



**Legal
Services
Society**

Providing legal aid
in British Columbia
since 1979

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Office of the Executive Director

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VIA EMAIL

Citizenship and Immigration Canada
Jean Edmonds South Tower
17th Floor, 365 Laurier Avenue West
Ottawa, Ontario K1A 1L1
Email: Jennifer.Irish@ci.gc.ca

Attention: Jennifer Irish, Director, Asylum Policy Program Development

Dear Madam:

Re: Comments on the proposed Regulations Amending the Immigration and Refugee Protection Regulations published in the *Canada Gazette*, Part I, Vol. 145, No. 12, on March 19, 2011

The Legal Services Society of BC (LSS) welcomes the opportunity to provide comments on the proposed Regulations Amending the Immigration and Refugee Protection Regulations. LSS provides legal aid services which range from legal information to advice and representation to people with low incomes in British Columbia. Our mandate is to help people resolve their legal problems and facilitate access to justice.

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

- legal information provided by front line staff and legal information outreach workers, and through print materials and the materials on the Web;
- legal advice and limited representation services provided by duty counsel, including criminal, family, and immigration duty counsel;
- telephone advice services for people arrested, detained and under investigation, and for people with family law problems; and
- legal representation referrals to private bar lawyers for criminal, immigration, and family cases.¹

LSS submits its comments from the perspective of the provider of legal aid services to people with low incomes in British Columbia. We recognize that our clients, particularly those claiming refugee status, 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

¹ Financial eligibility for legal representation is assessed through an intake process; some advice services are also subject to a financial eligibility test.



levels of literacy. They need a refugee determination process that is understandable, accessible, sensitive to the reality of their circumstances, flexible and fair. They require the assistance of experienced immigration legal counsel in order to have meaningful access to the refugee determination system.

Any changes to the refugee determination process that impact the provision of legal aid services will consequently impact access to legal representation for a substantial number of refugee claimants in BC. Based on previous years, we anticipate that LSS will receive approximately 1000 legal aid applications from refugee claimants annually (this number represents approximately half of all refugee claims filed annually in BC). Assuming about 60 percent of claimants will receive a negative decision at the Refugee Protection Division and that the majority of those will apply for legal aid, LSS could receive approximately 450 legal aid applications for the Refugee Appeal Division.

Comments on the Proposed Regulations

Overall we are concerned that the new regulatory framework for the refugee determination process, including the tight time lines, will result in considerable increased costs for legal aid providers. In the absence of a substantial increase in legal aid funding for refugee matters, LSS will not be able to ensure uninterrupted service delivery to refugee claimants. 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 the society is extremely sensitive to procedures that hinder the ability of legal aid plans to effectively merit screen and otherwise manage limited legal aid resources as efficiently as possible.

We would like to express some specific concerns regarding section **159.95** of the proposed Regulations, which establishes time limits for filing and perfecting an appeal to the Refugee Appeal Division (RAD).

According to the proposed Regulations appellants must file and perfect an appeal with the RAD no later than 15 working days after the Refugee Protection Division (RPD) decision and written reasons are received by the appellant. A perfected appeal includes the filing of an application to appeal, a copy of the decision and written reasons being appealed, and a memorandum of argument and supporting affidavits. According to the proposed Regulations the RAD may extend the time for filing and perfecting an appeal for reasons of fairness and natural justice. It appears from the Regulatory Impact Analysis Statement that extensions will be rare. The only reference to extensions in the Regulatory Impact Analysis Statement characterizes circumstances where an extension may be granted as “exceptional circumstances”, such as serious injury or illness.

We are very concerned that a 15-day period to file and perfect an appeal with the RAD will not provide our clients with a fair opportunity to access the new refugee appeal process and will place additional demands on our legal aid immigration budget for the following reasons:



1. Time lines will result in increased demand for legal aid

LSS receives limited government funding for legal aid advice and representation services for immigration cases. This funding is used to provide duty counsel services for detainees, refugee claimants' representation services, appeals to the Immigration Appeal Division, pre-removal risk assessment submissions, humanitarian & compassionate submissions, stay of removal applications, and judicial review applications.

When the *Balanced Refugee Reform Act* and the accompanying Regulations are implemented, we anticipate that there will be a greater demand for immigration legal aid services. Given the short time lines introduced into the refugee determination process, few claimants are likely to receive a work permit, obtain work and have the financial resources to pay for a private lawyer. We anticipate more claimants will be financially eligible for legal aid services, thus increasing the demand for legal aid referrals.

2. Time lines do not allow sufficient time to merit screen applications

LSS is not able to fund all applications for legal aid immigration services with our current budget. As a result we merit screen legal aid applications to properly administer our limited financial resources. To merit screen appeal cases, LSS normally obtains materials concerning the facts and legal issues involved in the appeal from the legal aid applicant and his or her counsel. This material is then reviewed by an LSS case review lawyer who provides a recommendation as to whether the appeal has sufficient merit for a legal aid referral. Following a similar process for the RAD could involve LSS requesting and reviewing a copy of the RPD decision, a transcript of the RPD hearing, the interview record, and a legal opinion from counsel who conducted the hearing. This process could take 7 to 10 days, after which time LSS would need to locate counsel able and willing to accept a RAD referral. The merit screening and appointment of counsel process could use more than half of the proposed time period in which to file and perfect the appeal.

3. Time lines present challenges in locating counsel and drive up case costs

Given the 15 day time frame, we anticipate that hearing counsel will be available less frequently to accept a RAD referral due to the short notice and prior work commitments. Appointing counsel to represent a claimant at the RAD who did not represent the claimant at the RPD hearing will place an additional burden on our limited legal aid immigration budget. It is always more expensive to have a new counsel conduct an appeal due to lack of familiarity with the facts and issues involved in the case. It also requires additional staff resources to locate new counsel.



4. Time lines do not allow sufficient time for counsel to adequately prepare for the RAD

After receiving a RAD referral, counsel would not have adequate time to prepare the appeal notice and the appeal document. This time frame will prove extremely problematic for even very experienced counsel to prepare for the appeal, especially if that counsel was not counsel of record for the RPD hearing. We cannot see how counsel can properly represent their clients given the proposed 15-day limitation period.

Impact of the Regulations on Fairness and Access to Justice

The Regulatory Impact Analysis Statement accompanying the proposed Regulations states that the processing time lines contribute to the objective of creating a faster and fairer refugee determination system that is less open to abuse. While LSS is in favor of a process that provides timely decisions for those in need of protection, we feel that the processing time lines emphasize speed and deterrence at the expense of fairness, and will compromise the ability of individuals in genuine need of protection (especially vulnerable claimants) to obtain legal aid and have adequate appeal preparation time. The proposed time lines have the potential for reducing the overall fairness of the refugee determination process in two key ways:

1. The 15-day time line will restrict appellants' ability to obtain legal representation in a timely enough manner for counsel to adequately prepare for the appeal process, and thereby, compromise the integrity of the appeal process as a whole.
2. The 15-day time line may force many appellants to be unrepresented at the RAD. This will render the appeal process inaccessible and thus essentially meaningless as unrepresented appellants may not be able to adequately articulate their case in writing. A large number of unrepresented appellants could also undermine the processing efficiencies intended by the new regulatory framework and significantly impact the tribunal's resources, as it will be extremely challenging for unrepresented appellants to navigate the tribunal's rules and procedures.

Other Appeal Filing Periods

The 15-day time limit for both filing and perfecting the appeal is a significant departure from other immigration rules of procedure. For example:

- An applicant must file an application for leave for judicial review in Federal Court within 15 days of receiving a decision under the *Immigration and Refugee Protection Act (IRPA)*, and has an additional 30 days to perfect the Application for Leave (s.72(2) of IRPA, s.10(a) of the *Federal Courts Immigration and Refugee Protection Rules*).



- An appellant has 30 days to file an appeal from a removal order made at an admissibility hearing or an examination under the *Immigration Appeal Division Rules* (IAD Rules), and the Immigration Division has an additional 45 days to prepare the appeal record (ss. 5 – 8 of the IAD Rules).

Recommendation

We recommend that an appellant have 30 days to file a notice of appeal with the RAD, and an additional 45 days to perfect the appeal. These time lines are more consistent with other immigration administrative tribunal rules of procedure. In the alternative, and at the very least, we recommend that the RAD follow the time lines for filing and perfecting an application for leave for judicial review (15 days to file and 30 days to perfect). In addition, we recommend that circumstances where the RAD may grant an extension of time include situations where a refugee claimant has had difficulty applying for legal aid and obtaining counsel.

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

Yours truly,

Mark Benton, QC
Executive Director
Legal Services Society of British Columbia