurmountable hurdle.

Subsection 140.3(3) of the Regulations permits the Minister to expand eligibility for self-supporting refugees by designating the US as a geographic area in which circumstances justify the submission of permanent resident visa applications not accompanied by a referral. This would encourage those who meet the definition of the class and have sufficient financial resources to apply from outside of

Canada, instead of appearing at a port of entry. The Minister could also grant a standing H&C exemption from the referral requirement for self-supporting refugees.

## **12. Expand options for decision-making outside Canada**

The government should consider if existing legislation or legislative amendments could allow for cases to be processed from outside of Canada. The government should also consider using Consulate Offices in the US to inform the public on the Canadian immigration system, referring people to Canadian counsel and offering duty counsel services.

### **Conclusion**

The CBA Section appreciates the opportunity to comment on policy and legislative options for asylum seekers. We would be pleased to meet with you to discuss our suggestions, and offer our assistance in developing materials and disseminating accurate information on the Canadian asylum system.

Yours truly,

*(original letter signed by Kate Terroux for Barbara Jo Caruso)*

Barbara Jo Caruso  
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