THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

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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: Review of Chairperson's Guidelines 3 (Phase 2)

We write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) in the context of Phase 2 of the Written Consultation and Review of Chairperson's Guidelines 3 (Child Refugee Claimants: Procedural and Evidentiary Issues).

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 Section is pleased to see that many of its recommendations from Phase 1 of the consultation have been incorporated, and appreciate this second opportunity to comment on Guidelines 3. The responses to the consultation questions can be found in attachment.

The CBA Section appreciates 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)

Lisa Middlemiss
Chair, Immigration Law Section

Written Consultation (Phase 2)

Review of Chairperson Guideline 3

Organization name: Canadian Bar Association, Immigration Law Section (CBA Section)

Context

The Immigration and Refugee Board of Canada (IRB) is conducting a revision of its *Chairperson Guideline 3 – Child Refugee Claimants: Procedural and Evidentiary Issues* (G3), 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.

As part of this next phase of consultations, 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 policy tools and guidance available reflect the needs of those appearing before the IRB, as well as the IRB itself.

Please note: Comments will only be accepted in the format of the template provided below; therefore, please provide your responses directly within this table. Please ensure that responses carefully correspond with the scope of each reflection question, which will be helpful to facilitate the Board's review of the feedback provided. These six questions reflect the areas which the IRB is **most focused on** in terms of soliciting your feedback. We have also appended a full copy of the draft Guideline. You may raise additional issues related to this draft in the last section of the table below (Q7). However, we kindly ask you to refrain from providing comments on format and terminology, given on-going work on these particular aspects.

Consultation Questions

Question 1:	**Excerpt from preliminary draft:**
Following the 1st phase of consultations, we heard that it would be important for G3 to define the difference between separated and unaccompanied minors. Building on this feedback, the updated G3 has expanded the definitions on the categories of minors appearing before the Board. Do you have any comments on these definitions?	There are three categories of minors who appear before the IRB. Reference to these categories is made throughout this Guideline to highlight unique procedural and evidentiary issues. ● **Accompanied minors:** minors who arrive in Canada at the same time as their parents or join their parents in Canada. ● **Separated minors:** minors who are separated from both parents or from their legal guardian, but not necessarily from other relatives. ● **Unaccompanied minors:** minors who are alone in Canada without their parents or anyone who purports to be a family member or legal guardian.
The CBA Section appreciates the use of new terminology to distinguish various types of child refugee claimants. We a child-first approach should always prevail, irrespective of the category under which they fall (accompanied, unaccompanied, separated minors and all those not captured in the proposed definitions of categories). As such,	

minors should not be singled out as a result of the existence or non-existence of a definition or category that applies to them.

Removing the language around "family members" and "relatives" releases the Board from the assumption that extended blood family members have guardianship/custody of the child – which is not always the case (e.g. adopting parents, or children conceived via surrogacy). The proposed language will still give extended blood family members consideration where they do have legitimate guardianship or custody rights, while also leaving room for persons without blood ties to show that they hold these rights.

The definition of "Accompanied minors" will be useful to prompt members to consider whether formal custody/access documentation is required, or whether authorization from non-accompanying parent(s) or guardian(s) abroad is needed. However, the CBA Section worries that some minors fall out of the definition as currently worded. Minors who are not travelling with all of their parents or guardians should be captured under the definition of Accompanied minors. This situation may arise, for example, as a result of custodial arrangements in polyamorous families, in cases of abduction, and where the accompanying parent is fleeing a conflict zone or intimate partner violence with the child.

Unique considerations are at play where a minor is accompanied by at least one person purporting to be a parent or guardian because it is unclear whether one or more non-accompanying individuals may also have parental custody or access rights. Understanding that the Board is <u>not</u> the appropriate forum for resolving complex issues of custody, the CBA Section encourages the IRB to put safeguards in place to:

- Avoid the irreparable harm to minors caused by delays in distinguishing minors who need protection in Canada with their accompanying parent, on the one hand, from minors who need protection from their "abductor", on the other.
- Ensure all children, whether accompanied or not, have the right to be heard and have access to independent counsel who can put their own narrative forward. The CBA Section recommends that the Guideline support the appointment of an independent Designated Representative (DR) and independent counsel as early as possible in the process, particularly in cases of suspected child abduction. It is every minor's right, regardless of whether they are accompanied. The Best Interests of the Child (BIOC) and the right to be heard are fundamental elements that, when ignored, leave children treated as objects of protection rather than rights holders.
- Prompt members to investigate each situation, including the formal custody/access documentation (or lack thereof). There are cases where custody/access documentation cannot be obtained or may not be determinative in Canada, such as: where the parent is fleeing a conflict zone with the child; where the parent and child come from a jurisdiction where custody/access determinations are not based on the BIOC (e.g., where guardianship or custody are automatically assigned by gender, and would not accord with fundamental human rights principles to which Canada adheres); or where the other parent cannot be located to give authorization.
- Ensure members don't fall victim to stereotypes, exceeding their jurisdiction, by attempting to make determinations on custody or possible child abduction that should fall in the purview of provincial family courts in Canada.
- Train members not to make assumptions on the custodial arrangements, including situations where a child's custody is shared between three or more persons, and not to seek contacts with the non-accompanying parent or guardian, which falls under the jurisdiction of provincial courts.
- Ensure members are trained on the importance of neutrality and the complexity of the rights outlined in Articles 3, 6, 8, 9, 12, 10 and 19 of the *Convention on the Rights of the Child*.

- Ensure members are familiarized with the UNHCR 2021 Best interest procedure and Guidelines assessing and determining the best interest of the child, particularly at pages 51, 52, 171, 173 and 174.[1]

Considering the above, the CBA Section proposes that the definition of Accompanied minors be modified as follows:

> **Accompanied minors:** minors who arrive in Canada at the same time as ~~their parents~~ one or more parent(s), or who join ~~their parents~~ one or more parent(s) in Canada.

Further commentary on this issue can be found in our response to Question 7**.**

Question 2:	**Excerpt from preliminary draft:**
Following the 1st phase of consultations, we heard that the Best Interests of the Child (BIOC) principle should be addressed from a procedural and substantive perspective. To do so, we have defined the BIOC as follows. Do you have any comments on this definition? Building on this definition, we have included substantive and procedural guidance throughout guideline.	**Definition** The BIOC is a term used to recognize that minors require special safeguards and care, and that particular attention must be paid to their interests, needs, and rights. The BIOC is recognized by the international community as a fundamental human right of a minor. Because the BIOC is a broad term, its interpretation depends on the circumstances of each case. Therefore, members must examine each case using an intersectional approach that considers how multiple identity factors may interact and affect the minor's interests. Such factors include age, gender, race, religion, cultural background, indigenous identity, past experience, past trauma, maturity, ethnicity, disability, sexual orientation, and any other factor that could impact the application of the BIOC.

This definition is too limiting. Although using "an intersectional approach" is fine, it should not be restricted to a consideration of how a child's "multiple identity factors may interact and affect the minor's interests." The term "best interests of the child" should be given a broad, non-exclusionary definition, guided by the outcome that best serves an individual child's best interests in a specific matter, and the legal rights of children to have the Board to give primacy to those outcomes in all substantive, interpretive, and procedural decisions.

To that end, the CBA Section proposes the following alternative language:

> Minors require special safeguards and care, and particular attention must be paid to their interests, needs, and rights. International law recognizes that minors have a fundamental human right to administrative decisions that center and prioritize their best interests.[2] The Board must therefore give primacy to the best interests of children in all actions concerning children - whether substantive, interpretive, procedural, or otherwise – across all four Divisions.

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1 UNHCR, 2021 UNHCR Best Interests Procedures Guidelines: Assessing and Determining the Best Interests of the Child, 2021, online.

2 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), at para. 6, online; see also Committee on the Rights of the Child, Concluding Observations: Canada, UN Doc. CRC/C/CAN/CO/5-6 (2022), at para. 42(a), online.

> It is insufficient for the Board to merely pay lip service to the BIOC and its importance. All decision-makers from every Division must seriously grapple with and give substantial weight to the rights of any affected child in every decision.[3]
>
> The content of BIOC is "highly contextual" because of the "multitude of factors that impinge on best interests". The child's right to have their best interests prioritized "must therefore be applied in a manner responsive to each child's particular age, capacity, needs and maturity".[4] It further entails "[d]eciding what (…) appears most likely in the circumstances to be conducive to the kind of environment in which a particular child has the best opportunity for receiving the needed care and attention".[5] Members must examine each case using an intersectional approach that considers how multiple factors may interact and affect the minor's interests. Without limitation, such factors include age, gender, race, religion, cultural background, indigenous identity, past experience, past trauma, maturity, ethnicity, disability, sexual orientation, etc.
>
> Outcomes that serve the best interests of the child must be prioritized even when competing considerations exist. In line with human rights principles, a failure to do so should be seen as a reviewable error.[6]

The CBA Section recommends replacing the phrase "applying the BIOC" with "centering the BIOC" wherever it appears, to emphasize that the BIOC are always the primary guiding consideration.

The CBA Section also recommends that in every case involving an Unaccompanied Minor, a minor not accompanied by all their parents or guardians, and an accompanied minor with the need to be heard individually without interference from the accompanying parent or guardian, the Board should appoint an independent DR, and ensure that the DR appoints an independent counsel as well. This will ensure the minor's views are heard by the Board without interference from parties and/or potential conflicts of interest. This measure would also protect children in cases where they may have been brought to Canada by an accompanying parent/guardian against their will, where they may possibly face abuse from the accompanying parent/guardian, or where they may have interests which are unknown to, not advanced, or even suppressed by the accompanying parent/guardian.

The UNCRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families explain that "[c]hildren should be heard independently of their parents, and their individual circumstances should be included in the consideration of the family's cases".[7]

Members should recognize that DRs may be unable to hire independent counsel in situations where the child lacks independent financial resources and lives in a jurisdiction without legal aid funding. The CBA Section recommends that the Board nonetheless ensure independent counsel so that justice is met. The Board can, for instance, name a friend of the court in those circumstances.

At s. 9.1 of the Guideline, the CBA Section recommends that the Board add the following paragraphs:

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3 *Baker v. Canada (M.C.I.)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 at par. 69-71, online; *M.M. v. United States of America*, 2015 SCC 62, [2015] 3 SCR 973 at par. 146, 201, 220, 262, online.

4 *Kanthasamy*, paras 35-37.

5 *Kanthasamy*, paras 36 and 39.

6 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), at paras. 37, 39, 40, 98, online.

7 Joint general comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No. 22 (2017) of the Committee on the Rights of the Child on general principles regarding the human rights of children in the context of international migration, UN Doc CMW/C/GC/3-CRC/C/GC/22, 16 November 2017. at para 37.

Members must examine whether minor refugee claimants face independent risks, separate from the risks faced by their family members (or other joined claimants where applicable).[8]

That said, the Board remains obliged to also consider derivative risks associated with family members. Per 185 of the UNHCR Refugee Handbook, "the principle of family unity operates in favour of dependents, and not against them."[9]

When assessing both independent and derivative risks, members must uphold the right to family reunification, and recognize the right of every child to live with their parents as enshrined in the United Nations Convention on the Rights of the Child and in the Universal Declaration of Human Rights.[10] Minor claimants cannot be expected to obviate risks by reducing or severing their ties to their family members.[11]

Although "whether a child is a refugee is […] unrelated to the question of whether it would be in the child's best interests to have refugee status",[12] the UNHCR has explained the BIOC still have a substantive aspect in refugee determinations:

> The RSD procedure must ensure that the best interests of the child are a primary consideration within the assessment of eligibility. This means that, when assessing eligibility, the best interests of the child need to be taken into account and given appropriate weight. This involves considering (and documenting in written decisions), inter alia, the potential for child-specific forms and manifestations of persecution, the appropriateness of internal flight/ relocation alternatives and assessment of the potential for harm to child upon return.[13]

As a legal principle, "if a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen."[14] Therefore, wherever a Board member interprets or applies the law, BIOC considerations should guide them, and they should seek to apply child-specific case law. Examples of questions where BIOC should offer guidance include the test for introducing new evidence at the RAD, the tests for re-opening and re-instatement of matters, questions of state protection, questions of internal flight alternatives, questions of subjective fear, etc.

With respect to the IFA test, an application of the BIOC would apply to both prongs of the test to be adequately applied in a substantive way.

Refugee determination needs to be child-sensitive. According to the Committee on the Rights of the Child:

> 74. When assessing refugee claims of unaccompanied or separated children, States shall take into account the development of, and formative relationship between, international human rights and

8 United Nations (General Assembly), 1966, *International Covenant on Civil and Political Rights*, Treaty Series 999 (December): 171 at art. 24 (1), online.

9 Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, UNHCR, December 2011, HCR/1P/4/ENG/REV. 3 at par. 119-125, online.

10 United Nations (General Assembly), 1948, *The Universal Declaration of Human Rights*, New York: United Nations General Assembly at art. 16(3), online; ICCPR, supra at art. 23(3); United Nations (General Assembly), 1966, *International Covenant on Economic, Social, and Cultural Rights*, Treaty Series 999 (December): 171 at art. 10, online.

11 *A.B. v. Canada (M.C.I.)*, 2020 FC 915 at par. 21-23, online; *Ali v. Canada (M.C.I.)*, 2020 FC 93 par. 48-50, online.

12 "2021 UNHCR BIP GUIDELINES: Assessing and Determining the Best Interests of the Child" (2021) UNHCR at 58, online.

13 *Ibid* at 59.

14 *Ibid* at 32.

refugee law, including positions developed by UNHCR in exercising its supervisory functions under the 1951 Refugee Convention. **In particular, the refugee definition in that Convention must be interpreted in an age and gender-sensitive manner, taking into account the particular motives for, and forms and manifestations of, persecution experienced by children.** Persecution of kin; under-age recruitment; trafficking of children for prostitution; and sexual exploitation or subjection to female genital mutilation, are some of the child-specific forms and manifestations of persecution which may justify the granting of refugee status if such acts are related to one of the 1951 Refugee Convention grounds. States should, therefore, give utmost attention to such **child-specific forms and manifestations of persecution** as well as gender-based violence in national refugee status-determination procedures.

75. Staff involved in status-determination procedures of children, in particular those who are unaccompanied or separated, should receive training on adopting an **application of international and national refugee law that is child, cultural, and gender-sensitive**. To properly assess asylum claims of children, information on the situation of children, including those belonging to minorities or marginalized groups, should be included in government efforts to collect country-of-origin information.[15]

Members should keep in mind that minors – especially accompanied minors and – can be reluctant to reveal information about the full range of risks they face. Their hesitancy may be motivated (in full or in part) by an alienation from one or both parents, a conception of loyalty to their families, or by fear of negative reactions from their families which may place their security, health, finances or education at risk. These concerns are especially applicable to girls, who experience elevated risks of gender-based violence, including through forced marriage, domestic violence and trafficking.[16] Post-traumatic symptoms may also impede minors from recalling or testifying effectively about their traumatic histories.

Question 3:	**Excerpt from preliminary draft:**
Following the 1st phase of consultations, we heard that the guideline should address situations where a minor becomes an adult while their case is still being processed. Building on this feedback, the updated G3 has included guidance on this matter related to the designated representative. Do you have any comments on this guidance?	**Becoming an Adult** When a minor turns 18 years old and their matter is still being processed, the designation of the representative ends. Members ~~may~~ should consider how the former DR can continue assisting in the proceedings, if the claimant wants this. For example, they may be called by the member to act as a witness or a support person. As part of this consideration, Members must consider the unique vulnerabilities experienced by the young person in their individual transition to adulthood. Where the DR was also designated because the minor is unable to appreciate the nature of the proceeding, the DR will continue after the minor's 18th birthday. If the initial designation was only based on the subject of the proceeding being a minor, and it appears that they are not able to appreciate the nature of the proceedings, the member must make a designation on this ground if the DR is to continue after the minor's 18th birthday. These issues should be anticipated and discussed with the parties, their counsel and the DR before the minor's 18th birthday.

15 UN Committee on the Rights of the Child (CRC), General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1 September 2005, CRC/GC/2005/6, at para 74-75, online.

16 UN General Assembly, Report of the Special Rapporteur on violence against women and girls, its causes and consequences: Custody, violence against women and violence against children, 13 April 2023, A/HRC/53/36, at para 12-19 and 36-39.

Allowing the Designated Representative to continue assisting after the child turns 18 is a positive change. The DR and child are often deeply invested in each other, and allowing for continuing assistance provides the former child with a sense of security and consistency.

However, the CBA Section recommends stronger language to frame the continuing involvement of the DR as the default expectation. Instead of saying the Members *may* consider how the former DR can continue assisting in the proceedings, the Guideline should say Members *should* consider it. That change would not make it mandatory for the Member to give the DR some continuing role; it just means the Member must always consider whether a continuing role is appropriate and act accordingly.

As part of this consideration, the Guideline should direct members to consider the unique vulnerabilities experienced by the young person in their individual transition to adulthood (as we recommended in our last consultation) as well as the views and desires of the young person.

In addition, the CBA Section recommends that the Guidelines direct Members to actively expect and request that DRs will retain counsel for their charges. The Guideline should also cite the following sources of international law in support:

- 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), at paras. 69, 72, online.
- 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), at paras. 36, 37, online.
- 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), at para. 17, online.
- UNHCR, Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees , at para. 69, online.

Legal representation for children is an access to justice issue tied to the fundamental right of participation. The UDHR and ICCPR also recognize the right to "legal personality" and the right to equality before the law without discrimination, including the right to a fair hearing. These rights apply equally to children, including all fair hearing guarantees, while enjoying at the same time the right to special protection because of their status as children. All legal guarantees and safeguards at all stages of all justice processes concerning children must be respected, including due process, the right to privacy, the guarantee of legal aid and other appropriate assistance under the same or more lenient conditions as adults, and the right to challenge decisions with a higher judicial authority.[17]

[17] Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)*, UN Doc. CRC/GC/2003/5 (2003), at par. 24, online; Human Rights Council, *Report of the United Nations High Commissioner for Human Rights: Access to Justice for Children*, UN Doc. A/HRC/25/35 (2013), online; Human Rights Council, *Right of the Child: Access to Justice*, UN Doc. A/HRC/25/L.10 (2014) at pars. 3, 9, 11, online; International Association of Youth and Family Judges and Magistrates, Guidelines on Children in Contact

The CBA Section also recommends that the following be added to the Guideline:

> The identity, views, interests and desires of a minor will usually evolve as they age into adulthood and gain the capacity to make independent choices. Keeping in mind that a minor has no direct control over whether a claim is filed in their name, or over how their case is presented (both procedurally and substantively), the Board should show as much understanding and flexibility as possible where a minor reaches adulthood and requests a fresh opportunity to present their case (or to amend how their case was presented previously).
>
> Members should be particularly mindful of this principle where the former minor had their matter originally filed or joined with the claim of their accompanying parent/guardian. In these situations, the claim as originally filed will often have centered on the parent/guardian's history, interests, identity, risks etc. while those of the minor may have been ignored or minimized. Once a minor reaches adulthood, their relationship with their parent/guardian changes. Their interests, identity, beliefs, desires etc. may have shifted considerably – and may no longer align with those of their parent/guardian. Therefore, minors entering adulthood should be provided with more safeguards to ensure they have a meaningful opportunity to present their case.
>
> Members should not delay a matter in order to allow a minor party to turn 18.
>
> Even after a minor turns 18, members should remain alive to the fact that maturation is a gradual process and that the concerns above may continue to apply to a lesser extent to young adults – especially those young adults under the age of 22 who are considered by the Regulations to be dependent children.[18]
>
> In the *Citizenship Act*, the rights of the minor are crystallized at the time of filing the application. The minor should not be penalized when the Board controls processing delays. The rights of minor children abroad are also crystallized at the time of filing the refugee claim. These are examples where the law is alert and attentive to the BIOC.
>
> The CBA Section recommends that the Board follow these examples in protecting minors' substantive rights.

with the Justice System (2017), online, 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, at pars. III(A)(2), 37, 38, 40, online.

18 *Immigration and Refugee Protection Regulations*, SOR/2002-227 at s. 2, 61(6).

Question 4:	**Excerpt from preliminary draft:**
Following the 1st phase of consultations, we heard that the guideline should address the importance of taking a child-sensitive approach whenever a minor is testifying. Do you have any comments on this guidance?	**Child-Sensitive Approach to Questioning** A child-sensitive approach to questioning should be used whenever a minor is testifying. Questioning minors should be done with the highest degree of sensitivity, care, and consideration to minimize any negative impacts that the hearing process may have and to elicit the most reliable testimony A child-sensitive approach to questioning involves taking steps that allow meaningful participation in the process, in accordance with the child's views, and creating an environment that is the most favourable for the minor to respond to questions. Questions should be adapted to take into account barriers that may inhibit testimony. For instance, questioning a minor should: ● use plain language to explain the process to the minor throughout the hearing; ● adopt an informal approach to questioning, like a conversation, rather than a question-and-answer format; ● discuss any concerns that the minor may have throughout the hearing; ● be attentive to limitations that could impact the minor's understanding of the questions. ~~The formulation of questions should take into consideration~~ Members should explain procedures, principles, decisions, and questions to minors in simple terms that are appropriate to the age of the minor, their maturity, level of education, cultural background, gender, and other factors that could impact their understanding. Members should be aware that these factors can also impact the level of information a minor may have about an issue; ● actively take steps to ensure the minor understands the questions and procedures, and take the necessary time to explain concepts again and adjust their language where it appears the minor is confused; ● avoid asking a minor to speculate about matters of which they have no knowledge. For example, in the refugee determination context, minors may not be aware of the motives of an agent of harm; and ● take particular care to avoid re-traumatizing a minor where there is evidence of past trauma.

The current draft suggests:

- *adopt an informal approach to questioning, like a conversation, rather than a question-and-answer format*

The CBA Section recommends adding an additional paragraph or footnote with the following corollary:

> While it is important for a child to feel as safe and comfortable in the hearing room as possible, and it is important for a Member to establish some level of trust with minor witnesses, it is equally important to ensure minors clearly understand the nature of the proceeding and what is at stake. A minor should not be induced

into thinking the Member is their friend, or that the Member's role is to promote, defend, or advocate for their interests. Therefore, it is critical that the Member explain their role at the outset of the hearing and verify that the minor understands.

The CBA Section also recommends adding the following paragraphs:

Children should only testify in the presence of their independent Designated Representative and their independent counsel. If either the Designated Representative or counsel wish to interject with procedural objections or suggestions, or to provide important context, the Member should allow them to do so and give their feedback serious consideration.

Members have broad discretion to tailor procedures to make them more child-sensitive. Where permitted by law, and where determined appropriate after considering the views of the minor as expressed through their Designated Representative, the Member may allow the following accommodations (among others) to increase the minor witness' sense of safety and comfort, to reduce the potential for trauma or re-traumatization, and to solicit more reliable testimony:

- Allow the child to testify outside the hearing room in a private more informal Board office
- notify the minor's Designated Representative or Counsel of the Member's questions in advance, and either
  - allow them to put those questions to the minor at the hearing
  - allow them to help the minor prepare answers in the form of a written affidavit
  - allow them to pre-record the minor's answers outside the hearing room
- allow the minor to testify in an alternative, informal setting instead of a hearing room
- create a more informal setting within a hearing room
- allow the minor to provide evidence by videoconference
- allow a support person to participate in a hearing
- vary the order of questioning
- exclude non-parties (including family members) from the space where questioning takes place
- provide a panel and interpreter of a particular gender
- allow any other procedural accommodations that may be reasonable in the circumstances.

Where there is reason to believe that a minor is hesitant to testify because they will be heard by other parties (especially family members), the Member should strongly consider separating the minor's proceeding from that of other parties where possible to ensure the minor's right to full participation in the proceeding is not compromised by undue pressures.

Question 5:	**Excerpt from preliminary draft:**
Following the 1st phase of consultations, we heard that the guideline should enhance the evidentiary section to include guidance on gathering and assessing evidence. Do you have any comments on this guidance?	**Evidentiary Issues** **Eliciting Evidence** All parties to a proceeding, including a minor, have a right to be heard. However, there are circumstances where it may not be appropriate or necessary to call upon a minor to provide oral testimony, having regard to the particular circumstances of that minor, including their views**.** For example, evidence on the file may indicate that the hearing environment could be triggering for a minor who has experienced trauma. Additionally, a minor may not have witnessed events that are central to the matter or may not have been privy to certain information involving adults. In some cases, the minor may be too young or may not have the sufficient level of maturity to provide testimony.

	For these reasons, an assessment should be made as to what evidence, if any, a minor is able to provide and the best way to elicit that evidence. When deciding whether to question a minor, members should consider their age and maturity level, background, cultural context, whether the minor may have experienced trauma, and whether they have expressed a desire to testify. To minimize any potential impact of calling upon a minor to testify at a hearing, members should consider alternative sources of providing evidence where appropriate (see section below). **Alternative Sources of Evidence** Members can consider the following alternatives to a minor's testimony: From the minors themselves ● affidavit evidence or pre-recorded testimony; ● records of testimony provided by the minor in other proceedings From others who have a positive relationship with the minor (viewed from the minor's perspective): ● evidence presented by the DR; ● evidence from family members; ● evidence from members of the minor's community; ● evidence from teachers, social workers, community workers and others who have interacted with the minor (e.g., coach, trainer, priest, community leader); and/or ● evidence from medical personnel, if available; Documentary Evidence ● documentary evidence of persons similarly situated to the minor; and ● country conditions documentation.

The CBA Section is pleased to see that "maturity level" has been incorporated into the guideline.

We recommend that the guidance on case conference at s. 6.7 of the draft Guidelines be expanded and strengthened. We would recommend that s. 6.7.1 be amended as follows:

6.7.1 The use of pre-hearing conferences is required for all cases that involve minor parties to:

- identify procedural accommodations including whether and how the minor will provide testimony;
- identify and communicate the issues they intend to focus upon at the hearing after their initial review of the matter (without limiting the Member's ability to raise new issues based on evidence that arises in disclosure or at the hearing);
- identify potential issues that may affect how the matter will be triaged, or possibly separated or joined (which may include anticipating the transition of the minor into adulthood during the proceeding);
- Discuss the importance of ensuring a confidentiality or anonymization order can be implemented to ensure the minor's right to privacy is protected if there is an appeal and the file is not already sealed; and

- identify what evidence can be produced.

6.7.2 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. The Board should ensure the child trusts the Designated Representative. 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).

6.7.3 The Board should identify matters involving minor parties as quickly as possible, and complete the pre-hearing conference before the hearing is scheduled; this is because the issues regarding accommodation and evidence determined at the pre-hearing conference will determine how much time is required to prepare for the hearing.

6.7.4 The minor's Designated Representative and Counsel must be allowed to present fulsome evidence and submissions during the pre-hearing conference. The Member must give this evidence and these submissions serious consideration, and make responsive decisions that take them seriously.

6.7.5 The Member who oversees the pre-hearing conference should generally be the same Member who hears and decides the claim, unless the minor requests a different Member through their Designated Representative or Counsel (ex. where the minor requests a Member of a certain gender, or because the Member's conduct during the conference had a negative effect on the minor's health).

6.7.6 Members should use case conferences throughout the proceedings to address new issues as they arise.

Question 6:	**Excerpt from preliminary draft:**
In line with Question 5, the updated G3 provides enhanced guidance on determining credibility when assessing evidence. Do you have any comments on this guidance?	**Credibility** There is nothing inherently unreliable about a minor's testimony. However, minors have different reasoning and communication skills than adults that can impact how they testify. Members should consider the age and level of maturity of the minor, as well as any barriers that could inhibit testimony ~~about certain subjects~~ when assessing the weight to be given to the testimony of a minor. Credibility determinations must be made on a case-by-case basis and take into consideration the following factors: ● Minors may not be able to present evidence with the same degree of precision as adults with respect to context, timing and details. For example, in the refugee determination context, a minor may indicate that men in uniform came to the house but not know what type of uniform they were wearing. Similarly, a minor may not know the political views of their adult family members. ● A lack of precision does not necessarily mean that the minor is not credible or is unreliable. If a minor's testimony lacks detail about certain events, members should consider whether they are able to infer details from the evidence presented or rely on corroborating evidence. ● Inconsistencies in a minor's testimony may not be an indication that they are being dishonest. A minor may not express the

	same details of an event if required to recall them numerous times. • Testimony of minors may be impacted by both their current age and age at which events took place. This impacts both their understanding of events and also their ability to recall or explain events. • Notes taken by a border officer at the point of entry should be considered with a careful assessment of the conditions in which the interview was conducted. This can include: the circumstances of travel and arrival prior to the interview, whether the minor was accompanied, the types of questions asked to the minor, and any other factor that may have impacted the minor's ability to answer questions. The Board member should not attack the credibility of the minor for questions asked at the port of entry if there was no Designated Representative appointed at the point of entry and no Counsel advocating for the minor's interests. Using POE notes to impugn the credibility of a minor has the potential to bring the administration of justice into disrepute.

As advised in our previous submission:[19]

> 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).

Section 7.3.4 of the draft Guideline reads:

> 7.3.4 When a minor of 14 years of age or older testifies, they should be required to do so under oath or solemn affirmation.

The Guideline should instead adopt s. 16 of the *Canada Evidence Act* regarding evidence collection from minors aged 14-17 whose capacity is challenged, similar to how s. 7.3.5 adopts s. 16.1 of the CEA to guide how the Board collects evidence from minors under age 14:

> 7.3.4 Before permitting a minor of 14 years of age or older to testify, the Board must first conduct an inquiry to determine (a) whether the minor understands the nature of an oath or a solemn affirmation; and (b) whether the minor is able to communicate the evidence. Such minors shall testify under oath or solemn affirmation if and only if they can meet both requirements. If the minor does not understand the nature of an oath or solemn affirmation, but can communicate evidence, then they may testify on a promise to tell the truth; a Member should not ask the minor any questions about their understanding of the nature of their promise to tell the truth. If the minor cannot communicate the evidence, then the Board should not allow them to testify.

Footnotes at s. 7.3.4 and s. 7.3.5 should explain that these guidelines are based on the *Canada Evidence Act*.

[19] CBA, Written Consultation: Reviews of Chairperson's Guidelines 3 and 8, November 22, 2022, online.

Question 7:

Are there any other points you would like us to consider, in addition to what you included above or what you previously shared during the first phase of consultation?

RESPONSE RE: S. 9.5.5: HAGUE CONVENTION

While we appreciate that the Board has taken steps to provide guidance on refugee cases where there may be allegations of child abduction, we have significant concerns about some of the suggested procedural steps and text in sections 9.5 to 9.5.17. Our suggested rewording is below, along with an explanation as to our concerns.

General Concerns

The CBA Section is concerned that the overall tone of sections 9.5 to 9.5.17 lacks neutrality and that these sections are written with the presumption that wrongdoing, i.e., child abduction, has occurred. This is seen in the repeated references to "evidence of child abduction," instead of "evidence suggesting that a child abduction may have occurred." (See, for example, ss. 9.5.3 and 9.5.4). This lack of neutrality is reinforced by the absence of reference to the exceptions to return in both Hague and non-Hague return order proceedings (e.g., situations of harm to the child) or to the circumstances in which such cases arise (e.g., family violence). There should be no presumption of wrongdoing. Taking this approach would ultimately subvert family court procedures by assuming a result before adjudication has taken place.

Insofar as the possibility of child abduction is relevant to a potential refugee exclusion analysis under s. 98 of IRPA, exclusion is a matter for determination at a hearing with the benefit of full evidence, including consideration of the relevant *Criminal Code* defence of imminent harm and whether removal or retention of a child by a parent across international borders without the consent of the other parent may have been a response to protect the child's safety and well-being. This is seen in situations of family and intimate partner violence, a valid basis for a refugee claim for both parent and child.

Moreover, although the drafters of the Hague Convention envisioned that it would apply primarily to cases of abductions by non-custodial parents (men) from primary parents (women),[20] the majority of Hague Convention applications are brought against mothers with primary or joint primary care of children.[21] The Hague Special Commission and judges in many signatory States have acknowledged that domestic violence is frequently present in cases involving "abductor" mothers.[22] The Commission has also noted that parents who brought return

20 M.H. Weiner, "International Child Abduction and the Escape from Domestic Violence" (2000) 69 Fordham Law Review 593 at 602.

21 Hague Conference on Private International Law (HCCH), Part I - A statistical analysis of applications made in 2015 under the Hague Convention of 24 October 1980 on the Civil Aspects of International Child Abduction – Global report, HCCH, The Seventh Meeting of the Special Commission on the Practical Operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention – October 2017, Prel. Doc. No 11 A (February 2018) at 10-11, 42-43.

22 Hague Conference on Private International Law (HCCH), Domestic and Family Violence and the Article 13 "Grave Risk" Exception in the Operation of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: A reflection paper, HCCH, Special Commission of June 2011 on the practical operation of the 1980 Child Abduction Convention, Prel. Doc. No 9 (May 2011) at 3-4.

applications admitted to engaging in or being accused of domestic violence in 30 percent of Convention cases.[23] A 2003 study found that domestic violence was a concern in 44% of cases involving female "abductors."[24]

Family violence may form the basis for an exception to return under the Hague Convention, as well as international return order cases involving non-Hague signatory countries. Through various enumerated exceptions to return, the Hague Convention recognizes that non-return of a wrongfully removed or retained child can sometimes be justified. The general concept that a prompt return is in the best interests of the child can therefore be rebutted in individual cases where an exception is established. The child's views can also be instrumental in establishing an exception.

The Guideline, as drafted, lacks this required nuance. The Guideline emphasizes the obligation "to ensure that a minor is promptly returned to their home country if they were abducted" without referencing the exceptions to return, including the circumstances of domestic violence in which such cases frequently arise, or the threshold needed to establish the child's country of habitual residence to determine if the Convention even applies. As a result, the Guidelines lack neutrality and appear to presume wrongdoing.

This is also reinforced by grouping together "abduction" and "trafficking in persons." It suggests that these distinct concerns should be separated, with the provisions on trafficking moved to a different section of the Guideline. While it is difficult to imagine any positive connotations to human trafficking, we have noted situations where the removal/retention of a child by a parent across international borders without the consent of the other parent may be consistent with the child's safety and well-being – for example, in situations of family violence.

Replace "Hague Convention" with "International Family Law Return Proceedings"

The heading of this section should be re-worded as "International Family Law Return Proceedings" as not all proceedings to return children after an alleged child abduction fall under the Hague Convention. Each province and territory has family law legislation relating to the return of children where the country of potential return is not a signatory to the Hague Convention. For example, in Ontario, a request for return to a non-Hague country would be dealt with under s. 40 of the *Children's Law Reform Act*, rather than s. 46 which incorporates the Hague Convention.

Similarly, as not all return order proceedings fall under the Hague Convention, the phrase "Hague Convention" should be replaced with "international family law return order proceedings" or "international return order proceedings," with the guidelines applying to all return order proceedings generally, rather than only Hague Convention proceedings. An example would be in s. 9.5.11 where it would be more accurate to refer to "a return order proceeding", rather than Hague Convention: "when there are ongoing international return order proceedings involving a minor…"

Response re: s.9.5.2: Procedural Considerations

We commend the Board for incorporating specific procedural mechanisms to enhance and bring forward the voice of the minor(s) where there are potential concerns of child abduction or trafficking. However, we are concerned about the recommendation that members "should consider" separating the claims or appeals of the minor from that of the accompanying parent in section 9.5.4. We believe that in many cases this is prejudicial to both minor and parent, as well as creating unduly complicated procedural or evidentiary issues. Further, this appears to be contrary to the Refugee Protection Division Rule 56(5), in which claims are to be joined where they involve similar

23 *Ibid*, at 3.

24 Reunite Research Unit, The Outcomes for Children Returned Following an Abduction, reunite International Foreign and Commonwealth Office (September 2003) at 35.

questions or fact and law, or where not to do so would cause an injustice. This is particularly so where the claims of the minor(s) and accompanying parent are based on the same allegation of domestic violence or child abuse by the "left behind"/non-accompanying parent, a.k.a. the alleged agent of persecution.

In practice, if the claims were separated, the minor or their DR (where the minor is too young to testify) and the in-Canada accompanying parent would likely need to act as a witness or source of evidence (written or testimonial) in one another's claim. This is particularly dependent on the age of the minor(s). If the minor is very young, the only testimony as to child abuse may be that of the "abducting" parent and the parent may be the only one able to obtain the documentary evidence from relevant sources as the minor may not be old enough to know who/what organizations might have supporting evidence. If the claims are separated, it could be prejudicial for the parent to be a witness and their testimony in the minor's hearing becomes a pre-existing statement against which testimony in their claim can be compared. For the parent alleged to have abducted the minor, the defence to child abduction and exclusion is that of imminent harm to themselves and/or child. If they do not have access to the materials from the minor's refugee claim (i.e., testimony of designated representative, disclosure, final RPD decision), this would significantly prejudice their refugee claim as well and prevent them from providing a defence, potentially leading to exclusion from refugee protection. This ultimately would not be in the best interests of the child.

We acknowledge that there may be some cases where it may be appropriate to separate the claims – but only in circumstances where there is clear evidence directly from the minor of the absence of child abuse or domestic violence. This can occur during an IRB hearing or a pre-hearing conference. However, in those limited cases, appointing a separate, non-parental DR or independent counsel would allow withdrawal of the claim for the minor as per their instructions.

The CBA Section suggests removing the suggestion that the Board should consider separation of the claims. Instead, appointing a separate DR should occur early in the hearing process so they are able to determine the wishes of the minor and take appropriate steps. This way, the Board remains neutral. We also encourage that the minor, regardless of age, be given the opportunity to speak directly to the Board Member, with a DR or alone (as the child wishes), to make their wishes clear and so their voice can be heard in the proceedings.

In light of the concerns about neutrality and procedural considerations, we also suggest corresponding text changes in s.9.5.1, 9.5.6- 9.5.18 [Note: added text is underlined and new additional footnotes added; original footnote text is removed for ease of reference]:

> 9.5 Safeguarding the Interests of Minors
>
> 9.5.1. Members should consider the following procedural precautions when there is a concern that a minor may have been abducted[57] or when their interests may not otherwise align with those of the principal claimant. Examples include:
>
> - order advising the counsel on file of the potential conflict of interest;
> - ordering that the hearing be conducted in-person to ensure that the minor is not being pressured to testify in a certain way and that no unauthorized persons are present at the hearing;
> - making a confidentiality order to ensure the matter is or remains private throughout the process and in appeal;
> - appointing a third-party DR, not related to the minor;
> - ensuring that independent counsel is appointed by the independent DR for the minor; and
> - holding conferences with counsel for the parties to discuss concerns.

[We suggest that ss. 9.5.2-9.5.4 be removed as unnecessary and repetitive (see above for additional concerns re s. 9.5.4).]

9.5.6 Under the Hague Convention, Canada is obligated to ensure that a minor is promptly returned to their home country if it is established that they were wrongfully removed or retained in Canada[61] and that none of the exceptions to return under the Convention apply.[25] Provincial family law legislation also addresses the return of wrongfully removed/retained children, as well as exceptions to return, when a country that is not a party to the Hague Convention is involved. A minor who is the subject of a Hague or other international family law return proceeding may also require refugee protection.

9.5.7 Provincial family law courts in Canada have jurisdiction to decide Hague and non-Hague return order proceedings. An appeal court has found that there is no operational conflict between Canada's obligations under the Hague Convention and the Refugee Convention or IRPA.[26] When the RPD accepts a minor's refugee claim, it creates a presumption that there is a risk of persecution upon return to the home country, which meets an exception to return under the Hague Convention, as well as provincial family legislation involving non-Hague countries.[27]

9.5.8 Canadian courts have recognized that the outcome of refugee protection proceedings is an important consideration in family law return order proceedings involving both Hague and non-Hague countries,[28]despite the delay that may be caused to that application by awaiting the outcome of the refugee claim.[29] The Hague Convention contemplates that applications will be decided expeditiously and that an explanation for the reason for the delay may be requested if the judicial authority has not reached a decision within six weeks from the date of commencement of the proceedings.[30] In some jurisdictions, the rules governing family law proceedings have enshrined the requirement to dispose of international return order cases promptly, and not later than six weeks after the case is commenced if the Hague Convention applies.[31] Therefore, refugee claims and appeals involving international return order proceedings should be prioritized and expedited where possible.

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25 Convention on the Civil Aspects of International Child Abduction (Hague Convention), arts. 1 and 3, online.

Art 1: The objects of the present Convention are -

a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State...

The removal or the retention of a child is to be considered wrongful where -

a) it is in breach of rights of custody attributed to a person, […], either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention. (Art. 3)

Pursuant to the test established by the Supreme Court of Canada in Office of the Children's Lawyer v. Balev, 2018 SCC 16, the child's habitual residence must be determined as a threshold issue to establish the applicability of the Hague Convention. Rights of custody must also be established on an evidentiary basis.

26 A.M.R.I. v. K.E.R., 2011 ONCA 417, online.

27 A.M.R.I. v. K.E.R., 2011 ONCA 417, online. Followed in Borisovs v. Kubiles, 2013 ONCJ 85 (CanLII), online; and Sabeahat v. Sabihat, 2020 ONSC 2784 (CanLII), online. See also M.A.A. v. D.E.M.E., 2020 ONCA 486 (CanLII), online.

28 *Ibid.*

29 Borisovs v. Kubiles, 2013 ONCJ 85 (CanLII), online, para. 53; M.A.A. v. D.E.M.E., 2020 ONCA 486 (CanLII), online.

30 Hague Convention, *supra*, Article 11.

31 *Family Law Rules,* O. Reg. 14/99, under *Courts of Justice Act,* R.S.O. 1990, c. C.43; R.37.2 Loi Sur Les Aspects Civils De L'enlèvement International Et Interprovincial D'enfants, article 27.

9.5.9 A Canadian court decision regarding a return order proceeding is not binding on RPD or RAD proceedings; nevertheless, court findings should be taken into account[32] where they are directly relevant to the facts before them.

9.5.10 To ensure the minor's interests are adequately represented where there are international return order proceedings, the RPD and RAD must be vigilant in applying the BIOC to the procedural considerations. ~~Since the parents have expressed opposed views, the members should also strive to obtain the best available evidence on which to make a decision about the risk faced by the minor.~~

9.5.11 Where there are ongoing international return order proceedings, a third-party, non-parent independent DR should be appointed. The minor should also have their own independent counsel.

9.5.18: ~~In a case where there is evidence that a claimant has committed an abduction or a trafficking offence abroad, before entering Canada~~, Members should consider whether exclusion is warranted under Article 1F(b) of the *Refugee Convention* and should notify the Minister where the Rules of the RPD require it. See also G4, paragraph 11.7.

Removal of s.9.5.13: This section suggests that the non-accompanying parent be called as a witness in the refugee proceeding. This is inappropriate where the non-accompanying parent is in fact the named agent of persecution for the accompanying parent and minor.

The non-accompanying parent should not be called as a witness as this parent may be the named agent of persecution.

Not only is the agent of persecution directly adverse in interest, but calling the agent of persecution to testify is not commensurate with the role of the Board or its own Guideline 4. It is a problematic precedent as the Board would be inviting alleged agents of persecution to take a role as a witness in the confidential refugee proceedings of their target of persecution. This opens the door to other alleged agents of persecution becoming involved as witnesses or providing disclosure. For example, would the Board invite consular officials to testify on behalf of the country against which refugee protection has been requested or request a representative from a persecuting organization to attend and provide testimony? If not, it also raises concerns as to why this group of claimants (parents and their children making refugee claims based on domestic violence or child abuse) are to be treated differently by the Board in inviting their agent of persecution to provide adverse testimony.

Calling the agent of persecution as a witness may also have the unintended effect of leading to further risk or generating a further *sur place* risk. Even where the non-accompanying parent may be aware of the refugee claim and its general basis (for example, that it is based on alleged domestic violence or child abuse), they may not be aware of the particular details put forward by the claimants. Questioning by the Board or Minister would reveal this information, potentially creating a further risk for the claimants in Canada or adding a *sur place* risk to the claim. This also raises concerning procedural issues not anticipated by the Guideline. For example, as a witness, would they be provided with the Basis of Claim for the minor or accompanying parent, so they can give responsive testimony or would the alleged agent of persecution be allowed to file disclosure to support their testimony?

Such procedures should be left to the family courts, which are specifically designed to address the competing claims of parents in an adversarial context.

[32] *Pacificador v. Canada (MCI),* 2003 FC 1462, at para. 83, online. [Note – the wording change suggested is from the decision in *Pacificador*].

It is also unclear in the context of refugee proceedings as to the weight that could be placed on testimony from such an adverse witness. Unlike in the family return order proceedings, *Maldonaldo* would apply as a principle to the testimony of the claimants but not the non-accompanying adult/agent of persecution. This would not be in aid of obtaining the best evidence as this testimony is not objective and is adverse.

We suggest that s. 9.5.13 be removed from the Guidelines as it is inconsistent with both the central consideration of Guideline 3, that of the BIOC, and the principles in Guideline 4.

Conflicts Between Designated Representatives and the Minor Whose Interests they are Meant to Safeguard

Where a minor has experienced significant trauma, the Board should consider on their own initiative (and certainly where raised by counsel) to appoint an independent DR for the minor regardless of whether there is a potential conflict of interest with a parent/guardian. An independent DR would be able to present testimony on behalf and in lieu of the minor, ensuring the minor has an independent voice from that of their parents in the proceedings and that their interests are fully represented.

The Board should also consider adding a paragraph reminding members that they are bound by the mandatory reporting requirements of provincial or territorial child protection legislation where they suspect ongoing abuse.

Regarding the guidelines on terminating a DR at s. 5.5.4, the following paragraph should be added:

> The minor's safety is the paramount consideration in this determination. Therefore, if seeking the views of the current Designated Representative or another party would risk the minor's safety, the Member should proceed without soliciting that information.

The associated footnote 15 should be amended to expand the listed examples:

> A person who supports practices that threaten the child's physical or mental health or integrity (ex. female genital mutilation) or holds hostile views about the child's identity or beliefs (ex. their sex, gender and gender expression, sex characteristics, sexual/romantic orientation, relationships, ethnic or national identity, religious or political beliefs and activities) would be seen as no longer being able to act in the best interest of a minor.

At s. 6.4.2, it is important to highlight that accompanied minors at times have <u>interests</u> that are distinct from those of their parents in addition to distinct rights.

At s. 6.4.4, the CBA Section recommends that the Guideline list additional factors to consider when determining whether to require a minor should appear at the hearing. While the Guidelines includes recommended procedures elsewhere through which the parties can raise these factors, it is also important to direct members to actively consider these factors at their initiative, without prompting from the parties:

- whether the subject matter of the expected testimony is likely to retraumatize or otherwise trigger negative health effects for the minor;
- whether the minor has meaningfully, robustly and effectively expressed their views and interests prior the hearing through other means.

The Guidelines should be amended to encourage members to raise the possibility of anonymization as a standard practice wherever a minor is involved, in keeping with the trend in the family courts. Section 6.8.2 should be replaced with the text below. The Board should also consider incorporating automatic anonymization of all children's information and the exclusion of non-party observers from hearings involving children into the ID and IAD Rules or into their policies. Consideration should be given to making confidentiality orders in all RPD and RAD

proceedings such that no information can be shared without authorization from the claimant or their lawyer, or by further order of the RPD/RAD on notice to the claimant and their lawyer.

> Privacy is vital to children's agency, dignity and safety, and for the exercise of their rights.[33] This principle is enshrined in article 16 of the UNCRC which speaks explicitly to a child's right to privacy; the constitutional protection accorded to privacy in Canada; [34] and appellate jurisprudence highlighting the heightened privacy interests of children.[35]
>
> Even in public proceedings, members may order that sensitive information be treated as confidential. Wherever a minor is involved in a public proceeding, members should presumptively treat their information as warranting privacy consideration, and actively seek submissions from the Designated Representative as to whether any information on the record would risk frustrating the minor's best interests if made public. Where it is ambiguous whether making the facts of the case public could endanger the minor's interests, the Member should err on the side of caution and exercise their powers to anonymize the case facts in all public-facing documents and to close the hearing to outside observers.
>
> Moreover, members should avoid seeking documents from provincial court proceedings that are statutorily confidential or subject to publication bans/sealing orders (e.g., documents/records from child protection cases, *Youth Criminal Justice Act* matters, adoption records, family law parenting cases, including Hague and non-Hague return order proceedings).
>
> Members must be mindful that, at times, parents accused of family violence (including those identified as agents of persecution in refugee matters) will attempt to provide information/evidence from family law proceedings to the Board or to the Minister in the context of refugee proceedings involving the child or their other parent/guardian. In these situations, the Board must always act in a manner that puts the minor's safety first. The Board should not permit itself to become the agent of family violence, or allow the Minister to do so.

The Immigration Division and Admissibility Hearings

It is positive that the proposed guidelines state that members must consider whether the minor had the requisite mental capacity to understand the nature and effects of their actions. The CBA Section recommends that the Guideline go further, to include a clear statement regarding a positive duty to elicit testimony on this topic.

An assessment of the minor's maturity level at the time of the hearing, as it relates to issues of credibility, is distinct from an assessment of the minor's maturity level at the time of the alleged acts underlying the inadmissibility allegations. Members must exercise caution not to allow their assessment of one to cloud the other.

The Guideline notes at section 10.2.4 that members should also consider the environment and context in which the minor's actions occurred as well as the possibility of duress or coercion. the *UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* offers guidance on relevant factors to consider in the exclusion context. These factors should be considered in the admissibility context as well. Specifically:

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33 Committee on the Rights of the Child, General Comment No. 25 on children's rights in relation to the digital environment, UN Doc. CRC/C/GC/25 (2021), at para. 67, online. *See also* Human Rights Council, *Artificial Intelligence and privacy, and children's privacy*, UN Doc. A/HRC/46/37 (2021), at paras. 67-71, 75-76 and 79, online.

34 *Jones v. Tsige*, 2012 ONCA 32, at paras. 41, 43, 44 and 46, online; *Yenovkian v. Gulian*, 2019 ONSC 7279, at para. 59, online.

35 *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at paras. 17 and 18, online; *R. v. Jarvis*, 2019 SCC 10, para. 86, online; *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, at paras. 51 and 73, online.

> 92. Where mental capacity is established, particular attention must be given to whether other grounds exist for rejecting criminal liability, including consideration of the following factors: the age of the claimant at the time of becoming involved with the armed group; the reasons for joining (was it voluntary or coerced or in defence of oneself or others?); the consequences of refusal to join; the length of time as a member; the possibility of not participating in such acts or of escape; the forced use of drugs, alcohol or medication (involuntary intoxication); promotion within the ranks of the group due to actions undertaken; the level of education and understanding of the events in question; and the trauma, abuse or ill- treatment suffered by the child as a result of his or her involvement. In the particular case of child soldiers, questions of duress, defence of self and others, and involuntary intoxication, often arise. Even if no defence is established, the vulnerability of the child, especially those subject to ill- treatment, should arguably be taken into account when considering the proportionality of exclusion for war crimes or serious non-political crimes.
>
> 93. At all times, regard should be had to the overwhelming obligation to act in the "best interests" of the child in accordance with the 1989 Convention on the Rights of the Child.

If the Member determines the minor has the mental capacity to understand the nature and effect of their actions, the Member must still consider, in cases where duress or coercion is invoked, the minor's age, mental capacity and other vulnerabilities when assessing how the minor perceived and reacted to the threat. While it may not have been reasonable for an adult in certain circumstances to take seriously a threat from a criminal organization to join, it may be reasonable in the child's circumstances to take said threat seriously.

Proceedings Where Exclusion is an Issue

The only reference in the draft Guidelines to proceedings involving exclusion is with reference to abduction and trafficking offences. The Guidelines are largely silent on proceedings involving exclusion of minors and the special considerations involved.

With respect to exclusion under Article 1F, the *UNHCR Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* provides guidance on the various factors that should be considered, including: the minor's age at the time of the alleged act; the minor's mental capacity at the time of the alleged act; the level of education and understanding of the events in question; the minor's reasons for engaging in the alleged act (i.e., was it voluntary, coerced, or in defence of oneself or others?); any consequences of refusal to engage in the alleged act; the length of the minor's involvement in the alleged act; the possibility of not participating in such acts or of escape; the forced use of drugs, alcohol or medication; promotion within a group due to acts undertaken; the trauma, abuse or ill-treatment suffered by the minor as a result of their action; and the vulnerability of the minor, especially those subject to ill-treatment.[36]

Before applying exclusion under Article 1E, members must also consider the minor's higher degree of vulnerability to harm in the putative Article 1E country, whether the impact on the minor's physical and mental development if returned to the putative Article 1E country would amount to persecution, and whether there is a serious possibility the minor would be deprived of the necessities of life in the putative Article 1E country.

Section 6.5 of the Guidelines states that pre-hearing conferences are recommended for all cases involving unaccompanied minors. Pre-hearing conferences should be required for all cases involving unaccompanied minors before all divisions and, in particular, for all proceedings where exclusion is raised as an issue. Subject to the

[36] UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, at ss 91-92.

Member's right to raise exclusion upon the receipt of new information at a later date, minors should be informed that exclusion will be an issue at their hearing at the pre-hearing conference.

Pre-hearing conferences should be required for all RPD and RAD proceedings where the Minister is intervening, whether based on exclusion, credibility or another issue. Given the adversarial nature of these proceedings, it is important to determine early on whether procedural accommodations will be necessary, whether alternative ways of eliciting testimony will be more appropriate, whether there should be any variation in the order of questioning, and which issues can be narrowed. Members should ensure the minors understand the allegations made against them in the Minister's intervention.

Further, the Guidelines should urge Members to exercise great caution when considering the application of exclusion clauses in relation to a minor.[37]

BIOC Before the IAD

At s. 11, the Guideline should include the following guidance on how to conduct an H&C analysis regarding BIOC. Decision-makers tasked with performing an H&C analysis too often frame the question as whether the hardships endured by the affected children are survivable, rather than what outcome would be best for the children.

> When conducting a BIOC analysis in the H&C context, Members should approach the analysis using Justice Russell's three-step approach in *Williams*:
>
> > 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 that this factor plays in the ultimate balancing of positive and negative factors assessed in the H&C application.
> >
> > […] 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?"[38]

The Federal Court has held where an adult is still dependent on their parents, even though they are over the age of 18, then the best interests of these adult children remain a relevant consideration and need to be given considerable weight.[39] Even if these youth are not minors, the Board must – at minimum – identify their interests and the impact each of the possible outcomes of the decision would have on said interests.[40] In this way, the H&C analysis must take on the character of the BIOC analysis, even where BIOC does not strictly apply.

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37 UN High Commissioner for Refugees (UNHCR), *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, at s 91.

38 *Williams v. Canada (M.C.I.),* 2012 FC 166 at par. 63-64, online; *Sun v. Canada (M.C.I)*, 2012 FC 206 *at* par. 44-45, online; *Sebbe v. Canada (M.C.I.)*, 2012 FC 813 at par. 16, online.

39 *Ramsawak v. Canada (M.C.I.)*, 2009 FC 636 at par. 17-20. 23, online; *Naredo v. Canada (M.C.I.)*, [2000] FCJ No. 1250 (QL) at par. 20, online; *Swartz v. Canada (M.C.I.)*, 2002 FCT 268 at par. 14, online; *Yoo v. Canada (M.C.I.)*, 2009 FC 343 at par. 32, online.

40 *Motrichko v. Canada (M.C.I.)*, 2017 FC 516 at par. 28, online; *Herdoiza Mancheno v. Canada (M.C.I.)*, 2013 FC 66 at par. 27, online; *Jogiat v. Canada (M.C.I.)*, 2015 FC 501 at par. 17-19, online; *Elia Martinez v. Canada (M.C.I.)*, 2014 FC 109 at par. 27, online.