



THE CANADIAN
BAR ASSOCIATION
L'ASSOCIATION DU
BARREAU CANADIEN

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Via email: Rob.Oliphant@parl.gc.ca

Robert Oliphant, M.P.
Chair, Standing Committee on Citizenship and Immigration
Sixth Floor, 131 Queen Street
House of Commons
Ottawa, ON K1A 0A6

Dear Mr. Oliphant:

**Re: Immigration and Refugee Board of Canada's Appointments,
Training and Complaints Processes**

The Canadian Bar Association Immigration Law and Administrative Law Sections (the CBA Sections) are pleased to comment on the Citizenship and Immigration Committee (CIMM)'s study of the appointment, training and complaints processes of the Immigration and Refugee Board of Canada (IRB or the Board).

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Immigration Law Section is comprised of over 1,000 lawyers, practicing all aspects of immigration law and delivering professional advice and representation in the Canadian immigration system to clients in Canada and abroad. The CBA Administrative Law Section consists of lawyers across Canada who practice administrative law and address practice issues related to administrative tribunals.

Context

Transparent, accountable and impartial federal tribunals have been a long-standing priority of the CBA. In 1990, the CBA commissioned the *Report of the Canadian Bar Association Task Force on the Independence of Federal Administrative Tribunals and Agencies in Canada* (Ratushny Report)¹. In 2007, the CBA Immigration Law Section commented on changes then proposed to the IRB appointment process,² and encouraged reforms to strengthen merit-based criteria for appointment, improve fairness and increase the quality of decision-making. Further, in 2016, the CBA

¹ Ottawa: The Canadian Bar Association, 1990.

² Canadian Bar Association, letter to the Chair, Standing Committee on Citizenship and Immigration, "Re: Change to IRB Selection Committee Appointment Process", dated April 16, 2007, available [online \(https://bit.ly/2IQWaQ\)](https://bit.ly/2IQWaQ).

Administrative Law Section wrote to the Prime Minister of Canada reiterating the recommendations of the Ratushny Report.³

The IRB has a unique and important role in the Canadian immigration law landscape. It is the largest administrative tribunal in Canada, operates with significant autonomy in establishing its own processes and is responsible for rendering decisions on complex legal and factual matters which can have enormous life and death consequences for Canadian citizens, permanent residents, refugee claimants and foreign nationals. The IRB has served the public faithfully since its creation over 40 years ago. However, recent problems have highlighted the need to improve the IRB.

The importance of enhanced transparency remains the primary focus of the CBA Sections in the context of this CIMM study. We encourage an open and transparent process throughout all aspects of the IRB's operations (the Immigration Division, the Refugee Protection Division, the Immigration Appeal Division and the Refugee Appeal Division).

The CBA Sections' comments are informed by their discussions and interactions with the IRB. Some members of the CBA Immigration Law Section have been appointed to the IRB in recent years and Board members (Members) actively participate in CBA conferences. The CBA Sections support greater interaction and consultation between the IRB and the CBA.

Appointments

The IRB appointment process must instill confidence in the parties appearing before it and those affected by its decisions. The CBA Sections recommend a transparent, systematic and merit-based appointment process. As stated in the Ratushny Report, Canadians should have access to information about opportunities to serve on federal tribunals and "proactive steps should be taken to identify well-qualified persons and encourage them to apply."⁴ Particular attention must be given to the process by which qualified Members are appointed and re-appointed to the IRB.

Merit-Based (Knowledge and Expertise)

Based on our daily experience with the IRB, the CBA Immigration Law Section recommends that a majority of IRB Members should be practicing lawyers (members of a provincial/territorial law society), with at least 5 years of experience practicing law. In Quebec, some of the largest administrative tribunals⁵ require members to have at least 10 years of experience, and that proceedings be decided by a lawyer or notary, or panel including a lawyer or notary.⁶ Decisions from all divisions of the IRB are treated with deference by the Federal Court and members should have the required knowledge and expertise to warrant this deference. Legal training provides an important foundation for understanding and analyzing jurisprudence and applying it in making reasonable and fair decisions and the quality and consistency of decision-making will be enhanced with more legally trained Members. As officers of the Court, lawyers are accustomed to being held to higher ethical obligations, not applicable to other citizens, and being accountable if they do not

³ Canadian Bar Association, letter to the Prime Minister of Canada, "Re: Governor in Council appointments", dated April 27, 2016, available [online \(https://bit.ly/2rVHiNZ\)](https://bit.ly/2rVHiNZ).

⁴ *Supra* note 1 at pg. 66.

⁵ See, for example, the Tribunal Administratif du Quebec, *Loi sur la justice administrative*, RLRQ, J-3, s. 41 available [online \(https://bit.ly/2KBS2Zw\)](https://bit.ly/2KBS2Zw); and the Régie du Logement, *Loi sur la regie du logement*, RLRQ, R-8.1, s. 7 available [online \(https://bit.ly/2IrN4C1\)](https://bit.ly/2IrN4C1).

⁶ See, for example, the TAQ, *Loi sur la justice administrative*, RLRQ, J-3, ss/21, 22.1, 24, 29, 31; the Régie du Logement, *Loi sur la régie du logement*, RLRQ, R-8.1, s. 30, and the Tribunal administratif du travail, occupational health and safety division, *Loi instituant le tribunal administratif du travail*, RLRQ, T-15.1, s. 83, available [online \(https://bit.ly/2Le7NHd\)](https://bit.ly/2Le7NHd).

comply with their legal and ethical obligations. Lawyers are also obligated to complete ongoing professional development.

Qualifications

The CBA Sections recommend that candidates be vetted for personal suitability. A deep and thorough background check and suitability assessment should be conducted. A basic test to establish competency in certain aspects of immigration and refugee law is insufficient to properly determine whether a candidate is suited for the IRB. Given the deference often afforded to IRB decisions (particularly for findings of fact and credibility determinations) and the possibility of grave consequences of these decisions, thorough vetting of candidates is appropriate and necessary. In addition to knowledge and expertise, demeanour and attitude are important factors for candidacy.

Re-Appointment

The CBA Sections are concerned about the lack of transparency in the reappointment process. Although the process is based on the performance and merit of candidates, requiring existing members to undergo a new appointment process as if they were applying for the first time acts as a disincentive to qualified candidates who may otherwise consider reapplying. To instill confidence in the IRB and attract high quality candidates, the CBA Sections recommend that tenure be protected. Existing members should not be required to reapply as outside applicants for a renewal of their term. Instead, we recommend a right of renewal, subject to passing a performance review process. This would help retain qualified members with a strong track record of excellent decision-making. Further, we suggest Members be given a longer term (for example, five years] to encourage more qualified candidates to apply. Prospective lawyers may otherwise be deterred from applying because of the relatively short term and the impact on their practice during that period.

The CBA Sections are also of the view that the Minister should consult with relevant stakeholders, such as the CBA, when considering reappointment of members. Feedback based on actual hearing room experience can offer valuable insight into the merit and performance of Members. Without this information, any performance review would be incomplete.

We also recommend that if Members are not re-appointed, they receive sufficient notice to allow them to prepare for their return to private life.

Appointment Delays

The CBA Sections are concerned about the delays between the time when candidates are approved and when they are subsequently appointed to the IRB. In recent years, it has been common for approved candidates to have lengthy delays before being appointed by the Minister, while backlogs are growing in the various divisions. A severely shorthanded IRB greatly affects its ability to perform its duties, and excessive delays can cause undue hardship on those awaiting decisions. Of course, this is not a problem unique to the IRB, but also affects all federal tribunals and the court system. The federal government should increase its efforts to expedite appointments to tribunals and courts.

Training

The CBA Sections encourage greater transparency of Member training. We understand that, currently, training is conducted by the Canada School of Public Service, and includes drafting of decisions, weighing of evidence and application of legal principles, such as the *Charter of Rights and Freedoms*. However, the lack of transparency about the training program leaves many unanswered

questions, including about the quality of education given to new and existing Members, as well as the performance of Members in the completion of the training programs.

We recommend that Members should have access to introductory and ongoing training that equips them with the tools necessary to render informed, independent and fair decisions. At a minimum, Members should receive foundational training in administrative law, constitutional law, criminal law, international law and immigration and refugee law. Training should continue throughout a Member's term and include relevant professional development courses to maintain their decision-making expertise.

Training on the Chairperson's Guidelines for Vulnerable Litigants

There are recent examples of the IRB's failings to address issues relating to cases with vulnerable litigants, including children, intellectually disabled individuals, and Lesbian, Gay, Bi-Sexual, Transgender, Queer, Two-spirited and Intersex (LGBTQ2I) individuals. The IRB's Chairperson's Guidelines, in particular Guideline 3 (Child Refugee Claimants), Guideline 4 (Women Refugee Claimants), Guideline 8 (Vulnerable Persons) and Guideline 9 (Sexual Orientation and Gender Identity and Expression)⁷ provide important frameworks that Members are expected to apply in hearings when these issues arise. However, recent examples demonstrate that training focused on understanding and implementing the Guidelines is also needed. It should include formal instruction on the correct application of the Guidelines, as well as meaningful exposure to first-hand, narrative-based accounts of refugee experiences to increase Members' awareness of the importance of the Guidelines.

Training to Conduct "Trauma-Informed" Hearings

Members should also receive instruction on how to conduct a "trauma-informed" hearing. Many individuals appearing before the IRB must share details of very personal and traumatic experiences that they have either experienced or witnessed. This is particularly true for individuals who have been sexually violated or exploited or who have been victims of domestic violence. Members must be trained to appreciate that, even with accommodations, it may be impossible for certain witnesses to provide evidence in the coherent or chronological manner that Members may expect.

Where the exact nature or extent of the trauma in an individual's history is not understood, general guidelines that set out standards for trauma-informed questioning would be valuable and may help Members better understand which specific Guideline(s) to apply.

Consultation

We encourage ongoing consultation with the Bar to improve the training process. For example, feedback from members of the CBA Sections who have appeared before the IRB indicates some Members lack a proper understanding of the nature of the solicitor-client relationship and training focused on this issue would improve the efficiency of Members.

Shadowing

The CBA Sections also recommend that, to start, new Members (both public servants and Governor in Council appointees) shadow more senior Members until new Members are equipped to hear cases alone. This would be an important step towards instilling greater confidence in the IRB process and avoiding concerns about claimants appearing before inexperienced new Members.

⁷ See Immigration and Refugee Board of Canada, Chairperson's Guidelines, available [online \(https://bit.ly/2wSz1th\)](https://bit.ly/2wSz1th).

Also, this could help with the ongoing backlog as hearings may be shorter when handled by an experienced Member.

Complaints Processes

The CBA Sections are particularly concerned with the need for a meaningful, transparent and accountable complaints process. A complaint review process must comply with the rules of natural justice and procedural fairness and must be seen by the public to comply with those requirements to instill public confidence in the integrity of the IRB's decisions. The CBA Sections recommend ongoing review of the complaints process.

The CBA Sections encourage the federal government to take steps to improve transparency and accountability at the IRB. We trust that our comments are helpful and we would be pleased to offer any further clarification. The actions and decisions of the IRB have important bearings on Canadians and we welcome further opportunities for discussion.

Yours truly,

(original letter signed by Gillian Carter for Barbara Jo Caruso and Audrey Boctor)

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