November 22, 1999

Marie Claude LaRose
Policy Advisor
Immigration and Refugee Board
Policy, Planning & Research Branch
344 Slater Street
14th floor
Ottawa, Ontario
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Dear Ms. LaRose:

Re: IRB draft policy on videoconferencing

I am writing on behalf of the Citizenship and Immigration Law Section of the Canadian Bar Association (the Section), in response to the invitation to comment on the IRB draft policy on videoconferencing. The Section has substantial concerns with this draft policy.

One of our members comments:

> I have had a number of negative experiences with videoconferencing. If you have a difficult case, and there is the ever present issue of credibility, it is very difficult to present persuasive evidence to the IRB that your client is credible via TV. It is my belief that the difficult assessment of credibility is almost impossible via video.
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> I also believe there are problems with videoconferencing for the IRB. I am aware of a hearing where the appellant's family continued to whisper suggestive answers to the appellant from out of the camera shot. Given the restriction of both audio and visual during the videoconference, the IRB did not know that the appellant was receiving some prompts. I do believe that video may be ok for refugee expedited cases or other straightforward short matters, but in a full blown hearing with numerous issues in dispute, including credibility, it is a second rate hearing.

Another member comments:

> The immigration practitioners in Northern Alberta have concerns re a major push towards videoconferencing in IRB matters because we are one of the regions where we have no local Board members and it is likely our region will be one where there will be heavy reliance on videoconferencing. While we have less hesitation in holding assignment courts, re-convened hearings, argument and submissions not requiring evidence of witnesses by videoconferencing, we want it to be clear that where there are issues of credibility of the Applicant, Appellant, or any witness on a matter, the use of videoconferencing should be kept to a minimum.

Another member comments:

> . . . videoconferencing has no place in refugee hearings before the CRDD and in complex IAD cases. Specifically (it has no place) where there is extensive documentary evidence and the issue of credibility is central to the case... Administrative efficiency should not be the ultimate objective over the rights of those people who must put their lives in the hands of the IRB.
>
> The use of a motion to seek a hearing in person is costly and prohibitive to the average person who appears before the IRB... The procedure outlined for objecting to the use of videoconferencing reduces access to justice for a client of modest means or a client without counsel. The use of a motion procedure is perceived as complex and onerous. I would submit that the use of a formal motions procedure for objecting to the use of videoconferencing makes access to justice more difficult.
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> Those people who appear before the IRB are some of the most vulnerable people in our society. The imposition of a motion requirement in order to access to an in person decision maker, in my view, will only be utilized by those persons who have significant financial resources to proceed with their cases before the IRB.
> . . .
> the use of videoconferencing is suitable for detention review, inquiries, where the record is clear that an allegation cannot be refuted (i.e. criminal convictions in Canada) and assignment court matters. However, the use of videoconferencing should not be routinely used for IAD appeals or any refugee claims. The stakes are too high for the people who are forced to appear before the decision makers. There is a lot to be said for the close observation of a person's demeanor before a tribunal. This is what the credibility assessment is often about. To impose a barrier (a fuzzy television screen) between the decision maker and the person concerned is far too risky in my professional opinion.

We draw your attention to the case of *R. v. Pawlowski* (June 21, 1991 Ontario Court of Justice - General Division, Ottawa). In that case, Mr. Justice Chadwick said:

> The demonstration of the video interviews of the witnesses points out that some technical difficulties which arise with transcribing of video evidence. This is further compounded when the witness is testifying in Russian and the evidence is being interpreted from Russian to English and vice versa.
>
> However the same problem presents itself in viva voce evidence when a witness is required to give evidence through an interpreter. Something is lost between the viva voce evidence and the videotaped evidence in that some of the mannerisms and characteristics of the witnesses are not properly captured by the videotaped evidence. In considering all of the Crown's crucial evidence by way of video the triers of fact, namely the jury, are put at a disadvantage.
>
> This disadvantage could be favourable to the accused but there is a strong possibility of it being to his disadvantage. And specially as it relates to the cross-examination of the witnesses. Taken by itself, it would not be grounds to refuse the application for commissioned evidence. Rather it would then be left to the trial judge to review the videotaped evidence to make a determination at the time of trial as to its admissibility.

This was done by Campbell J. in *R. v. Finta* "Proceedings at trial", Vol. 16, p.2812. It is interesting to note that the *War Crimes Act 1945* and *War Crimes Amendment Bill 1987* in Australia specifically prohibits the introduction of evidence by videotape in relation to war crimes.

Mr. Justice Chadwick refused the Crown's application for video taped commission evidence in that case because the factors taken all together prejudiced the rights of the accused to a fair trial. Amongst the factors he listed were:

- the taking of the evidence of all the material witnesses by way of commission;
- the videotaping of this evidence; and
- the difficulties the jury would have in assessing credibility by way of videotaped evidence.

The Crown applied to the Supreme Court of Canada for leave to appeal this judgment, but leave was denied. Unable to bring the testimony of its witnesses into court, the Crown abandoned the case against Pawlowski.

We are concerned about the possibility of a double standard, with accused war criminals being treated better than permanent residents in Canada or refugee claimants. It cannot be the law that a case against an accused war criminal can be thrown out because, in part, all evidence was to be by videotape, yet the case of a permanent resident in Canada or refugee claimant can proceed by way of videotape.

The draft policy refers to the case of *R. v. Dix*. However, the *Pawlowski* case is more relevant than *Dix*, since *Dix* was not encumbered by the double disadvantage to which the *Pawlowski* case refers of both the interpretation barrier and the video barrier. Many refugee claimants in Canada require interpreters.

In light of these comments and jurisprudence, the Section proposes the draft policy be changed to read (proposed changes in italics):

. Paragraph 3: "Recognized by the courts as a useful and valid tool *when credibility is not in issue*".

. Paragraph 5: "The IRB promotes the use of videoconferencing *at assignment courts, re-convened hearings where credibility is not in issue, argument and submissions not requiring evidence of witnesses by videoconferencing*. The phrase "in all matters before it." should be deleted.

. In paragraph 5, the relevant factors listed after "any significant prejudice to a party" should include words to the effect "*including the prejudice that inevitably results from the use of videoconferencing when the IRB needs to assess the credibility of the parties and/or witnesses before it*".

. In paragraph 7, we would recommend adding "*Ongoing monitoring and evaluation will include an expert study to find out the impact of videoconferencing from all possible perspectives. Part of the data for the study would be feedback from the parties participating in videoconference hearings by way of questionnaires provided to the parties following each videoconferencing session*".

The draft practice notice should be changed to read (proposed changes in italics):

. Under the heading **General Principles**, "The IRB promotes the use of videoconferencing *at assignment courts, re-convened hearings where credibility is not in issue, argument and submissions not requiring evidence of witnesses by videoconferencing*. The phrase "in all types of proceedings before it" should be deleted.

. Under that same heading "(a) any significant prejudice to a party *including the prejudice that inevitably results from the use of videoconferencing when the IRB needs to assess the credibility of the parties and/or witnesses before it*".

. Under the heading **Procedures for Determining to Proceed by Videoconference**, paragraph 2: "A party to the proceedings may object to the use of videoconferencing *in writing*." The words "by making a motion under the applicable motions rule" should be deleted as well the references to the applicable rules.

. Paragraph 3: "If the party *who objects* satisfies the decision maker..." The words "who brings the motion" should be deleted.

We trust that these comments will be of benefit in your review of the draft policy.

Yours very truly,

Elizabeth Chow Bryson
Chair
National Citizenship and Immigration Law Section