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Office of the Executive Director

December 14, 2010 **VIA EMAIL**

Reform Office
Immigration and Refugee Board of Canada
Room 13-027, 344 Slater Street
Ottawa, Ontario K1A 0K1
Email: Paula.Thompson@irb-cisr.gc.ca

Attention: Paula Thompson, Director, Business Process Design

Dear Madam:

Re: Proposed New Refugee Protection Division (RPD) and Refugee Appeal Division (RAD) Rules, 2011 (Draft 2010-11-23)

The Legal Services Society (LSS) welcomes the opportunity to provide comments on the proposed Immigration and Refugee Board of Canada (IRB) rules of procedure. It is hoped that these comments and recommendations will be helpful in drafting Rules that are useful and practical for all those who require access to the IRB.

The Legal Services Society is a non-profit organization that offers legal aid services, which range from legal information to advice and representation. Our mandate is to help people resolve their legal problems and facilitate access to justice, with priority given to low-income individuals in British Columbia.

Clients may receive one or more services to help them resolve their legal problems. Our services include:

- legal information provided by front line staff and legal information outreach workers, and through print materials and the Web;
- legal advice and limited representation services provided by duty counsel, including criminal, family, and immigration duty counsel;
- the Brydges Line, a 24-hour telephone advice service for detainees; and
- legal representation referrals to private bar lawyers or staff lawyers for criminal, immigration, and family cases (eligibility for which is assessed through an intake process).

LSS submits its comments from the perspective of a provider of legal services to low-income people in British Columbia. 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. They need a refugee determination process that is understandable, accessible, sensitive to the reality of their circumstances, flexible and fair.

GENERAL COMMENTS:

As general principles LSS supports administrative tribunal rules that:

- are simple, straightforward and in plain language;
- provide sufficient time for unrepresented claimants to obtain legal advice; and
- provide accessible appeal and judicial review processes for reviews of decisions of administrative tribunals.

We believe the new refugee determination system introduces more steps and more complexity to the process: completion of an IMM 5611, the interview, the review and amendment of the interview report, the RPD hearing, a possible appeal to the RAD, and a possible Judicial Review.

Funding for immigration legal aid is provided through a federal-provincial agreement that divides a fixed budget among participating provinces. The agreement makes no provision for additional funding to deal with procedural changes that increase costs or for rising volumes of cases. BC has experienced significant fluctuation in the number of refugee claimants and LSS manages the demand through a merit screening process.

When LSS faces insufficient resources to sustain core refugee services its practice is to give notice that services will be discontinued until resources become available. LSS recognizes that this step is disruptive to the efficient and effective determination of refugee claims, and is therefore extremely sensitive to changes that might place further fiscal pressure on an already underfunded program.

LSS's immigration legal representation services include limited duty counsel services for detainees, and referrals to a private bar lawyer. Referral to a lawyer is a two-stage process. A claimant must make a first application for a Personal Information Form (PIF) referral. LSS screens PIF preparation applications for merit depending on the applicant's country of origin. If successful, a PIF-only referral is issued. A claimant must make a separate application for a refugee hearing referral. LSS screens all refugee hearing cases for merit regardless of the applicant's country of origin, and in doing so, reviews the applicant's PIF. LSS also has a limited budget for funding of judicial review applications and other immigration matters such as PRRAs and H&C applications.

When the *Balanced Refugee Reform Act* and the accompanying Regulations and Rules are implemented, we anticipate that there will be a greater demand for immigration legal advice and representation services from the Legal Services Society and other legal service providers, especially with the introduction of a new level of decision-making (the RAD). Interpretation and transcription requirements throughout the process will add additional expenses for claimants, either unrepresented or represented, and for legal aid disbursement budgets.

To make best use of our limited legal aid immigration budget it will be imperative for LSS to have the opportunity to screen cases for merit prior to approving a legal aid referral. However, the short timeframes for the initial Interview, RPD Hearing, and RAD Appeal will

make merit screening of legal aid applications and appointment of counsel very challenging, if not impossible.

Overall, we see the implementation of this new process causing significant challenges for legal aid budgets as well as for unrepresented claimants. As a result, the changes may have the potential for reducing the overall fairness of the refugee determination process.

SPECIFIC RECOMMENDATIONS: Refugee Protection Division

A. Interview Information

a) *Contents of Interview Information – Rule 3*

Rule 3(2) states that an officer must notify the claimant in writing by way of a notice to appear of the location, date and time of the Interview. According to this rule, information must include an explanation about how an Interview proceeds, the subject areas of the Interview, and an explanation that the claimant may seek legal representation.

In order to make the Interview process understandable for claimants, we ask the IRB to ensure that it provides the interview information, referred to in Rule 3, in plain language, and in multiple languages.

We also ask that the information about the claimant's ability to seek legal representation include information on provincial legal aid plans, such as contact information for legal aid offices and how to make a legal aid application. This information will need to be tailored to each province and territory. We would be happy to work together with the IRB in preparing this information.

This Rule does not specify what information the claimant will be asked to provide at the Interview. We ask that in order to give the claimant a meaningful opportunity to prepare for the Interview, Rule 3(2)(iii) should specify that the claimant be given a copy of Schedule 1 and Schedule 2 (Personal Information about the Claimant). Given that these schedules are public information it would be helpful for all claimants to have easy access to them in order to fully prepare for the Interview. In addition, it would be extremely helpful if both Schedules were available in a variety of languages.

b) *Personal Information about the Claimant – Schedule 2*

We recommend that the language and order of questions in Schedule 2 mirror, wherever possible, the language and order of the questions on the IMM 5611. This would allow the claimant and their legal representative to better prepare for the Interview and reduce unnecessary preparation time, which will be quite limited on legal aid cases.

B. The Interview

a) *Fixing a date for the Interview – Rule 3*

Rule 3(1) states that as soon as a claim for refugee protection is referred to the IRB, an officer must fix a date for the claimant to attend an Interview. The timing of the Interview is set out in section 11(4) of the *Balanced Refugee Reform Act*, which states that the "date fixed for the interview must not be earlier than 15 days after the day on which the claim is referred, unless the claimant consents to an earlier date."

During IRB consultation sessions, we were informed that the Interview will be held as close to 15 days as possible. Currently LSS merit screens some legal aid applications for PIF preparation. If the IRB schedules the Interview soon after the 15th day as planned, we anticipate that this will pose significant barriers to LSS's ability to merit screen legal aid applicants, which will in turn have significant impacts on our budget. The 15-day period will also likely create difficulties for LSS intake workers to locate available legal counsel and interpreters to assist the claimant before the Interview, or for an unrepresented claimant to adequately prepare for the Interview.

Rule 52(8) states that the IRB will only allow an application to change the date or time of an Interview "if there are exceptional circumstances including whether the change is required to accommodate a vulnerable person". We believe this is too limited. The Rules should provide an easy mechanism for counsel, who are retained after the Interview date is set but before the actual Interview date, to change the interview date if they are not available.

b) *Counsel's role at the Interview – Rule 6(6)*

Rule 6(6) states that the claimant "may be assisted by counsel for the purpose of understanding the interviewer's questions, but counsel may not question the claimant, answer questions for the claimant or otherwise participate in the Interview, unless allowed by the interviewer."

LSS is concerned that the role of counsel, as currently stated, is too limited. If the claimant is to exercise a meaningful right to counsel, the Rules should allow for a more expanded role of counsel at the Interview. Early estimates are that the Interview will take two to four hours. The claimant may be nervous and uncomfortable, provide short answers, be unable to express themselves clearly due to anxiety or low levels of literacy, and some information may get lost through translation. There is a concern that without meaningful assistance from counsel, the Interview will be insufficient to reveal the full nature and details of the claim. Given the significance of the Interview — that the information is taken under oath and "will be used as evidence" at the RPD hearing — it is important that the claimant have a full and fair opportunity to put forth his or her claim. Counsel, who has spent time with the claimant, have a clear understanding of the basis of the claim and should have an opportunity to interject questions where the claimant is not providing full answers. Clearly, counsel should not answer questions for the claimant or provide submissions in the Interview, however, there is an important role for counsel to assist in the fact finding process.

We recommend that Rule 6(6) be amended to state that counsel may question the claimant during the interview for the purposes of clarification or elaboration on answers given to the interviewer, and that counsel may object to inappropriate or irrelevant questions during the Interview.

Further, we recommend that Rule 6 state that the claimant be permitted to bring written notes into the Interview to use as a reference tool. If the Interview process is simply an information gathering session, we believe written notes could benefit the process by providing a memory aid to the claimant. Considering the length of the Interview, that many claimants may lack a proper education and be unable to express themselves clearly even in their own language, and that the Interview process will be quite daunting for newly arrived claimants, it would help the claimant better provide the necessary relevant details of his or her claim if the claimant had notes to help remember specific dates and facts, particularly if attending the Interview without counsel. The notes would not be used to read into the record of the Interview but would act as a reminder of the important points, particularly given the very detailed nature of the questions in Schedule 2.

We recommend that Rule 6 state that the Interview is a non-adversarial forum for gathering information about the refugee claim, and that its purpose is not to test credibility of the refugee claim.

c) *Interview Report – Rule 7*

Rule 7(1) states the interviewer will prepare an Interview Report that includes information gathered using Schedule 2. The interviewer must review this Report with the claimant with the assistance of an interpreter if necessary, and advise the claimant that the information will be used at the RPD hearing to decide the claim. Rule 7(4) requires the claimant to sign a declaration at the end of the Report "acknowledging having reviewed and received a copy of the Interview Report", and pursuant to Rule 7(5) the interviewer must give a copy of the signed Report to the claimant.

The Interview Report is a significant document since it forms the basis of the record for the RPD proceedings. Rule 7 simply states that the claimant must sign the Report at the end of the interview; it is unclear whether signing the Interview Report will be interpreted as agreeing to its contents. Having just sat through a two- to four-hour interview, the claimant may not be able to fully digest the contents of the Interview Report in order to determine if it accurately reflects his or her answers during the Interview, especially if the claimant is unrepresented.

We recommend that Rule 7(4) clearly state that signing the Interview Report does not mean agreement with its contents, but is merely an acknowledgement of receipt of a copy of the Report.

Rule 7(7) allows the claimant to amend the Interview Report after the Interview. Allowing changes to the Interview Report is a positive step given the importance of the Interview Report in the proceedings; however, amending the Interview Report could be a very time-consuming and detailed process, particularly where the claimant was unrepresented at the

Interview. It is likely that the claimant will require assistance of counsel to make such changes, and to provide "detailed reasons for the changes". If not present at the interview, counsel will most likely require extra time to review the Interview recording and Interview Report before amending the Report. This step of amending the Interview Report with the assistance of legal counsel could add additional time, process, and expense for claimants who have a private lawyer, as well as another step for which counsel will seek legal aid funding. Further, the ability to amend the Interview Report will be extremely difficult for unrepresented claimants.

Our preference is to provide an expanded role for counsel at the interview so that Rule 7(7) changes to the Interview report are minimized.

d) *Abandonment – Rule 62*

Rules 62 states that if the claimant fails to attend the Interview, the IRB may declare the claim abandoned without further notice to the claimant unless the IRB receives an acceptable written explanation with proof from the claimant within 5 days after the date of the Interview.

Given that the Interview could be scheduled as early as 16 days after the claimant's arrival in Canada (where the eligibility determination is made by CBSA at a port-of-entry), there could be several legitimate reasons why the claimant did not appear for the Interview, especially if the claimant has not yet come in contact with social service agencies, or has not yet obtained legal counsel. We are concerned that during the initial implementation of the new process, claimants and service providers may be very unsure of the procedure and inadvertently miss interview dates.

We are concerned that the unrepresented claimant may not be able to provide "an acceptable written explanation", and risk having his or her claim abandoned without a full and fair opportunity to provide an explanation.

We are also concerned that Rule 62, as drafted, will place additional costs on the LSS immigration budget by resulting in more applications to reopen an abandoned claim.

We believe the Rules should allow for a simple process to reinstate the claim at this early stage where the claimant misses the Interview.. The claimant should be given notice and an opportunity to explain their failure to attend prior to the claim being declared abandoned.

C. Procedural Issues

a) *Counsel of Record – Rule 13*

Rules 13 and 14 state that as soon as claimant's counsel agrees to a date for a proceeding (which includes the Interview), counsel becomes counsel of record for the claimant, and to be removed as counsel of record, counsel must make a written request to the IRB. We assume this request is not in the form of an application pursuant to Rule 48 but a simple letter.

We are concerned that these Rules may lock-in counsel too early in the process as counsel of record. If LSS maintains a two-stage merit screening process, referral counsel may only be retained for one stage of the process. As well, due to the short timelines between referral to the IRB and the initial Interview, LSS may implement alternative ways to provide services to refugee claimants, such as a duty counsel model for the initial stages of the proceedings. According to this Rule, if duty counsel took on the role of legal counsel at the Interview *only*, that duty counsel would become counsel of record. Duty counsel would then be required to write to the IRB to get removed from the record. This would result in extra work for legal aid lawyers and extra administrative work for the IRB.

We recommend that Rule 13 be re-written to allow for legal counsel to qualify his or her retainer at the beginning of a proceeding. This would allow, for example, duty counsel to represent a claimant at the Interview, but not become counsel of record for the hearing. We would be happy to work with the IRB to determine exactly how such "limited" retainers would operate in practice.

b) *Form of Documents – Rule 30*

Rules 30(1) and 30(2) state that any document or photocopy used in a proceeding must be typewritten and presented on double-sided paper. While we believe that allowing double-sided filings is a positive step, we do not think double-siding should be mandatory. There are many reasons, such as equipment malfunction or an unrepresented claimant not having access to a double-sided photocopier, why providing double-sided filings may not be practical under all circumstances and under short filing deadlines. Therefore, we recommend that Rule 30 be amended to encourage double-sided filings, while making them optional.

D. Hearings

a) *Timeframe from the Interview to the Hearing, and for Filing Documents – Rule 32*

Currently, LSS merit screens all legal aid applications by refugee claimants for Hearing representation. We anticipate that the proposed 60 day and 90 day timeframes for hearings will pose significant barriers to LSS's ability to merit screen legal aid applicants and make timely referrals to lawyers.

For instance, Rule 32(4)(a) states that the claimant must file supporting documents for the Hearing not later than 20 days before the Hearing. This means that there is only a 40-day or 70-day window for LSS to merit screen applications, locate available lawyers and/or interpreters, and for the lawyer to prepare the claimant and the case for the Hearing. In many cases, this will not be adequate time to complete all of these steps. In support of a claim, it is not unusual for the claimant to file medical or psychological reports. Disbursement costs for LSS and for claimants will likely increase with a need to pay premiums to obtain expert reports within such short timeframes. It will also be more difficult for claimants to obtain supporting documentation from overseas within these timelines.

We are concerned that counsel will find it necessary to apply for adjournments in many cases and bill LSS for these applications. This would put an additional strain on the legal aid budget and cause an additional administrative burden on the IRB.

b) *Transcripts of tape recording of interviews - Rule 33*

Rule 33 states that if a party wants to rely on the recording of the Interview at the Hearing, the party must state the reasons why, and provide the full transcript of the Interview at the party's own expense no later than 20 days before the hearing. Requiring the claimant to file the full transcript will have significant cost consequences for the unrepresented claimant and for legal aid disbursement costs. If the claimant is only relying on parts of the Interview he or she should be permitted to file partial transcripts.

Where transcripts are necessary, they should be provided and paid for by the IRB.

c) *Expedited Hearing Process*

The draft IRB Rules do not mention an Expedited Hearing process. We anticipate that the elimination of an expedited hearing process will impact legal aid budgets. Currently, counsel fees for expedited hearings are about one-half those for full hearings. Eliminating this option would very likely increase hearing expenditures for LSS. We recommend that the IRB re-introduce the Expedited Hearing process into the Rules.

E. Operational Issues

As discussed above, LSS may need to consider alternative service delivery models for refugee claimants due to funding challenges created by the current changes to the refugee determination system. Should LSS implement a duty counsel model to provide services to claimants at the front-end of the process (e.g. the Interview), this model would require duty counsel to have office space to meet with claimants at this stage. We may also seek assistance in scheduling claimant interviews and interpreters. We hope that the IRB, CIC and CBSA will take this into consideration when designing its new operational structure under the *Balanced Refugee Reform Act,* and we can work in partnership to enhance service to claimants.

SPECIFIC RECOMMENDATIONS: Refugee Appeal Division

A. Filing and Perfecting the Appeal

a) *Timeline to File Appeal*

We understand that the claimant will have to file and perfect an appeal to the RAD within 15 days of receiving the RPD's decision. Rule 9 of the RAD Rules states that the appellant must file a written notice of appeal and an appeal document, which must include a memorandum of argument, a full transcript of the RPD hearing if the appellant chooses to

rely on the transcript in the appeal, any documents, and any law the appellant intends to rely on in the appeal.

The RAD adds a new level of proceeding to the refugee determination process. As it is new, no funding exists for this stage in LSS's current budget. LSS now merit screens all legal aid appeal applications for other matters. We anticipate that this 15 day timeframe will pose significant barriers to LSS's ability to merit screen legal aid applicants for RAD representation, and to appoint counsel. Performing a merit screening and making a referral to a lawyer could take 15 days or more (assuming the claimant contacts LSS on the day he or she receives the decision, which is not always the case). After receiving the referral, the lawyer then needs time to prepare the appeal notice and the appeal document. This timeframe will prove extremely problematic for counsel preparing for the appeal, if that counsel was not counsel of record for the RPD Hearing.

We recommend that there be a 15-day timeframe for filing the notice of appeal and an additional 30 days be provided for filing the appeal document.

b) Contents of Appeal Document – Rule 9(5) - Transcripts

Rule 9(5)(v) states that the appellant must file the appeal document containing the *full* RPD Hearing transcript, if choosing to rely on it in the appeal.

We have several concerns with this requirement. As in the RPD draft Rules, the RAD draft Rules emphasize the importance of the role of transcripts in the refugee determination process. Transcripts are very expensive to obtain, especially when doing so on an expedited basis. Under these Rules, obtaining a full transcript in 15 days or less is likely to generate significant disbursement costs that LSS will have difficulties supporting under our current budget, as well as a significant costs for the unrepresented claimant.

We recommend that the Rule dispense with a full transcript requirement, and instead allow flexibility for the appellant to file only those portions of the transcript that he or she intends to rely on in the appeal. Further, the Rules should allow the RAD to dispense with the necessity for a transcript in certain situations and permit the member to listen to the recording of the hearing.

Where transcripts are necessary they should be provided and paid for by the IRB.

c) Format of Appeal – Rule 9

Rule 9 requires the appellant to file the appeal in writing. We are concerned that many appellants will be unrepresented and will be unable to articulate their appeal in writing, thus limiting the accessibility of the appeal process.

CONCLUSION:

Given that we have had only a few weeks to review these draft Rules, we anticipate that we will provide further comments during the next round of revisions to these Rules.

We hope our comments assist the IRB in drafting Rules that guarantee fairness, efficiency and access to justice.

Yours truly,

Mark Benton, QC
Executive Director
Legal Services Society of BC