



September 10, 2012

**VIA EMAIL**

Immigration and Refugee Board of Canada  
344 Slater Street  
Ottawa, Ontario K1A 0K1  
Email: [reform-reforme@irb-cisr.gc.ca](mailto:reform-reforme@irb-cisr.gc.ca)

Attention: Sylvia Cox-Duquette, Senior General Counsel

Dear Madam:

**Re: Comments on the proposed Refugee Protection Division (RPD) Rules and Refugee Appeal Division (RAD) Rules as published in the *Canada Gazette*, Part 1, on August 11, 2012**

The Legal Services Society of BC (LSS) welcomes the opportunity to provide comments on the proposed Immigration and Refugee Board of Canada (IRB) rules of procedure.

LSS commented previously on both the 2010-11-23 draft rules and the RPD and RAD Rules as published in the *Canada Gazette*, Part 1: Vol. 145, No 27 (July 2, 2011).

As we explained previously LSS provides legal aid services, which range from legal information and advice to full representation by a lawyer, to people with low incomes in British Columbia. Our mandate is to help people resolve their legal problems and facilitate access to justice.

In the area of immigration and refugee law LSS provides the following services:

- Duty counsel services for persons in detention and legal representation at Immigration Division detention hearings
- Legal information for persons not eligible for legal aid
- Public legal education materials provided in print and on the LSS website
- Information sessions and training for clients and service providers
- Legal aid representation referrals<sup>1</sup> for:
  - Admissibility cases before the Immigration Division
  - Appeals to the Immigration Appeal Division involving permanent residents facing removal
  - preparation of Personal Information Forms
  - hearings before the Refugee Protection Division
  - judicial reviews in Federal Court

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<sup>1</sup> To receive legal aid representation referrals applicants for legal aid must be financially eligible for legal aid services. Financial eligibility is based on household size and looks at income, assets and expenses.

- humanitarian and compassionate applications
- Pre-Removal Risk Assessment applications
- Any other case where there is a risk harm if a person is removed from Canada

LSS submits its comments from the perspective of a provider of legal services to people with low incomes in British Columbia. When reviewing the Rules we focus on the impact the Rules will have on our clients, refugee claimants in receipt of legal aid, and unrepresented claimants who either do not apply for, or are not granted, legal aid.

Funding for immigration legal aid is provided through a federal-provincial cost sharing agreement that divides a fixed budget among participating provinces. The agreement makes no provision for additional funding to address either procedural changes that increase legal aid costs or the incidental administrative costs associated with such changes. We anticipate that Bill C-31, the *Protecting of Canada's Immigration System Act* (PCISA), and these Rules will place additional financial demands on our fixed immigration legal aid tariff budget.

Particular cost increases associated with Bill C-31 and these Rules that we have identified include:

- An increase in legal aid referrals for refugee hearings as a result of the lost opportunity to merit screen refugee claim cases at both the PIF stage and the hearing stage
- Increased involvement of counsel who, because of the tight time lines for hearings, will likely meet with inland claimants prior to their eligibility interview thus incurring more preparation hours
- Counsel attending conferences at the RPD
- Funding refugee appeals to the RAD – new costs include counsel fees, interpreter fees, attendance fees at appeal hearings or conferences, and disbursements
- Increased cost of disbursements including medical reports, translations of documents under tight time pressures, and transcripts for RAD applications
- Limited opportunity to merit screen RAD cases due to tight time limitations for filing and perfecting appeals without the benefit of transcripts
- Funding cases that address legal issues raised by new legislation and procedures. Clarification of these issues by the courts will be required for the efficient operation of the IRB.
- Production of new public legal education materials and training of staff and service providers
- Changes to LSS case management technology to process cases and accounts given new referrals types and tariff limits
- Processing both legacy claims and current claims, which requires the use of different internal LSS case management processes and rules
- Serving documents to the Minister and providing proof of service, including photocopying and courier costs
- Increased LSS intake resources (specialized intake staff with outreach capacity) and creation of new systems to assist LSS to place cases with private bar lawyers in a timely manner

Given the reality of legal aid plans' funding we anticipate that a sizable number of refugee claimants will be unrepresented and will be faced with navigating the Act and the Rules without the assistance of counsel.

The Regulatory Impact Analysis Statement notes that for the proper functioning of the IRB the rules must be clear, transparent, and applied in a consistent manner thereby facilitating the fair and efficient administrative processing of cases. They also provide guidance to ensure that all cases are processed in a way that respects the principles of fairness and natural justice. It is our submission that in addition to the above, the Rules must be flexible, support an accessible system, and easy for claimants to understand and apply, and above all, not be a barrier to a fair determination of refugee claims. We do not believe that the Rules as drafted meet all these goals.

We anticipate that these rules will result in procedural disputes that may have the impact of restricting access to a fair and just refugee protection process. We fear that legal aid plans will be spending limited legal aid funds on cases that raise issues of process leaving fewer resources available to fund refugee protection claims.

Our refugee clients face multiple challenges. Many are vulnerable individuals who speak limited if any English or French; belong to a cultural minority; are traumatized due to persecution, domestic violence, or torture; and face housing and financial challenges upon arrival in Canada with limited access to settlement services. These clients are often unfamiliar with Canadian principles of fairness and justice, have little education, and low levels of literacy.

As a legal aid provider part of our mandate is to educate the public about their rights and responsibilities. These rules are too complex and circumscribed, particularly for a client group comprised of refugee claimants from foreign countries. It will be challenging for us to produce materials which are easy to understand and help people navigate the process.

We are particularly concerned with the new deadlines the Rules impose on refugee claimants. We urge you to simplify the Rules to improve flexibility and ease of use in order to ensure that refugee claimants have access to a fair and simple refugee determination system.

## **SPECIFIC RECOMMENDATIONS: RPD RULES**

### **Rule 3: Information and Documents to be Provided**

The current Rule 3 (4) (b) states that the officer must inform the claimant that they may, at their own expense, be represented by legal or other counsel. Given the short time limits for filing a Basis of Claim form (BOC) and for setting hearing dates it is imperative that claimants wishing to apply for legal aid do so at the earliest available opportunity. According to our information a high percentage of refugee claimants in BC apply for legal aid. LSS intends to produce public legal education materials explaining legal aid and a claimant's right to counsel. It would be helpful if these materials were made available to claimants upon their first contact with CIC or CBSA.

In addition the Claimant's Guide should provide claimants with clear and specific information concerning legal aid. We have had an opportunity to review the draft Claimant's Guide. We are concerned that the section on Counsel does not prominently provide information regarding where to seek assistance with preparing a claim. We would suggest, for example, that the question in the Guide, "Do I need counsel to represent me in my claim?" should read, "How can I get help with my claim?" An explanation of legal aid should be set out clearly and noticeably in response to this question.

LSS would welcome an opportunity to provide more detailed comments on the wording of the claimants guide.

***Recommendation #1***

*Rule 3 (4) (b) should require the officer to provide to the claimant information on how to apply for legal aid. A fact sheet on legal aid, produced by legal aid plans, should be included with the Claimant's Guide.*

**Rule 7: Providing basis of claim form**

The current Rule 7 requires a port of entry claimant to provide a copy of the BOC to both the Minister and the Division. For unrepresented claimants it will be difficult to know how to serve these two bodies. It would be simpler to require the claimant to file the BOC with the IRB and for the IRB to provide a copy to the Minister (our concerns with this process are discussed in our comments re: Rule 9).

***Recommendation #2***

*Rule 7 be amended to state that port of entry claimants must file a BOC with the Division and the Division will provide a copy to the Minister.*

**Rule 8: Extension of time to file a Basis of Claim Form**

The current Rule 8 requires the claimant to make an application for an extension to file a BOC in accordance with Rule 50 and no later than *three working days* before the expiry of the time limit set out in the Regulations.

We anticipate that many claimants will need to apply for an extension of time to file a BOC. New arrivals to Canada are faced with a number of settlement challenges and barriers in accessing services. In the first weeks after arrival they have a very full plate. Many will not know how to access legal aid. In addition, LSS may have challenges in processing legal aid applications within the short timeframes. In British Columbia we have only a small immigration and refugee bar that accepts legal aid cases. We are concerned that with shortened time limitations it will be more challenging to find counsel willing and available to take refugee cases.

We suggest that the restriction that the application be made before three days before the expiry date be removed and the rule be more open and flexible.

In addition, we are concerned about the processing of inland refugee claimants. These

claimants are required to file a BOC with an officer at their eligibility interviews. Claimants do not want to delay their eligibility interview since obtaining proof that a claim is initiated is required in order to get social assistance and in many cases to secure housing. Finding lawyers available to represent inland claimants may be challenging.

The Rule should permit inland claimants to apply for an extension to file a BOC after their inland eligibility interview.

Further, the rule is unclear as to whether the claimant needs to file a statutory declaration or affidavit in support of an extension application. In several other rules the lack of a requirement of filing an affidavit or statutory declaration is specifically stated. The rule should state that an affidavit or statutory declaration is not required.

The current Rule 8 (2) requires the claimant who makes an application for medical reasons to provide a medical certificate signed by a qualified medical practitioner. This rule will force claimants to access medical services that are difficult to obtain and may not be medically necessary. Further, the cost of the medical certificate, for cases funded by legal aid, will be paid for as a disbursement. According to the Regulatory Impact Statement the cost of providing a medical certificate is expected to be about \$20. In fact, pursuant to the *LSS Tariffs* doctors can charge LSS the standard BCMA rate, or Item A00070 (\$153), for a simple letter or form completion. We anticipate the costs of these letters to be significant and not necessary.

### ***Recommendation #3***

*Rule 8 be amended to delete the 3-day time restriction for filing an extension request. The rule should be further amended to state that the claimant is not required to give evidence in affidavit or statutory declaration form. The rule should address the situation of inland claimants seeking an extension time. Further the Rule should not require a medical note to support a medical adjournment unless the Division directs that a note is necessary.*

### **Rule 9: Changes to Basis of Claim**

The current Rule 9 (1) (a) requires changes or additions to the BOC to be provided first to the Minister and then to the Division. Subsection (3) requires claimants to provide proof that the documents were provided to the Minister. Under the current system, material filed with the Division is sent to the Minister. Requiring claimants, instead of the Division, to provide documents to the Minister puts an unnecessary burden on claimants. Claimants have few resources to locate and serve the Minister and often will be unable to provide written proof. In cases funded by legal aid it is likely counsel will use couriers to serve documents and will require couriers to return with proof of service. This will result in an additional disbursement cost to LSS.

Further, the requirement in Rule 9 (2) to file changes to the BOC 10 days before the start of a hearing is too restrictive. Given the significantly shortened timelines it will be, in many cases, difficult to meet this deadline.

**Recommendation #4**

*Rule 9 be amended to require the claimant to provide changes or additions to the Division and for the Division to forward materials to the Minister. Further, the requirement to file changes to the BOC within 10 days be reduced to 5 days, or preferably, the time limitation be removed completely.*

**Rule 10: Conduct Of A Hearing:**

The current Rule 10 (1) states that if the Minister is not a party, the claimant will be questioned first by the Division and then by the claimant's counsel. This rule incorporates the policy on reverse order questioning found in Chairperson's Guideline 7. As noted in the Regulatory Impact Analysis statement, the procedure of reverse order questioning was upheld by the Federal Court of Appeal. However, now that the guideline is incorporated into a rule we anticipate this rule will be challenged. It remains an open question whether a mandatory rule regarding questioning at a hearing complies with the principles of natural justice and whether this Rule is an unreasonable fettering of discretion.

It is in LSS's interest, both from a financial standpoint and a fairness standpoint, that the initial hearing be conducted in the fairest manner possible. To achieve this objective, we would suggest it is preferable that the Rule is drafted in such a way as to make reverse order questioning permissive and not mandatory. This would avoid unnecessary legal challenges regarding the validity of the reverse order questioning procedure.

**Recommendation #5**

*Rule 10 (1) be amended to allow the Division to question a claimant first if the reverse order questioning meets the principles of natural justice ("will be" should be changed to "may be").*

**Rule 15: Counsel of record**

Rule 15 requires the Division to grant permission for counsel to withdraw from the record. It is unclear under what circumstances the Board would refuse a request of counsel to withdraw. In some cases counsel may get on the record in error prior to legal aid approval. Also, given the short limitation dates set for hearing dates, we anticipate that counsel may face scheduling challenges which will require them to remove themselves from the record.

When the Division receives a request from counsel to withdraw from the record that request should be granted.

**Recommendation #6**

*Rule 15 be amended to permit counsel to remove themselves from the record by filing a simple request form. The Rule should state that counsel ceases to be counsel of record upon receipt of a written notice.*

**Rule 34: Disclosure and Use of Documents**

Rule 34 requires claimants to disclose documents 10 days in advance of a hearing. For claimants from Designated Countries of Origin (DCOs) this is only 20 days from the filing of their

BOC. In many circumstances it will be difficult for refugee claimants to meet this deadline particularly if they are seeking documents from overseas or obtaining expert reports.

***Recommendation #7***

*Rule 34 be amended to state that the claimant disclose documents 5 days in advance of the date set for the hearing.*

**Rule 50: Making an application**

Rule 50 requires claimants, unless a rule specifies otherwise, to provide an affidavit or statutory declaration in support of an application. For unrepresented claimants, producing an affidavit or statutory declaration is difficult and can be costly. To make the process more accessible, applications should be accompanied by a written statement.

***Recommendation #8***

*Rule 50 be amended to require a written statement rather than a statutory declaration or affidavit in support of an application.*

**Rule 53: Changing the location of a proceeding**

The current Rule 53 requires a claimant to make an application for a change of location no later than 20 days from the date fixed for a hearing. In cases of claimants from a Designated Country of Origin (DCOs), where a hearing is set within 30 days, the application must be made within 10 days of filing a BOC. In many cases it will be difficult for a claimant to make this application at such an early stage in the process. In some cases, claimants who arrive in BC have greater supports in other parts of the country and may require time to make connections with relatives and to obtain legal advice. These claimants should be permitted to apply for a change of location up to a date closer to their hearing date.

***Recommendation #9***

*Rule 53 be amended to set the time limit for filing an application for a change of location to a date closer to a claimant's hearing date.*

**Rule 54: Changing a date for a hearing**

The current Rule 54 (2) states that a claimant must apply to change the date of the hearing at least three days before the hearing date and provide at least three available dates within 5 days of the date set for the hearing.

Practically, given the short limitation dates, there will be many situations where counsel do not have three available dates within the set 5 day period. Many counsel who represent refugee claimants practice in other areas of law. Many have very busy court calendars and pre-set dates months in advance. Requiring LSS to locate counsel who have current availabilities will be challenging.

The current Rule 54 (4) states that the Division must not allow an application unless there are exceptional circumstances. We anticipate that there will be many good reasons for a change in a hearing date that might not meet the test of "exceptional circumstances" but are reasonable and legitimate.

The current Rule 54 (5) states that when a claimant did not have counsel at the time the date was set for a hearing the Division must allow the application if certain conditions are met. Allowing the claimant only 5 working days from the day after the day on which the hearing date was fixed by the officer to apply is too restrictive. We anticipate that there will be many situations where an application cannot be made within this timeframe due to challenges LSS will face in locating available counsel.

Further Rule 54 (6) requires a claimant who makes an application based on medical grounds to provide a medical note. As noted above with respect to Rule 8, we do not think mandatory medical notes are necessary and they will result in additional costs to legal aid.

***Recommendation #10***

*Rule 54 be amended to permit claimants to apply for a change of hearing date with more flexible time restrictions. Further, the Rule should allow dates to be changed where the request is reasonable instead of exceptional. Further the Rule should not require a medical note to support a medical adjournment unless the Division directs that a note is necessary.*

**Rule 67: Decisions**

The current Rule 67 states that the Division must provide in writing a notice of decision to the claimant and the Minister. If given orally, the decision takes effect at the time the Member states the decision and gives reasons.

To assist LSS in assessing legal aid applications for appeals to the RAD, it would be helpful if the claimant was provided a copy of the audio recording of the hearing at the time of decision so that the recording can be reviewed as part of the merit assessment to determine funding of the appeal.

Decisions should take effect on receipt of the written reasons when decisions are rendered orally.

***Recommendation #11***

*Rule 67 be amended to state that the Division shall provide a claimant with a copy of the audio recording at the conclusion of the hearing or at the time a decision is rendered. Further, the Rule should state that a decision takes effect, if rendered orally, upon receipt of written reasons. Reasons sent by mail could be deemed to be received within 5 days of mailing.*

**Rule 73: General Provisions**

We anticipate than in many circumstances refugee claimants, due to no fault of their own, will not be able to comply with the tight time limitations set out in the Rules. There needs to be a process to allow a claimant to make an application outside of the time limits set by the Rules. To ensure that the Rules are applied in accordance with the principles of natural justice there should be clear language to allow the Division to deviate from the Rules.



### **Recommendation #12**

*There should be clear language to indicate that the Division may deviate from the Rules if the principles of natural justice require a different practice. The Rules should provide a process for claimants to make applications outside the time limits set by the Rules.*

## **SPECIFIC RECOMMENDATIONS: RAD RULES**

### **Rule 2: Filing and perfecting an appeal**

Rule 2 (1) requires a person to first provide the Minister with a written notice of appeal before filing the notice with the RAD division. The Rule further provides that the appellant must provide proof of service.

LSS has very limited resources to fund appeals to the RAD. We anticipate that many refugee claimants will be appearing before the RAD without counsel. It is very challenging for unrepresented claimants to serve the Minister and provide proof of service. This is particularly so given the very short time limitations to file and perfect a RAD and the linguistic and other challenges facing refugee claimants.

The Rules should permit appellants to file a notice of appeal and appellant's record with the RAD Division and for the Division to provide these documents to the Minister.

Rule 2(3) provides that the appellant's record must contain all or part of the transcript of the RPD hearing if the appellant wishes to rely on the transcript. It is hard to imagine an appeal of a refugee claim, other than an appeal on a narrow procedural issue, where an appellant is not relying on a transcript.

The idea that family, friends or community volunteers could provide a transcription of the hearing is not realistic or workable. Refugee claimants, new to Canada, rarely have family or friends fluent in English and proficient at transcription. Community groups have limited resources and do not have volunteers available to type transcripts. Producing a transcription of a hearing is challenging and requires significant skills. Obtaining transcripts from a transcription service provider is costly. Given the timeframes for filing an appeal the transcripts may need to be ordered on an expedited basis which increases costs.

### **Recommendation #13**

*Rule 2 (1) should be amended to state that the notice of appeal must be filed with the Division and that the Division will forward a notice of appeal to the Minister. Rule 2 (3) (b) should be amended to permit the filing of the audio recording instead of a transcript. This audio recording should be provided to the claimant at the conclusion of the RPD hearing.*

### **Rule 5: Extension of Time**

It will be very difficult for LSS to merit screen and appoint counsel within the 15 days required to prepare and file a notice of appeal and appellant's record. We anticipate that there will be many situations where claimants will need to request an extension of time to file a RAD appeal.

The Rule should permit an application for an extension of time to be filed without the requirement to file a full appellant's record. Unless the extension is granted it is expensive for LSS to fund the work involving in preparing an appellant's record. We would want to only fund the preparation of appellant's records if and when an extension is granted.

In addition this Rule should provide for an extension of time to file relevant evidence that is not currently available. If, for example, a claimant is in the process of obtaining a medical report or documents from their home country they should be able to apply for an extension to file specific documentary evidence.

***Recommendation #14***

*Rule 5 be amended to require a claimant to file a notice of appeal, but to not require the filing of the appellant's record, with an application for an extension. The rule should state that once the extension is granted the appellant has 10 days to file an appellant's record.*

*Rule 5 include a process for applying for an extension of time to file documents that are not currently available in support of an appeal.*

**CONCLUSION**

The Legal Services Society appreciates this further opportunity to provide comments on the Rules. As stated at the outset, one of our primary concerns is the impact the Rules will have on access to the refugee process and on the costs borne by legal aid providers.

We hope our comments will assist the IRB and the government to develop Rules that support efficiency while preserving fairness and access to justice.

Yours truly,



Mark Benton, QC  
Executive Director, Legal Services Society of BC

Cc: Bonny Wong-Fortin, Director of Legal Aid, Department of Justice (via email)  
James Deitch, Executive Director, Criminal Justice and Legal Access Policy Division, Ministry of Attorney General, Victoria (via email)

# **APPENDIX A – SUMMARY OF RECOMMENDATIONS**

## **SPECIFIC RECOMMENDATIONS: RPD RULES**

### **Recommendation #1**

Rule 3 (4) (b) should require the officer to provide to the claimant information on how to apply for legal aid. A fact sheet on legal aid, produced by legal aid plans, should be included with the Claimant's Guide.

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### **Recommendation #3**

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Rule 5 include a process for applying for an extension of time to file documents that are not currently available in support of an appeal.