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Via email: [Roula.Eatrides@irb-cisr.gc.ca](mailto:Roula.Eatrides@irb-cisr.gc.ca)

Roula Eatrides, Deputy Chairperson  
Immigration and Refugee Board of Canada  
Refugee Protection Division  
344 Slater Street  
Ottawa, ON K1A 0K1

Dear Ms. Eatrides:

**Re: COVID-19 – Plan and Measures at the Refugee Protection Division**

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to comment on the plan of the Refugee Protection Division (RPD) in response to the COVID-19 crisis as discussed at the meeting of the Immigration and Refugee Board (IRB) Consultative Committee on May 8, 2020. The CBA Section supports virtual hearings at the RPD as a voluntary, temporary and extraordinary measure during the COVID-19 pandemic and recommends other measures.

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 Section has approximately 1,100 members across Canada practising in all areas of immigration and refugee law.

**Importance of Maintaining in-Person Refugee Hearings After the COVID-19 Crisis**

Because virtual hearings may raise procedural fairness concerns particularly relating to credibility assessments, we do not support a permanent transition to virtual hearings once the crisis is over.

Refugee hearings are based on the accounts of individuals of the persecution and mistreatment they suffered in their home countries. Refugee claimants are often forced to flee in dangerous, rushed and difficult circumstances, and may have limited personal evidence to support their claim. The claimant's account of what happened to them and their family is critical to their case, and at the heart of this is their credibility.

There are also inherent challenges unique to refugee hearings, such as the claimants' psychological vulnerabilities, language barriers and cultural differences, and gender vulnerabilities. Claimants are anxious about the hearing itself given the serious implications of the board member's decision on their lives.

When the board member, claimant, counsel and interpreter are all in the same room, claimants can express themselves better and give clearer evidence than they can by virtual hearing. There will be fewer interruptions and technical challenges, and less need to repeat statements for the interpreter.

In a virtual hearing, it is more difficult for the board member to assess the claimant's demeanor, facial expressions and other nuances that could impact their overall assessment. Subtle impressions and details are particularly crucial for assessing vulnerable claimants, individuals who have suffered abuse and torture, and LGBTQ+ claimants. Having a board member in the same room as the claimant can also help the claimant feel heard in a way that is not possible in a virtual hearing.

Regardless of technological advancements, a virtual hearing remains an impersonal and dehumanizing mechanism to give testimony on personal and extremely difficult experiences. Having an interpreter in the room allows for more fluid communications, including pausing, repeating and clarifying when necessary, while maintaining the proper flow of the hearing. Technical issues could lead to delays and adjournments and further anxiety for claimants who may need to wait for the continuation of the hearing and have their testimony split over two hearings.

According to a 2018 report from Western Sydney University, “[o]n all the key features of the hearing communication, participation and environment – witnesses give significantly lower rankings than their counterparts who experienced hearings in a face to face environment. They also are more likely to distrust the evidence of witnesses or of the respondent ...”<sup>1</sup> The study recommended developing “strong guidelines” to ensure that any virtual court procedures implemented do not harm the credibility of the process.<sup>2</sup>

While the CBA Section supports voluntary access to virtual hearings before the RPD as a temporary and extraordinary measure during the COVID-19 crisis, we oppose a permanent transition to virtual hearings once the crisis is over, and in-person hearings can be safely conducted.

### **Expansion of Short Hearings, Paper Process and Case Conferences**

The RPD should immediately prioritize and maximize its measures to decide cases through an expedited process and identify cases that can be decided and accepted without an oral hearing. The RPD can expand on the current list of country profiles and the profiles of groups in particular countries eligible for the expedited process. If additional evidence or a case conference can help the board member make a positive decision without an oral hearing, these conferences should be scheduled as soon as possible unless there is an impediment for the claimant.

### **Voluntary and Counsel-Assisted Three-Month Pilot Project for Virtual Hearings**

To preserve access to justice, the efficient operation of the RPD, and ensure that cases move forward during the COVID-19 crisis, virtual hearings should temporarily be available as a voluntary option on a case by case basis. The CBA Section endorses a voluntary and counsel-assisted three-month pilot project to conduct RPD hearings virtually. This pilot project will allow the efficacy of virtual proceedings to be evaluated, debated and repositioned as required before it becomes a generally available option for the duration of the COVID-19 pandemic.

Disruptions associated with the pandemic could continue for more than two years, given the time it will take to develop a vaccine and make it widely available. IRB staff, counsel and claimants may be justifiably reluctant to attend in-person hearings in the meantime. Even if current restrictions are

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<sup>1</sup> Virtual Court Study: [Report of a Pilot Test 2018](#), p. 30.

<sup>2</sup> *Ibid.*

eased, some individuals including those with underlying health conditions, older individuals and those with immediate family members who are high risk or immunocompromised may wish to participate in a virtual hearing, rather than waiting until the pandemic is over to be heard. A pilot project could help to ensure that virtual hearings as an extraordinary measure during the course of the pandemic are as fair and effective as possible.

### **Development of Operating Interim Eligibility Guidelines**

The CBA Section recommends the RPD promptly develop Operating Interim Eligibility Guidelines to administer the pilot project. We recommend the interim guidelines include five elements:

1. **Complex cases:** counsel may advise against virtual hearings for complex matters such as cases involving the intervention of the Minister, exclusion issues and other complex identity issues. The RPD may also choose not to make virtual hearings available in these types of cases.
2. **Unrepresented claimants:** only claimants represented by counsel should be eligible to participate in the pilot project. The CBA Section recognizes that unrepresented individuals may not be able to take advantage of virtual hearings. Unrepresented claimants are particularly vulnerable, and a negative decision can have serious implications for them.
3. **Phased-in approach:** once a pilot project for the first three months has been evaluated and amended as needed, the virtual hearing option may be opened to unrepresented individuals. However, the RPD should require that they receive legal advice about the procedural fairness issues and other concerns of appearing before the RPD by virtual hearing unrepresented. The CBA Section would be pleased to discuss with the RPD how this advice may be offered, which may include legal aid, pro bono counsel or private counsel. After receiving advice, unrepresented individuals may decide to wait for an in-person hearing or seek representation for a virtual hearing rather than proceeding with a virtual hearing without representation. We recommend establishing an RPD working group to develop potential options and solutions for issues relating to unrepresented individuals.
4. **Legal minimum standards/no waiver:** a claimant's participation does not waive the expectation that a refugee proceeding will fully comply with legal standards, involve individualized assessments and allow concerns to be raised during and after the proceeding. The CBA Section is confident that the RPD will ensure there is no abrogation from these standards due to the use of a virtual hearing.
5. **Claimants' physical attendance not required:** claimants should be permitted to participate in hearings from their home or other place of their choosing. No one else should be present while the claimant is giving testimony to ensure their evidence is not supported, encumbered or influenced by anyone. This will maximize claimants' comfort and allow them to better communicate their claims.

### **Crippling Backlogs if Virtual Hearings are Not Offered**

If temporary and extraordinary measures are not adopted during the pandemic, the RPD's already significant backlog could become crippling, increasing delays and pressures, and jeopardizing the sustainability of the existing refugee regime.

The duration of the pandemic and its restrictions are still unknown. For as long as it continues, we must find ways to resume the life-saving work of the RPD. Failing to act now in a measured, lawful and compassionate manner could have serious unintended consequences.

### **Equity and Access to Justice Concerns**

We recognize that there are equity implications to offering voluntary virtual hearing to claimants. Some claimants and counsel may not have the technological support or comfort level to pursue this option. Support should be provided to these claimants through community organizations, and the RPD should consider advocating for additional resources to accommodate them. An RPD working group could be established to recommend solutions to address these equity concerns.

While not everyone may be able to proceed with a virtual hearing, the CBA Section believes that all parties will benefit if virtual hearings are an option during the pandemic. Any matters concluded during this time will ease the backlog and benefit all parties when the COVID-19 crisis is over.

In this extraordinary time, an exceptional response is required from the RPD. We would be pleased to discuss our recommendations with you at your convenience.

Yours truly,

*(original letter signed by Nadia Sayed for Ravi Jain)*

Ravi Jain  
Chair, Immigration Law Section