



August 14, 2020

Via email: Roula.Eatrides@irb-cisr.gc.ca

Roula Eatrides, Deputy Chairperson
Immigration and Refugee Board of Canada
Refugee Protection Division
344 Slater Street
Ottawa, ON K1A 0K1

Dear Ms. Eatrides:

Re: COVID-19 – Resumption of in-Person Hearings at the Refugee Protection Division

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to express our concerns about the resumption of in-person hearings at the Refugee Protection Division (RPD) as discussed at recent meetings of the Immigration and Refugee Board (IRB) Consultative Committee, and as outlined in a Practice Notice dated June 23, 2020,¹ and in the IRB's New COVID-19 health and safety measures.² We wrote to you in the spring about the RPD's proposed response to the COVID-19 pandemic.³ As stated in our previous letter, we do not support a permanent transition to virtual hearings at the RPD. However, for the duration of the pandemic, we believe that virtual hearings should be the default option.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section has approximately 1,200 members across Canada practising in all areas of immigration and refugee law.

We believe the RPD's resumption of in-person hearings raises many health, safety and procedural concerns for claimants and their representatives. Considering the most recent scientific evidence, we believe that virtual hearings should be the default option during the pandemic. This is the best way to balance public health and safety with access to justice, and is the approach taken by the Federal Court and some other courts and tribunals. We welcome the recent news that the RPD will be launching a virtual hearing pilot project in Ottawa and hope that virtual hearings will soon be available in all the locations where the RPD operates.

¹ [Refugee Protection Division: Practice Notice on the resumption of in-person hearings](#), June 23, 2020.

² [New COVID-19 health and safety measures](#).

³ [COVID-19 – Plan and Measures at the Refugee Protection Division](#), July 9, 2020.

Our concerns with the RPD's policies for in-person hearings include, but are not limited to, the following issues:

1. Under the Practice Notice, RPD members may not be in the same room as claimants and counsel and interpreters will also be off site. This raises the question of whether there is any practical benefit to holding hearings in-person.
2. Traveling to IRB offices places claimants and their representatives at risk of exposure to COVID-19. The risk extends to using public elevators and being confined to small rooms for extended periods of time. Installing plexiglass and taking temperatures will not eliminate those risks. There is growing scientific evidence that the virus is airborne and can remain active for long periods in indoor environments with circulated air.⁴ A vaccine – the only effective method to mitigate the risk of harm – will not be available for public distribution in the foreseeable future.
3. Many people are particularly vulnerable to COVID-19 due to their age or health. The default in-person policy places participants in the uncomfortable position of having to request alternate arrangements. While we appreciate the clarification at recent meetings that parties will not be required to disclose their specific health conditions or vulnerabilities, some of our members do report being asked whether they have a health condition or vulnerability when requesting an in-person hearing. Some claimants may be able to attend in person while their counsel cannot, potentially requiring claimants to seek another lawyer and unnecessarily hindering the advancement of their claim. Making virtual hearings the default would alleviate these concerns, while allowing individuals who feel strongly about an in-person hearing to discuss that option with their counsel and make that request.
4. We believe that in-person hearings as the default will add to delays. Time and resources are being used to render individual determinations on each request for a virtual hearing. Since virtual hearings are not widely available at this time, we fear an adverse incentive for claimants to risk their health and safety to have their claim adjudicated more efficiently. It will result in disparate treatment of similarly situated claimants.
5. Face masks are now mandatory in indoor public places in most major Canadian cities. The IRB's current health and safety guidance states that masks must be removed when testifying or giving submissions at an in-person hearing.⁵ We appreciate your indications in our meetings that parties can ask to keep their masks on and that members will show flexibility in assessing these requests. Nevertheless, encouraging parties to remove their masks increases the risk to participants. On the other hand, having clients testify with a mask on for several hours may jeopardize the clarity of the hearing recording, which in turn compromises fair access to a CD for purposes of an appeal. Testifying with a mask on may also add to claimants' anxiety about their hearing thus impacting their testimony. In contrast, virtual testimony will allow claimants with access to technology to testify without a mask so the member can see their face when assessing their credibility.

Refugee claimants have a right to a proceeding in accordance with principles of procedural fairness and natural justice. Now, more than ever, these principles are being put to the test. The way the RPD has been holding in-person hearings could compromise claimants' procedural fairness rights or encourage them to take health risks to advance their claim.

⁴ See for example: Centre for Disease Control: [COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China](#), July 2020; [Yes, the Coronavirus Is in the Air](#), New York Times, July 2020.

⁵ [New COVID-19 health and safety measures](#).

We are grateful for your ongoing collaboration and would appreciate another opportunity to discuss these concerns. We believe additional evaluation at this time will save hardship and difficulty down the line.

Yours truly,

(original letter signed by Nadia Sayed for Ravi Jain)

Ravi Jain
Chair, Immigration Law Section