THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

November 22, 2022

Via email: Engagement@irb-cisr.gc.ca

Salim Saikaley
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Immigration and Refugee Board of Canada
344 Slater Street
Ottawa, ON K1A 0K1

Dear Mr. Saikaley:

**Re: Written Consultation: Reviews of Chairperson's Guidelines 3 and 8**

We write on behalf of the Immigration Law Section and Child and Youth Law Section of the Canadian Bar Association (CBA Sections) with an initial response in the Written Consultation and Review of Chairperson's Guidelines 3 (Child Refugee Claimants: Procedural and Evidentiary Issues) and 8 (Procedures with Respect to Vulnerable Persons Appearing Before the IRB).

The CBA is a national association of 37,000 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 Immigration Law Section has approximately 1,200 members across Canada practicing in all areas of immigration and refugee law. The CBA Child and Youth Law Section addresses law, policy and legal research developments on matters affecting children in Canada in a manner consistent with their rights under the United Nations Convention on the Rights of the Child.

We welcome the IRB initiative to review Guideline 3. As with Guideline 4 (Gender Considerations in Proceedings before the IRB), we believe that the review presents an opportunity to better align the IRB's practice with international human rights standards and best practices. This has the potential to enhance the ability of young people to participate meaningfully and have their interests protected in administrative processes that impact their lives. In its most recent Concluding Observations, the UN Committee on the Rights of the Child urged Canada to:

> (a) Intensify measures to ensure that legislation and procedures use the best interests of the child as a primary consideration in all immigration and asylum decision making processes, and that determination of the best interests is consistently conducted by professionals who have been adequately applying such procedures;[1]

[1] Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth reports of Canada*, CRC/C/CAN/CO/5-6 (9 June 2022) at para 42 (a).

We believe this call requires meaningful collaboration between the IRB and those with expertise in working with children. The Child and Youth Law Section welcomes all opportunities to give further input on this and other initiatives that impact on the rights of children.

The CBA Sections appreciate this opportunity to participate in the review consultations for Chairperson's Guidelines 3 and 8. However, we reiterate the concerns raised in our letter of November 18, 2022[2] on the short timeline for this response. The time allowed to prepare this submission was approximately a month, including a one-week extension. CBA members who appear daily before the IRB understand the importance of these Guidelines and believe that this is insufficient time to make a full response. Sufficient time is needed to allow for meaningful consultation with our members on such important policy documents. As this work is undertaken primarily by volunteers, a thoughtful response is directly tied to the IRB giving enough time for stakeholders to respond.

We also note that the request for written submissions on the Guidelines comes at the same time as the IRB is soliciting feedback on other policies and Rules.

We are also concerned that comments will be accepted only in the format of the IRB's template, which suggests that responses are to correspond with the scope of the IRB's reflection questions. Although the reflection questions offer insight into the IRB's primary concerns, they also limit the nature of the consultation and the review of the Guidelines. In the past, stakeholders have been encouraged to give feedback on any issues of concern in the consultation matter. This approach enables meaningful consultation and has been effective in past consultations on Guidelines 4 and 9.

In light of the short timelines, limited scope imposed and other ongoing consultations across the IRB, the enclosed response to the Written Consultations for Chairperson's Guidelines 3 and 8 should be considered our preliminary response. The CBA Sections intend to give subsequent and more detailed recommendations to supplement these initial written submissions.

The CBA Sections appreciate the opportunity to raise concerns on this issue. We would be pleased to discuss our recommendations in greater detail.

Yours truly,

*(original letter signed by Véronique Morissette for Lisa Middlemiss and Sarah Dennene)*

Lisa Middlemiss
Chair, Immigration Law Section

Sarah Dennene
Chair, Child and Youth Law Section

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2 Letter of November 18, 2022, online.

# Written Consultation

## Review of Chairperson's Guideline 3

## Context

The Immigration and Refugee Board of Canada (IRB) is conducting a revision of its *Chairperson's Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues*, which provides guiding principles for adjudicating and managing cases and supports the achievement of the Board's strategic objectives. This initiative is part of the IRB's commitment to the quality, fairness, and consistency of its adjudicative processes and decision-making.

An important component of this review is seeking input from our stakeholders which will help us assess the current state of the Guideline as a key policy instrument and identify areas that may require updating. Following this consultative effort, the IRB will review all feedback and suggestions received which will help to inform the drafting of the revised *Chairperson's Guideline 3*.

As part of this consultation, your organization is being asked to provide a written submission **using this document** to share your knowledge, expertise, and experience. This contribution will help strengthen the Board's efforts to sustain and improve the quality of its adjudication by ensuring that tools and guidance available reflect the needs of those appearing before the IRB, as well as the IRB itself.

**Comments will only be accepted in the format of the template provided below**, therefore please provide your responses directly within this table. We kindly ask that you ensure responses carefully correspond with the scope of each reflection question.

## Reflection Questions

| Question | Response |
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| **I - Scope of the Guideline** | |
| 1. If the Guideline were to be expanded to all Divisions, what common procedural guidance should be provided? | The Supreme Court of Canada has reiterated that substantive equality requires unequal treatment. The Guidelines must reflect this. Children are a historically disadvantaged vulnerable group and child victims of persecution and other children before the Board will sometimes have multiple layers of vulnerability. A legal recognition that they are vulnerable along with accommodation is required. Accommodations alone are insufficient. The Application of the Guideline should be flexible and generous to account for different situations.<br><br>The Guideline should be informed by and be consistent with the framework for children's rights established under the United Nations *Convention on the Rights of the Child* (UNCRC). Explicit reference should be made to the General Comments and Concluding Observations of the UN Committee on the Rights of the Child as significant sources of interpretive guidance. Of particular relevance: |

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| | - Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* UN Doc. CRC/C/GC/14 (2013)<br>- Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, UN Doc. CRC/C/GC12 (2009)<br>- Committee on the Rights of the Child, *General Comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin*, UN Doc. CRC/C/GC/2005/6 (2005)<br>- Committee on the Protection of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint General Comment No. 3 (2017) of the Committee on the Protection of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, UN Doc. CMW/C/GC/3-CRC/C/GC/22 (2017)<br>- Committee on the Protection of All Migrant Workers and Members of Their Families and Committee on the Rights of the Child, *Joint General Comment No. 4 (2017) of the Committee on the Protection of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration*, UN Doc. CMW/C/GC/4-CRC/C/GC/23 (2017)<br>- Committee on the Rights of the Child, Concluding Observations: Canada, UN Doc. CRC/C/CAN/CO/5-6 (2022), at para. 42(a)<br>See also the CBA Child Rights Toolkit.<br>Procedural guidance regarding access to justice principles applicable to children in all contexts may be found in:<br>- Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice and their explanatory memorandum*, 17 November 2010<br>- International Association of Youth and Family Judges and Magistrates, *Guidelines on Children in Contact with the Justice System* (2017) |

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| | The Board should uphold the child's right to dignity and privacy. Anonymization should be considered for all cases dealing with children.<br><br>As with the Federal Court, the Immigration Division and the Immigration Appeal Division should establish a procedure to anonymize files, even after a decision is rendered. This could be achieved by amending the Rules or by updating the Guidelines Chairperson Guideline 4, section 10.2, which establishes a means by which to request a confidentiality order. We recommend that this be adopted and included in the guideline.<br><br>The Immigration Division should consider a more informal process for the issuance of conditional removal orders to unaccompanied minors.<br><br>The Board should endeavour to ensure the same Designated Representative is appointed to the minor across the divisions of the Board unless the minor requests a change of designated representative. |
| 2. Should the Guideline enhance the existing guidance related to accompanied, unaccompanied and separated minors? If so, please explain.<br><br>● Accompanied minors are children that are accompanied by at least one parent or by an adult who, by law or custom, is their responsible guardian.<br><br>● Unaccompanied minors are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.<br><br>● Separated minors are those separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members or caregivers. | The Board should ensure the child has legal counsel assisting them, in addition to a Designated Representative, in all IRB proceedings.<br><br>The Court of Appeal of Quebec has recognized the constitutional right of someone in a detention facility who does not understand the nature of the proceedings to duty counsel (*A.N. c. Centre intégré universitaire de santé et de services sociaux du Nord-de-l'Île-de-Montréal*, 2022 QCCA 1167). This principle applies to minors in detention, and accords with Article 37 of the UNCRC.<br><br>In all divisions, the Board should ask the minor claimants at the outset of the hearing if they have met with their counsel in person prior to the hearing day.<br><br>Counsel should be given the opportunity to confirm they have interviewed the minor to ensure there is no risk of conflict of interest and that they have advised the minor child to seek independent counsel, such as in the case of accompanied minors claimants in abduction / Hague cases. A separate Designated Representative (other than the parent) should also be appointed in such cases.<br><br>The Board should identify claims made by minors early and establish a procedure for early case management through which the child's counsel and Designated Representative can make submissions to the Board, prior to scheduling a hearing, as to how evidence should be adduced on behalf of the child. How the child should be heard and whether the child should have an independent Designated Representative (other than |

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| | the parent), and independent counsel should be determined as early as possible. The Board should consider File Review where possible and for any live issues that remain, consider alternative means for evidence such as affidavit evidence. In deciding how to proceed, the Board should assess the child's developmental stage and ability to participate and effectively engage in the proceedings.<br><br>However, to comply with the UNCRC, a minor claimant should be given the opportunity to be heard directly by the Board, if they wish.<br><br>Jurisprudence regarding the maturity of the child should be incorporated to ensure that the mature child can appoint their own counsel without having the Designated Representative choose one for them.<br><br>The Guidelines should expand on the role of the Designated Representative and best practices with respect to Designated Representatives. The updated Designated Representative Guide which provides these details should be incorporated into the current Guideline. See also the CBA Submission Designated Representatives in Immigration and Refugee Matters: Using Them to the Fullest Potential (December 2015). Board Members should examine with the child and Designated Representative whether these best practices are met in a particular case. The Board Member should evaluate the vulnerabilities of the child to determine if there are any barriers impeding the child and their Designated Representative's ability to present their claim. This should include assessing whether the child is in an appropriate care situation (e.g., shelter, food, schooling, and assistance with medical and emotional needs).<br><br>Where concerns are raised about the Designated Representative by counsel or the child, a change of Designated Representative should be facilitated. A procedure by which to register a complaint against appointed Designated Representatives should be established and publicized. This is not addressed in the Designated Representative guide.<br><br>In *Canada (Minister of Citizenship and Immigration) v Patel*, 2008 FC 747, the Federal Court offered helpful guidelines from the UNHCR handbook on the treatment of unaccompanied minors during a hearing:<br><br>V. Preliminary issue: Unaccompanied minors<br><br>[11] The United Nations Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, Geneva, reedited January 1992 (UNHCR Handbook) specifically addresses the question of |

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| | unaccompanied minors and what a decision maker must consider when determining if a minor child is a Convention Refugee (at paragraphs 214-219):<br><br>214. The question of whether an unaccompanied minor may qualify for refugee status must be determined in the first instance according to the degree of his mental development and maturity. In the case of children, it will generally be necessary to enroll the services of experts conversant with child mentality. A child—and for that matter, an adolescent—not being legally independent should, if appropriate, have a guardian appointed whose task it would be to promote a decision that will be in the minor's best interests. In the absence of parents or of a legally appointed guardian, it is for the authorities to ensure that the interests of an applicant for refugee status who is a minor are fully safeguarded.<br><br>215. Where a minor is no longer a child but an adolescent, it will be easier to determine refugee status as in the case of an adult, although this again will depend upon the actual degree of the adolescent's maturity. It can be assumed that—in the absence of indications to the contrary—a person of 16 or over may be regarded as sufficiently mature to have a well-founded fear of persecution. Minors under 16 years of age may normally be assumed not to be sufficiently mature. They may have fear and a will of their own, but these may not have the same significance as in the case of an adult.<br><br>216. It should, however, be stressed that these are only general guidelines and that a minor's mental maturity must normally be determined in the light of his personal, family and cultural background.<br><br>217. Where the minor has not reached a sufficient degree of maturity to make it possible to establish well founded fear in the same way as for an adult, it may be necessary to have greater regard to certain objective factors. Thus, if an unaccompanied minor finds himself in the company of a group of refugees, this may — depending on the circumstances —indicate that the minor is also a refugee.<br><br>218. The circumstances of the parents and other family members, including their situation in the minor's country of origin, will have to be taken into account. If there is reason to believe that the parents wish their child to be outside the country of origin on grounds of |

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| | well-founded fear of persecution, the child himself may be presumed to have such fear.<br><br>219. If the will of the parents cannot be ascertained or if such will is in doubt or in conflict with the will of the child, then the examiner, in cooperation with the experts assisting him, will have to come to a decision as to the well-foundedness of the minor's fear on the basis of all the known circumstances, which may call for a liberal application of the benefit of the doubt. |
| 3. Should the Guideline incorporate a definitions annex of the terms and if so, which terms do you believe would benefit from being defined? | The Guidelines should incorporate the definition of a child from the *Immigration and Refugee Protection Act* and the *Immigration and Refugee Protection Regulations,* applicable to each section. Section 2 of the *Regulations* states:<br><br>*dependent child*, in respect of a parent, means a child who<br><br>(a) has one of the following relationships with the parent, namely,<br><br>(i) is the biological child of the parent, if the child has not been adopted by a person other than the spouse or common-law partner of the parent, or<br><br>(ii) is the adopted child of the parent; and<br><br>(b) is in one of the following situations of dependency, namely,<br><br>(i) is less than 22 years of age and is not a spouse or common-law partner, or<br><br>(ii) is 22 years of age or older and has depended substantially on the financial support of the parent since before attaining the age of 22 years and is unable to be financially self-supporting due to a physical or mental condition. (*enfant à charge*)<br><br>The Guidelines should state that Designated Representatives may continue their role for a young person past their 18th birthday, should the youth wish. Ongoing vulnerabilities of young people transitioning to adulthood have been recognized in the child welfare context. For example, in Ontario children's aid societies continue to provide a variety of ongoing supports and services to eligible young persons until age 21 through their Continued Care and Support for Youth program (O. Reg. 156/18 to the Child, Youth and Family *Services Act*, 2017, S.O. 2017, c. 14, Sched. 1, at s. 54). |
| **II - Best Interest of the Child (BIOC) principle** | |
| 4. Should the Guideline elaborate on how the application of the BIOC principle applies to the | The Guidelines should adhere to the child's right to privacy as set out in Articles 16 and 40 of the UNCRC. |

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| different divisions for hearings involving minors appearing before the IRB? If so, what should be highlighted (e.g., best practices aligning with international standard and Canadian legislation)? | The Board, across all divisions, should anonymize cases dealing with children as claimants or parties to the proceedings. The exhibits and file should be sealed.<br><br>No publication ban or sealing order at the provincial court level should ever be violated by the Board, without prior appropriate authorization.<br><br>Even where the child is not a party, proceedings should be anonymized and the file sealed when the proceedings deal with youth under the *Youth Criminal Justice Act*, children in alternative care, adopted children, children involved in alleged abduction cases, family law proceedings, children with disabilities or mental health issues.<br><br>According to Article 3 of the UNCRC, the best interests of the child (BIOC) "shall be a primary consideration" in all actions concerning children. The BIOC concept is described as a threefold one by the UN Committee on the Rights of the Child in its General Comment No. 14:[1]<br><br>> First, the BIOC should be regarded as a substantive right of the child. The child has the right to have their best interest taken into consideration in all processes that affect them.<br><br>> Second, it is a guiding principle for interpreting the rights of the child. BIOC should be considered and respected when developing changes to the Guideline.<br><br>> Third, the BIOC is also a procedural right that calls for procedural guarantees to ensure that it is adequately assessed.<br><br>The Guidelines, as currently written, do not reflect an approach that encompasses respect for these three aspects of the BIOC.<br><br>Concrete ways of applying the best interest of the child can be found in General Comment No. 14. The Committee on the Rights of the Child particularly identifies the following procedural safeguards:<br><br>a. The right of the child to express his or her views: an assessment of the BIOC should allow the child to participate fully in procedures that should be adapted and child-friendly. It is important to note that this should be viewed as a right of the child, independent from the views of their representative. |

[1] Committee on the Rights of the Children, *General comment No 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1) no 14* General comment no 14, CRC/C/GC/14 (29 May 2013) at para 46 [General comment No. 14].

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| | b. Establishment of facts:[2] the assessment of the BIOC requires a holistic approach. Facts and information should therefore be collected by professionals that are properly trained, should they be Board Members, lawyers, social workers, or designated representatives.<br><br>The Guidelines should recognize the inherent difficulties of completing a Basis of Claim form for an unaccompanied child where information is not readily accessible. Incomplete forms should be accepted and/or extensions granted without it negatively affecting the credibility of the child. The child should always have the benefit of counsel and a Designated Representative prior to being required to submit a Basis of Claim form. Currently, the Designated Representative is often not appointed until much later in the process.<br><br>The Guidelines should elaborate on evidentiary issues and the lack of corroborative evidence in cases where a child is involved. While recognizing that Board Members are entitled to prefer corroborative evidence when a child's testimony is silent on key issues, in assessing the documentary evidence or lack thereof, Board Members should consider the specific circumstances of the child before making adverse credibility inferences.<br><br>c. Time perception:[3] when it comes to refugee hearings that involve children, whether accompanied or not, attention should be given to the fact that the passing of time is different for children. Delays in proceedings, or gaps between hearing dates, have particularly adverse effects on children. Therefore, proceedings regarding or impacting children should be scheduled as early as possible and completed in the shortest time possible, as is compatible with due process and fairness to the child. However, additional time should be accommodated if necessary to meet the needs and circumstances of the particular child or youth.<br><br>d. Qualified professionals:[4] to correctly assess the BIOC, Board Members should have knowledge of matters related to child and adolescent development, as well as the particular manifestations of trauma in children and youth. Specialized training should therefore be provided to Board Members with respect to children's rights and as noted above, the |

2 General comment No. 14 at para 92.

3 General comment No. 14 at para 93.

4 General comment No. 14 at para 94-95.

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| | Board should consider establishing a specialized task force for matters involving children.<br><br>e. Legal representation: legal representation is a necessary procedural safeguard for children in all proceedings involving an assessment of their BIOC. There should be no exception for administrative proceedings. The UN Committee on the Rights of the Child specifically highlights that a legal representative is required *in addition* to the appointment of a guardian.<br><br>In the context of proceedings at the Board, this means that legal representation should be provided in addition to a designated representative, whether or not the minor is accompanied.<br><br>The provision of legal representation to children is an access to justice issue tied to the fundamental right of participation. It has been specifically recognized in a number of international human rights instruments, including the Report of the UN High Commissioner for Human Rights: Access to Justice for Children (2013) and the UN Human Rights Council Resolution: "Rights of the child: access to justice for children" (2014). The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) also recognize the right to "legal personality" and the right to equality before the law without discrimination, including the right to a fair trial. These rights apply equally to children, who also have the right to special protection because of their status as children. They include the right to due process, the right to privacy, the guarantee of legal assistance and other appropriate assistance, and the right to challenge decisions with a higher judicial authority.<br><br>f. Legal reasoning: to demonstrate that the BIOC has been assessed and taken as a primary consideration, any decision concerning the child or children must be justified and explained. The decision should explicitly state the factual circumstances regarding the child, what elements have been found relevant in the BIOC assessment, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reasons for that should be clearly stated. If, *exceptionally*, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. Consideration should be given to framing decisions in language accessible to the child or youth in question. |

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| | g. Mechanisms to appeal/review decisions: review mechanisms should be made known to the child and be accessible by them - this includes ensuring that the child continues to have the benefit of the same Designated Representative for any appeal, if the child wishes and if the lawyer, in consultation with the child, also agrees that this is in the child's interests. The child should also always have legal representation and should have the opportunity to choose his lawyer if he has the maturity to do so. In addition to considering any legal error, the reviewing body must consider whether the above-noted procedural safeguards have been respected and whether the BIOC assessment has been adequately carried out, or whether competing considerations have been given too much weight. |
| 5. Should the Guideline elaborate on the procedural accommodations that could be offered to minors to ensure their mental health is considered during a proceeding? If so, what child-specific procedural accommodations for mental health should be highlighted and why? | Refugee claims of unaccompanied minors should be decided through File Review where possible. The Board should establish a procedure for early case management, giving counsel and Designated Representatives an opportunity to make submissions on how evidence should be adduced on behalf of the child.<br>If meeting the child is required, or if the child wish to be heard in person, the Board should consider a more informal mode of meeting rather than a hearing, similar to the Board's former in-office fast track proceedings.<br>A full hearing should be held only if absolutely necessary and in the best interest of the child.[5]<br>The child should be given the opportunity to speak to the Board Member alone if this is their wish.<br>Hearings, when held, should be as limited as possible to the Board Member's remaining concerns that are not addressed by the documentary evidence.<br>The procedural accommodations for vulnerable persons identified in Chairperson Guideline 8 should also be specifically incorporated or adapted into the revised Guideline 3, namely:<br>a. allowing the child or young person to provide evidence by videoconference or other means, if direct evidence from the child is needed;<br>b. allowing a support person to participate in a hearing in addition to the Designated Representative and counsel;<br>c. creating a more child-friendly, informal setting for a hearing;<br>d. varying the order of questioning; |

[5] *Canada (Minister of Citizenship and Immigration v Patel,* 2008 FC 747., at para. 11.

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| | e. excluding non-parties from the hearing room;<br>f. providing a panel and interpreter of a particular gender;<br>g. explaining IRB processes to the child or young person in advance;<br>h. allowing any other procedural accommodations that may be needed in the circumstances;<br>i. applying the guidelines before the hearing for paper-based application; and<br>j. allowing testimony by a designated representative to help minor provide evidence. |
| 6. In addition to the ones contained in the current Guideline (section B. I.), are there other best practices that should be employed when questioning a minor during a proceeding? | The CBA Sections encourage the Board to review:<br>● Nicholas Bala, Rachel Birnbaum, Francine Cyr and Denise McColley, *Children's Voices in Family Court: Guidelines for Judges Meeting Children,* Family Law Quarterly, Vol 47, No 3 (Fall 2013), pp. 379-408.<br>● *B.J.G. v D.L.G.*, 2010 YKSC 44, on the child's right to be heard. |
| **III - Substantive issues** | |
| 7. Should there be additional guidance of substantive issues specific to each Division? If so, which substantive issues should be included in the context of minors appearing at the IRB? Non-exclusive examples could include the assessment of IFA and state protection in the context of minor claimants at the RPD.<br>● A substantive issue is one that applies to the decision-making process and is generally guided by the law or jurisprudence. It will generally be comprised of elements that must be weighed by a decision maker to arrive at a decision. This is in contrast with procedural considerations that refer to the process of how evidence is presented during a proceeding. | The CBA Sections have not had sufficient time in this consultation to compile a full list of cases that should be included in the revised Guideline 3. Guideline 3 should include expanded substantive guidance and refer to leading case law on claims involving children, as in Chairperson Guidelines 4 and 9.<br>When assessing the reasonableness of a proposed IFA for a minor, the Board should consider the case law relating to hardship and BIOC arising in the humanitarian and compassionate application context. The Guidelines should recognize that what may be only an inconvenience for adult claimants can constitute hardship for minor claimants, and sending a child to an unfamiliar place, without the support of an adult and without the prospect of a livelihood, constitutes undue hardship.[6]<br>In *Sun*, the Federal Court outlined a three-step process to the BIOC analysis:<br>*When assessing a child's best interests, an officer must establish: first what is in the child's best interest; second the degree to which the child's interests are compromised by one potential decision over another; and then, finally, in light of the foregoing assessment, determine the weight* |

6 *Elmi, Mahamud Hussein v. M.E.I.*(F.C.T.D., no. IMM-580-98), McKeown, March 12, 1999, at para 14.

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| | *that this factor plays in the ultimate balancing of positive and negative factors assessed in the H&C application.*<br><br>[…] *Furthermore, there is no hardship threshold such that if the circumstances of the child reach a certain point on that hardship scale only then will a child's best interests be so significantly negatively impacted as to warrant positive consideration. The question is not, "is the child suffering enough that his 'best interests are not being met'"? It is also not, "is the child surviving where he is?" The question at the initial stage of the assessment is, "what is in the child's best interests?"*[7]<br><br>The current guidelines recognize that a child may not be mature enough to establish a well-founded fear of persecution in the same way as an adult. The revised Guideline should include express reference to the guidance from the Federal Court on this issue in *Canada (Minister of Citizenship and Immigration) v. Patel,* 2008 FC 747.<br><br>The Guidelines should recognize that BIOC is not limited to procedural rights. The Guidelines should make express reference to the Federal Court decision *in Sahota v Canada,* (1994), 80 F.T.R. 241 (TD), where the court found the child's rights were violated because the RPD failed to consider the *Convention on the Rights of the Child* and the child's best interest when assessing IFA.<br><br>See also *Kim v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 149, [2011] FCR 448, where the Federal Court held that "decision makers must inform themselves of the rights recognized in the CRC. It is the denial of these rights which may determine whether or not a child has a well-founded fear of persecution if returned to his or her country of origin" (at 469, 475).[8] |
| **IV - Evidentiary issues** | |
| 8. Are there additional evidentiary issues pertaining to child refugee claimants that could be addressed in the Guideline? | The National Documentation Package (NDP) does not contain up to date information on children's rights.[9] Few studies from the IRB touch on children in the NDP. It is paramount that the NDP be amended to include objective evidence on country conditions impacting on children in the child's country of origin. |

7 *Sun v. Canada (M.C.I),* 2012 FC 206 at par. 44-45. See also *Sebbe v. Canada (M.C.I.)*, 2012 FC 813 at par. 16.

8 In a similar vein, *see Voskovo v Canada (Minister of Citizenship and Immigration),* 2011 FC 1376; [2011] FCJ No. 1682, at para. 43; *Bueckert v Canada (Minister of Citizenship and Immigration),* 2011 FC 1042, at para. 17; *Ruiz v Canada (Minister of Citizenship and Immigration*), 2012 FC 258, at para. 60.

9 For example, there is no evidence in the NDP on the situation of unaccompanied minors in foster care in the United States, nor is there any evidence relating to the United States practice to keep children held at US immigration detention facilities in cages.

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| | Sometimes this is the only documentary evidence a child will have.<br><br>The Board should consider and weigh a child's testimony and evidence filed on behalf of the child in another proceeding, such as family court, to assess the child's credibility without having to undergo another credibility assessment, if this is in the child's best interest and requested by the child's counsel or Designated Representative, providing this evidence is not subject to a publication ban or sealing order. |
| 9. In line with adopting an intersectional approach, are there additional considerations related to assessing a minor's testimony that could be included in the Guideline? If so, what considerations should be included? | The Guideline should include an explicit statement recognizing the inherent vulnerability of children and that child claimants require unique support and protections to meaningfully access their rights guaranteed under the *Immigration and Refugee Protection Act.*<br><br>The Guidelines should ensure that Board Members hearing claims made by children have received specialized training in how memories form in children and the developmental realities of children including their increased dependence on adults, their perception of time and their experiences of trauma. The Guidelines should caution against stereotypes, such as that a seemingly advanced child may form memories like an adult.<br><br>Similar to the Gender Related Task Force, the Board should establish a task force with specialized training to hear and decide claims by children in the case of unaccompanied or separated minors, minors whose claims have been separated from their parent(s), and other minors where the particular facts of the case call for inclusion in the task force.<br><br>The Guidelines should address the right of children to be reunited with their family. The Board regularly denies refugee protection to children (particularly U.S. citizen children) when their parents are granted refugee protection, in violation of Article 9 of the *Convention on the Rights of the Child*. |

# Written Consultation

## Review of the Chairperson's Guideline 8

## Context

The Immigration and Refugee Board of Canada (IRB) is conducting a revision of its *Chairperson's Guideline 8 – Procedures with Respect to Vulnerable Persons Appearing Before the IRB*, which provides guiding principles for adjudicating and managing cases and supports the achievement of the Board's strategic objectives. This initiative is part of the IRB's commitment to the quality, fairness, and consistency of its adjudicative processes and decision-making.

An important component of this review is seeking input from our stakeholders which will help us assess the current state of the Guideline as a key policy instrument and identify areas that may require updating. Following this consultative effort, the IRB will review all feedback and suggestions received which will help to inform the drafting of the revised *Chairperson's Guideline 8*.

As part of this consultation, your organization is being asked to provide a written submission **using this document** to share your knowledge, expertise, and experience. This contribution will help strengthen the Board's efforts to sustain and improve the quality of its adjudication by ensuring that tools and guidance available reflect the needs of those appearing before the IRB, as well as the IRB itself.

**Comments will only be accepted in the format of the template provided below**, therefore please provide your responses directly within this table. We kindly ask that you ensure responses carefully correspond with the scope of each reflection question.

## Reflection Questions

| Question | Response |
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| **I - Scope of the Guideline** | |
| 1. The current Guideline 8 states that:<br><br>"For the purposes of this guideline, vulnerable persons are individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, women who have suffered gender-related persecution, and individuals who have been victims of persecution based on sexual orientation and gender identity."<br><br>The IRB is now considering expanding the current Guideline by shifting the focus away from labeling persons as "vulnerable" towards a focus on accommodations. Would you have any comments about this shift? | The CBA is concerned that the removal of the term "vulnerable" will have a negative impact on the most vulnerable groups in our society. The term "vulnerable" is still used in many cases before all divisions of the Board, the Federal Courts, the Supreme Court, and provincial courts in Canada, in cases dealing with historically disadvantaged groups in society such as the elderly, women, persons with disabilities and other vulnerable groups.<br><br>Jurisprudence has been developed to uphold real or substantive equality for these vulnerable groups who are disadvantaged in society often with multiple layers of vulnerability. The removal of "vulnerable" from the Guidelines may adversely impact the ability of these vulnerable groups to rely on this jurisprudence thereby removing the substantive rights that emerge from these cases. |

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| | The federal court has overturned the decision when the RPD failed to declare someone vulnerable and also failed to mention the Guidelines on vulnerable claimants. Removing this language will not be helpful in securing substantive rights for vulnerable groups in our society. This recognition is needed to accompany procedural rights.<br><br>Further, this terminology helps remind the Board Member, who has many factors to consider, of the historical disadvantages that certain groups face, serving to ensure the Board member provides a fair opportunity to these vulnerable claimants to be fully heard. This requires accommodation as well as a disposition and understanding that being a member of these groups can trigger substantive rights and *Charter* protection and a recognition under section 96 of IRPA.<br><br>The term vulnerable should also be expanded to other groups such as claimants with hearing or visual impairment, and temporary or permanent mental disabilities.<br><br>The Board should be mindful of the different layers of vulnerability some claimants have. It is insufficient to declare all refugee claimants as vulnerable and to only focus on accommodations.<br><br>Although each case should be decided based on its particular facts, there should be greater consistency across the Board's regional offices as to when to apply the designation under Guideline 8.<br><br>The Guidelines should incorporate a better description of the possible accommodations counsel can request. The Guidelines should allow the Board to order accommodations *proprio motu* and without an application by the claimant, without removing the term "vulnerable". |
| 2. Are there assumptions, stereotypes or outdated ways of thinking in the current Guideline that should be removed or amended in the revised one? Are you aware of any best practices, choice of language or any other elements that the IRB should consider including in the revised Guideline? | The Guidelines should incorporate the Convention on the Rights of Persons with Disabilities, including recognition of temporary/transient and permanent mental health disabilities.<br><br>The Guidelines should be amended to expressly state that they apply to all sections of the Board, not only to the RPD/RAD.<br><br>The Board should uphold the right to dignity and privacy. Cases dealing with vulnerable persons and persons with disabilities should be anonymized and sealed. Information that could jeopardize someone's mental health, career or other facet of their life, should not be put online and published. |

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| | The Guideline should expressly recognize the substantive rights engaged. A disability or vulnerability is often grounds to grant refugee status as many vulnerable claimants are persecuted because of their disability. Procedural accommodations are often not enough. Substantive rights are also engaged, such as the right to confidentiality and dignity.<br><br>Another example of substantive rights triggered by the term "vulnerable" is the example of slaves. Slavery still occurs today, and a victim of slavery should not be reproached for a delayed claim when it is due to their vulnerability that they were not able to leave and seek refuge earlier. Procedural accommodations for vulnerable claimants are often not enough since fundamental rights are often engaged.<br><br>The Guidelines should acknowledge that all persons experience some level of vulnerability, and every individual's ability to articulate themselves and present their case will change over time and across cultural contexts. Persons claiming protection and persons in detention will also share common vulnerabilities due to the nature of their matters. Therefore, even in the absence of a formal vulnerable person designation, the Board should be flexible in granting procedural accommodations. |
| 3. The IRB is now considering expanding the current Guideline by including guidance on dealing with substantive issues. Substantive issues could include evidentiary matters and determinative issues. Would you have any comments regarding such a possible inclusion? Are there substantive issues which you feel should be included?<br><br>● A substantive issue is one that applies to the decision-making process and is generally guided by the law or jurisprudence. It will generally be comprised of elements that must be weighed by a decision maker to arrive at a decision. This is in contrast with procedural considerations that refer to the process of how evidence is presented during a proceeding. | Although the CBA Section has not had sufficient time in this consultation to compile a full list of cases that should be included, the revised Guideline 8 should include expanded substantive guidance and refer to leading case law on claims involving vulnerable persons, as in Chairperson Guidelines 4 and 9.<br><br>This includes reference to cases establishing an event that may not constitute persecution or unreasonable hardship (in the IFA context), but for some claimants may nonetheless constitute persecution or unreasonable hardship for vulnerable persons. This engages substantive rights. |
| **II - Guidance for working with persons who may require accommodations in proceedings before the IRB**<br><br>*This would include the needs of various individuals, including those that have suffered trauma, persons with disabilities, and persons with mental health issues. There may be overlapping and intersectional needs to consider as well.* | |
| 4. Other than those accommodations already in the current Guideline, are there best practices in | Board Members should ask unrepresented claimants if they wish to delay proceedings in order to retain counsel. The |

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| providing accommodations that the IRB should consider in cases involving individuals with particular needs? | Guideline should recognize that when a vulnerable person is unrepresented, there is a higher onus on the Board Member to make allowances when the vulnerable person is not familiar with the Board's processes and rules. The duty of fairness requires a higher standard for Board Members to explain the process of the hearing to unrepresented, vulnerable persons, and to sufficiently advise them of their participatory rights.<br><br>More flexibility should be provided in all divisions for extensions of time and the need to change counsel when dealing with vulnerable persons.<br><br>Claimants who have hearing or visual impairments, or other communication-related disabilities, face systemic barriers communicating with counsel and are further disadvantaged in accessing the Board. Hearings should not be scheduled if a claimant has failed to file evidence in their case when they suffer from a disability. Special procedures recognizing their disadvantage should be put in place to allow these vulnerable persons to better present their case.<br><br>The Guidelines should apply at the hearing and also before the hearing when requests for postponements are made.<br><br>As the master of procedures, Board Members should ensure that, if the Minister is intervening, their representative must also observe any designation or accommodation granted to the vulnerable person.<br><br>The Guidelines should expand on the role of the Designated Representative and best practices with respect to Designated Representatives. Board Members should examine with the claimant and Designated Representative whether these are met in a particular case. The Board Member should evaluate the vulnerabilities of the claimant to determine if there are any barriers impeding the claimant and their Designated Representative's ability to present their claim. This should include assessing whether the vulnerable person has shelter and assistance with their physical and emotional needs.<br><br>The Guidelines should better emphasize that in appropriate cases the Designated Representative can and should provide testimony on behalf of the vulnerable person. In many instances, Board Members deny the Designated Representative this opportunity. This allows vulnerable persons to meaningfully participate in their proceedings. |
| 5. In the recently revised *Chairperson's Guideline 4 – Gender Considerations in Proceedings before the IRB,* the Board reaffirmed its commitment to, and | The CBA Sections encourage the IRB to incorporate similar language into Guideline 8. This commitment should be reflected before the hearing in scheduling hearings by |

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| the importance of, intersectional and trauma-informed approaches to the adjudication of proceedings involving gender considerations.[1] How should the principles of using a trauma-informed approach (TIA) be incorporated into the revised Guideline 8? Please describe any additional elements of a TIA to adjudication which you would like to see incorporated in the revised Guideline. | allowing an expedited hearing when required or by granting a postponement when necessary to allow the client time to heal. |
| 6. The IRB is now considering revising the current Guideline to clarify how accommodations can be requested by parties. In your view, how could this be best accomplished? | Accommodations should be flexible, and counsel should not be reproached for not having made a request for accommodations earlier. It is often impossible to know which accommodations are required until counsel obtains an expert report and sometimes the need for accommodation only becomes apparent when the claimant is confronted with an approaching hearing date. The thought of the hearing can trigger symptoms not before seen by counsel.<br><br>The Guidelines should recognize these practical realities and caution Board Members against making assumptions or rendering negative inferences based on vulnerable person applications and/or accommodation requests that arrive late in the proceedings.<br><br>The board no longer has private offices to remove the formal setting of traditional hearing rooms with no windows as an important accommodation for vulnerable claimants. This used to be an important accommodation offered by the Board which is no longer available. |
| **III - Guidance for dealing with evidence in cases where persons may require accommodations**<br><br>*This would include the needs of various individuals, including those that have suffered trauma, persons with disabilities, and persons with mental health issues. There may be overlapping and intersectional needs to consider as well.* | |
| 7. What are some of the challenges that persons appearing before the IRB face in obtaining an expert (medical, psychological or psychiatric) report to request accommodations? | Studies outline different systemic barriers encountered by refugee claimants and migrants when trying to access doctors and psychologists in a timely manner. The cost, delays, shame to consult a psychologist, embarrassment of seeking an interpreter in their community, and fear of stigmatization are often barriers to obtaining a psychological report at the first opportunity. A claimant's embarrassment or shame to recount their story to someone in their community or who speaks their language is often a barrier. |

[1] See *Chairperson's Guideline 4 – Gender Considerations in Proceedings before the IRB*: 5.2 Principles of trauma-informed adjudication 5.2.1 The IRB recognizes the importance of taking a trauma-informed approach to the adjudication of proceedings involving gender considerations. The following principles should be applied by all those engaged in the adjudication process:
- lead the proceeding with sensitivity to help prevent re-traumatization through the IRB decision-making process;
- anticipate the possibility that trauma may impact a person's memory and ability to provide testimony;
- and create a safe adjudicative environment for all participants to facilitate the giving of testimony.

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| | This is most observed in divisions where the right to privacy is not yet guaranteed by the Board, such as the ID and the IAD, as claimants are correct to fear that their medical and health information could be publicly available if their case is not anonymized and sealed, and the repercussions this could have for their reputation, career and life.<br><br>Cost is often a significant barrier to obtain reports, as is the limited number of practitioners who will provide these reports, particularly where there is limited financial coverage through legal aid.<br><br>Some claimants do not have insight into their own mental health condition or challenges. They may resist obtaining a psychiatric assessment, despite the need for accommodation or potential appointment of a DR. The lack of a psychiatric assessment currently leads to challenges in filing a VP application or requesting accommodations. Often counsel (or their office staff) are in the best position to explain why, based on their experiences and interactions with the client as to why accommodations are required. In these situations, greater weight should be given to counsel's information.<br><br>For RPD hearings, applicants often refuse to get a medical report because they need to rely on a member of the community to act as an interpreter or because they fear the government authorities. Applicants who have lived under authoritarian regimes do not trust the government or the social workers, and will often refuse to obtain much needed medical or psychological reports.<br><br>As noted, the Board should recognize the practical reality that some symptoms may not be apparent when working with a claimant on their Basis of Claim and only become apparent when preparing for the hearing, and some symptoms may only arise as a result of the hearing being scheduled or days prior to the hearing in a hearing preparation. As a result, vulnerable person applications or accommodation requests may be made late, and the expert evidence on which they are based may be late and based on a single assessment.<br><br>The Guidelines should caution Board Members against making assumptions or rendering negative inferences based on the fact that the expert evidence is based on a single and/or recent assessment. Just as Board Members are competent to make credibility determinations after a single two-to-three-hour hearing with a claimant, mental health professionals are competent to make diagnosis in a single assessment. Given the expertise of mental health |

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| | professionals and the independent nature of this evidence, it should be of a presumptively high probative value. |
| 8. To what extent do you feel that persons appearing before the IRB understand the contents of the expert (medical, psychological or psychiatric) reports they have submitted? What do you do (if relevant to your position) to assist persons in understanding the report? | Some claimants do not understand the report, and some disagree with the report. When considering an expert report that conflicts with a claimant's self-report, Board Members should consider that the claimant may be in denial, the symptoms of their disability or illness may prevent them from recognizing the disability or illness, the claimant may come from a culture where disabilities are stigmatized and therefore feels ashamed or embarrassed, the claimant may come from a culture where they are required to be docile which may hinder their ability to ask for what they need to meaningfully participate in their hearing, and other factors.<br><br>The Board should also recognize the difficulties faced by counsel to advocate for a vulnerable person designation and accommodations for claimants who do not understand or agree with these reports, particularly those with severe cognitive impairment or temporary mental states of paranoia. The Board should recognize that counsel spends significant time with these vulnerable claimants and should give significant weight to counsel submissions on how to balance the above factors before determining whether the claimant is able to understand the nature of the proceedings or can meaningfully participate in their hearing.<br><br>In some cases where the claimant does not have insight into their condition or they disagree with any suggestion that they have a mental illness, reviewing a psychiatric report with the claimant may lead to termination of communication or breakdown of client-solicitor relationship. |
| 9. The current Guideline states that "[a] medical, psychiatric, psychological, or other expert report regarding the vulnerable person is *an important piece of evidence*" that must be considered. Given the difficulties in obtaining expert reports, the IRB is exploring other ways for IRB members to consider what accommodation(s) could be provided.<br><br>a. What other types of evidence do you think could be useful for IRB members to consider in this regard?<br><br>b. Other than evidence from experts, what other tools (e.g., self-assessment questionnaires) do you think could be developed to assist members in this regard? | The current Guidelines provide an opening for expert evidence other than a psychiatric or psychological report. This openness was also encouraged by the Supreme Court in *Kanthasamy v. Canada (Minister of Citizenship and Immigration),* 2015 SCC 61, in which the Supreme Court at paragraph 42 used the term "mental health professional" rather than narrowing expert mental health evidence only to psychologists or psychiatrists.<br><br>The Board should adopt a maximalist approach to the type of evidence they will accept to support a claimant's vulnerability.<br><br>The Board should also give weight to declarations from designated representatives and social workers, which is currently not always the case.<br><br>Designated representatives are sometimes prevented from testifying. |

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| | In many cases, vulnerability or the need for accommodations arises during preparation with counsel for the hearing; information from counsel and their experiences with the claimant should be given weight.<br><br>Family members and friends who spend significant time with a vulnerable claimant or who the vulnerable client trusts are also well placed to speak to any limitations the claimant may have in presenting their case, such as issues with memory, confusion and emotional regulation. Family, friends and others in contact with the claimant may also be well placed to give anecdotal evidence of any behavior they have observed that may support the existence of a disability.<br><br>The CBA Sections encourage a self-assessment questionnaire, but are concerned that Board Members will give this evidence little to no weight. The Guidelines should encourage Board Members to give adequate weight to self-assessment questionnaires about a claimant's symptoms, while also acknowledging the caveat addressed above – e.g., that the claimant may be in denial, that the symptoms of their disability or illness may prevent them from recognizing the disability or illness, that the claimant may come from a culture where disabilities are stigmatized and the claimant therefore feels ashamed or embarrassed, or that the claimant may come from a culture where they are required to be docile which may hinder their ability to ask for what they need to meaningfully participate in their hearing. As noted, the Board should recognize that counsel spends significant time with these vulnerable claimants and should consider counsel's submissions on these issues. |