



November 18, 2022

Via email: Richard.Wex@irb-cisr.gc.ca

Richard Wex
Chairperson and Chief Executive Officer
Immigration and Refugee Board
Minto Place, Canada Building
344 Slater Street, 12 Floor
Ottawa, ON K1A 0K1

Dear Richard Wex:

Re: Stakeholder engagement and proposed agenda for IRB consultative committee meeting

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to share the CBA's proposed agenda items for the Immigration and Refugee Board's (IRB) upcoming consultative committee meeting, and to recommend process improvements for future stakeholder consultations.

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 Section has approximately 1,200 members across Canada practising in all areas of immigration and refugee law.

IMPROVEMENTS TO STAKEHOLDER CONSULTATIONS

The CBA Section notes the IRB's invitation to make a joint submission in advance of the upcoming consultative committee meeting. The CBA Section and other groups have historically made separate submissions to the board without having to consult or agree with other stakeholders and wishes to continue that practice. Separate submissions allow stakeholder organizations to fully represent the interests of their members which, in turn, generates informed discussions and healthy debate that benefits all in attendance.

The CBA Section has made submissions regarding the independence of the IRB, and we wish to reiterate CBA's recommendations as per our previous submissions.¹

¹ See [Immigration and Refugee Board of Canada's Appointments, Independence of Canada's refugee determination process](#) and [Change to IRB Selection Committee Appointment Process](#).

The CBA Section notes the tight timelines imposed on volunteers in the participating organizations, and the narrow and limited feedback welcome by the IRB. For example, the Guidelines number 3 and 8 address complex legal issues dealing with the most vulnerable members of our society, an issue that the CBA Section takes seriously. However, the timelines imposed were of just a few weeks, with little flexibility for extensions. As this work is primarily undertaken by CBA volunteers, the ability to give a thoughtful and considered response is directly tied to the IRB giving sufficient time for stakeholders' responses. For example, to prepare any CBA submission, we consult the members of the CBA Section, volunteers undertake to compile, analyze and draft a response, and responses undergo an internal review prior to release to the IRB. Each step ensures the CBA's reputation of writing quality, multisectoral and consistent submissions.

The imposed response format is also problematic because the limited scope and word count does not allow our members to fully convey their observations. As such, the CBA Section considers the invitation for feedback on Guidelines 3 and 8 as a preliminary investigation that should lead to another more substantial consultation on a more nuanced draft with a thorough review of the jurisprudence and the doctrine.

In addition to the narrowed scope of recent consultations, we note the multiple requests for engagement on the Guidelines, various other policies and Rules in short periods of time and coming from different contact points across the IRB. This lack of space between consultations has made it impossible for certain volunteers to be able to draft quality submissions. This is of the utmost importance to the Section given our vulnerable clientele and our objectives of advancing access to justice.

We thank the Board for taking our comments into consideration for future consultations.

PROPOSED AGENDA ITEMS FOR BI-ANNUAL MEETING

As requested, the CBA Section has identified three issues below that we hope will be discussed during the meeting.

1. Scheduling of hearings and hearing process

We would like to raise as an issue for discussion the Board's current practice and approach to the scheduling of hearings. We recognize that following an over two-year pandemic, there are many technical and procedural adjustments to be made regarding the practice of immigration law.

We note the overwhelming number of hearings scheduled of late by the Board, including more recent claims and claims that may not be ready for hearing yet at the Refugee Protection Division (RPD) due to claimant vulnerability and difficulty in claimants collecting the required documentation to make a thorough claim. This generates requests for postponements that could be avoided. At the same time, there is inconsistent scheduling of older claims or those sent back to the Board from re-determination at the Refugee Appeals Division (RAD) or Federal Court (FC), where some of these claims (which are ready for hearing) are not being scheduled in a timely manner.

We suggest that an efficient approach that facilitates access to justice would engage counsel to identify which claims are appropriate for scheduling and what matters are priorities for scheduling given the needs of vulnerable claimants. We also suggest that the Board propose to counsel which claims it believes are ready to schedule, with a prioritization of older claims, those pending re-determination post-RAD and FC, and those with concurrent family law proceedings. This could be done by way of setting a scheduling conference with counsel and the IRB Registry. We respectfully submit that this would be a more efficient way of proceeding to facilitate access to hearings in a timely manner when needed while permitting other clients adequate time to gather documentation before their hearing is scheduled.

In particular, we have observed that new technologies have created new challenges for claimants. For example, we have witnessed clients encountering issues obtaining required evidence on time. Many clients do not own a computer and have to use their cellphones to collect evidence and communicate with their lawyer who is navigating the online portal. In this turmoil, we noticed that self-represented clients and clients who change counsel are often questioned at the hearing for changing their narrative with the help of their new counsel. The explanations given for the modifications to the narratives are sometimes not taken into consideration by the Board and we are concerned when clients' credibility is questioned based on their first version of the narrative, while they have the right to correct their narrative prior to the hearing.

We believe these changes to the scheduling and process will help promote wellbeing at work for all parties.

2. Individuals Affected by Mental Health Conditions, Cognitive Impairments and Other Challenges (All Divisions, national)

We urge the Board to continue to focus on those with mental health conditions, cognitive impairments and other challenges in order to improve access to justice for this vulnerable group. While Board members regularly acknowledge the applicable Chairperson's Guidelines, we find that the Guidelines are not always applied in cases where the circumstances would dictate the use of such measures, including in cases where it is apparent that the person has a cognitive or mental health issues. For instance, we find that such individuals require more procedural and evidentiary prompts, particularly in cases where the individual is not represented by counsel. We also find that elderly people require more assistance accessing and navigating the technology used by the IRB, and that people with some types of mental health concerns are often less able to use IRB technology effectively. We suggest that the timely initial vetting of cases and prompting of supporting materials will help the IRB determine which accommodations are necessary earlier on in the adjudication process.

Further, we trust that Board members understand barriers faced by refugee claimants up to the moment of their hearing. These barriers include language, technical and procedural issues, including, but not limited to, the near mandatory use of the online refugee portal, previous interactions with Canada Border Services Agency, detention, limited English or French language ability, difficulty accessing food, housing, counsel and other support services, in addition to significant processing delays at the Immigration, Refugee and Citizenship Canada and IRB levels.

We believe that Board members would benefit from additional training and resources to ensure that they are aware of the various barriers faced by individuals appearing before the IRB, including the recent barriers faced by new online portals implemented by IRCC. We are also interested in learning what training is being provided to members in adjudicating hearings where people have mental health conditions or cognitive impairments. Finally, we encourage the effective early vetting of cases and prompting of supporting documents to determine which accommodations may be necessary throughout the adjudication process.

3. Recommendations to increase fairness of hearings (RPD, national)

All stakeholders believe that the fairness of hearings should be of paramount importance. While we share the IRB's concern for efficiency, considering the impact of the IRB's procedures and decisions on those who appear before it, the fairness of procedures that maximize the ability to participate must come first. As such, we make the following recommendations to enhance and ensure fairness for those coming before the IRB.

Advance notice of proposed Internal Flight Alternatives: We request that the RPD provide notice of proposed Internal Flight Alternatives (IFAs) to claimants well before their 10-day disclosure deadline to allow claimants adequate time to submit evidence on the proposed IFAs. It should not be assumed that the IRB National Documentation Packages (NDPs) contain complete information about IFAs proposed by Board Members. Furthermore, NDPs may contain information that a claimant wishes to challenge in light of what the RPD panel has selected as the proposed IFA(s).

Advance notice of sufficiently detailed Exhibit List: We request that the RPD provide advance notice of the Exhibit List with sufficient detail for claimants/counsel to understand the items identified as exhibits prior to the commencement of hearings. In some cases, the RPD has only been visually sharing the list of exhibits virtually (i.e.: putting it up on the screen on the day of the hearing), rather than providing it to claimant/counsel as pre-hearing disclosure, which can cause delays or disadvantage claimants later on.

Early vetting and responsive communications about postponements: We recommend that the RPD engage in early vetting of cases to ensure that preventable issues that may give rise to postponements (i.e.: documents missing from RPD Record, Board Member not yet assigned) are resolved in a timely way, and that known postponements are communicated to the parties in a timely way. There have been instances where the RPD was aware, or arguably ought to have been aware, that a refugee hearing could not proceed a day or more before the scheduled hearing but did not provide timely communications of it to the parties. There is great distress for people whose hearing is cancelled - made worse by the lack of clear communication and commitment on rescheduling. Vetting cases early will also help the RPD identify which claims are suitable for the stream for less complex claims, which would promote the early resolution of claims.

The CBA Section appreciates the opportunity to recommend improvements to stakeholder meetings and to propose agenda items for the upcoming bi-annual meeting.

We would be pleased to discuss our recommendations and offer additional insights.

Yours truly,

(original letter signed by Véronique Morissette for Lisa Middlemiss)

Lisa Middlemiss
Chair, CBA Immigration Law Section

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