



Office of the Executive Director

July 27, 2011

**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 I: Vol. 145, No. 27, on July 2, 2011**

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 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 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.<sup>1</sup>

LSS submits its comments from the perspective of a provider of legal services to people with low incomes 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

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

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**

In immigration matters LSS currently provides the following services: a duty counsel system for detainees; legal aid referrals to private bar lawyers to represent refugee claimants during preparation of their Personal Information Forms (PIF) and at their RPD hearings; and referrals to private bar lawyers for Judicial Reviews, Pre-Removal Risk Assessment (PRRA) applications, Humanitarian and Compassionate (H&C) applications, and some Immigration Appeal Division (IAD) matters.

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 address either procedural changes that increase legal aid costs or the incidental administrative costs associated with such changes. 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.

In order to make the best use of our limited legal aid immigration budget under the new refugee determination system it will be imperative for LSS to merit screen cases prior to issuing a legal aid referral. The short time lines for the initial interview, RPD hearing and RAD appeal will make screening of legal aid applications and appointment of counsel challenging, and may result in some clients not having access to legal aid services.

LSS made submissions on the draft Rules that were circulated to stakeholders in November 2010. LSS is pleased to see that some of the draft Rules have been amended in a manner that is consistent with our previously stated concerns, such as the role of counsel at the initial interview.

Since commenting on those draft Rules LSS has learned that our budget for immigration legal aid services will not increase even though we anticipate the new refugee determination system will place additional financial demands on our limited resources. For this reason, we wish to focus our comments on two main areas – costs and fairness. LSS is concerned about the financial burden the Rules may place on legal aid plans and claimants, particularly as it relates to transcript costs. LSS also has significant concerns about procedural fairness issues that may affect our clients.

## **SPECIFIC RECOMMENDATIONS: RPD RULES**

### **A. Costs to Legal Aid Plans and Claimants**

#### **Rule 24 - Allowing a claim without a hearing**

Rule 24 allows a claim to be decided without a hearing. There is no mention in the Rules regarding a claim being decided by way of an expedited interview.

In the past, expedited interviews have provided a cost savings to LSS. Typically cases that were heard via an expedited interview were less expensive in that they incurred fewer preparation hours and fewer hearing hours because the issues and areas of questioning had a narrower focus. Knowing in advance that a claim will be decided by the expedited interview process means that counsel will spend fewer hours preparing the claim for a formal hearing. This results in savings for legal aid plans.

#### **RECOMMENDATION #1:**

We recommend that a Rule be included, in addition to Rule 24, to allow the RPD to schedule an expedited interview. If the claim is not allowed by the expedited interview process then the claim would proceed to a full RPD hearing.

#### **Rule 36 -Transcripts of interviews**

Rule 36 provides that if a party wishes to rely on a recording of the interview at the RPD hearing the party must provide, at their own expense, a transcript of the interview.

We note that, unlike the draft Rules, the word “full” does not precede the word transcript in Rule 36(a). It is not clear from this Rule whether a full transcript is required or whether a partial transcript, of relevant portions of the interview, would suffice.

The cost/benefit analysis of the Regulatory Impact Analysis Statement indicates that transcripts may be produced by non professional individual transcribers, such as family members or friends, thus reducing transcription costs. In practice most refugee claimants do not have family or friends that have the language abilities and other skills required to transcribe interviews. Community resources in BC are very limited and the services they provide to refugee claimants are restricted by their funding agreements. We do not anticipate that community resources will be able to assist with transcription.

It is likely that in practice most transcripts will be produced by professional service providers or by lawyers’ support staff. In either case LSS will be asked to fund the cost of producing the transcript; however, LSS does not have the funding to pay for full transcripts. Often claimants will want to rely on a very limited portion of the interview and thus a transcription of the entire interview would not be necessary. In most cases, a partial transcript should suffice.

Or, this Rule could prevent claimants who cannot afford to pay for transcripts themselves, and who are unable to get the help of friends, family or community resources for transcription, from showing that the interview record is inaccurate and jeopardize the fairness of the hearing.

### **RECOMMENDATION #2:**

We recommend that the Rule be amended to allow the RPD to play relevant portions of the interview audio recording at the hearing at the first instance, or as an alternative to filing the interview transcript. The RPD could keep audio equipment on site and this approach would reduce costs for all.

Alternatively, we recommend that the Rule be amended to provide that if a party wishes to rely on a recording of the interview the party must provide, at their own expense, a transcript of the relevant portions of the interview only.

### **Rule 69 - Transcripts of hearings**

The cost/benefit analysis of the Regulatory Impact Analysis Statement indicates that the IRB will, as a practice, provide parties with a transcript of the RPD hearing for the purpose of pursuing an appeal at the RAD. The rationale for this statement is that this would be the practice of the IRB as the Rules do not specify that the parties must provide the transcript at their own cost.

We believe that if the intended practice of the IRB is to provide claimants with a transcript of the hearing along with their negative decision, then this should be clearly stated in the Rules. If this is not clearly stated in the Rules, misunderstandings as to who should provide a transcript of the hearing may arise.

Having a transcript provided with a copy of the RPD hearing decision will assist LSS in merit screening applications for RAD referrals. In addition, LSS does not have the financial resources to fund hearing transcript costs.

### **RECOMMENDATION #3:**

We recommend that Rule 69 be amended to add a requirement that when the RPD makes a decision to deny a refugee claim, the RPD will provide the claimant with a copy of the transcript of the hearing along with the written notice of decision.

## **B . Fairness to Claimants**

### **Rule 3 - Providing information about legal aid**

Rule 3(b)(iv) states that the claimant must be provided, in writing, with information explaining that they may, at their own expense, be represented by legal or other counsel.

In BC LSS provides legal aid services to a large number of refugee claimants.<sup>2</sup> Given the short time frames introduced by the Balanced Refugee Reform Act (BRRRA), we are concerned that

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<sup>2</sup> Based on volumes over the last several years, LSS could receive approximately 1000 legal aid applications from refugee claimants annually.

claimants will be unable or unaware that they should immediately apply for legal aid. It is in everyone's interest that legal counsel be engaged as early on in the process as possible. For the IRB it will assist in scheduling to know if counsel has been retained before the interview, and if so, to be provided with counsel's available hearing dates at the interview.

Along with informing claimants of their right to legal representation we ask that officers provide claimants with written materials outlining legal aid services and information on how to apply for legal aid. LSS could produce this information which could then be included in the claimants' interview package.

#### **RECOMMENDATION #4:**

We recommend that Rule 3(b)(iv) be amended to state that written information about provincial legal aid plans be provided to the claimant.

#### **Rule 22 - Disclosure of personal information**

Rule 22 allows the RPD to disclose to a claimant personal or other information from another claimant unless there is a serious possibility that it will endanger life, liberty or security of person or cause an injustice.

We are concerned that refugee claimants, who have reason to fear for their safety, will be reluctant to provide full details of their claim, knowing that their personal information may be disclosed to other claimants without their knowledge given that the Rule permits disclosure without notice in circumstances where a claimant cannot be contacted.

#### **RECOMMENDATION #5:**

We recommend that the Rule state that the RPD shall not disclose to a claimant personal information regarding another claimant unless the other claimant is notified that the information may be disclosed and is given an opportunity to respond. If the claimant cannot be notified than the information should not be disclosed.

Rule 22 should also state that the Division must notify the claimant of the reasons for the release of personal information so that the claimant whose information the Division is seeking to release has an adequate opportunity to balance the reasons for disclosure against the claimant's privacy/safety concerns.

The Rule should clarify that the onus of establishing that (a) there is sound reason to disclose the personal information and (b) the disclosure will not endanger the life, liberty or security of any person or cause an injustice rests with the Division.

#### **Rule 55 - Changing a date or time of a proceeding**

Rule 55(9) states that "exceptional circumstances" are required for changing the date or time of an interview.

In cases where the claim is made at a port of entry we are being advised that claimants will be given their interview dates upon completion of their refugee notification interview. With inland

claims we expect that most claimants will not apply for legal aid until after attending their notification interview and receiving their interview dates.

Given the timing of interview scheduling, we anticipate that there will be circumstances where counsel will need to apply for a change of the interview date in order to meet with their client to prepare for the interview or to attend the interview, particularly where claims are made at a port of entry. The current wording of the Rule will make it difficult for newly retained counsel to change the RPD interview date where counsel was not notified of the date and the claimant had only a limited or no opportunity to meet with counsel before the interview.

We note, however, that Rule 55(5) provides extensive criteria for changing the date and time of all other proceedings other than the interview.

#### **RECOMMENDATION #6:**

We recommend that the criteria set out in Rule 55(5) apply to all proceedings including an application to change the date and time of the interview.

#### **Rule 63 - Reopening a claim or application**

Rule 63 provides a procedure to reopen a claim for refugee protection that has been decided or declared abandoned. It states that the RPD must not allow the application unless there was a failure to observe a principle of natural justice.

We are concerned that the test for reopening abandoned claims is too narrow. In some cases claimants have a very valid explanation as to why they may have failed to attend an interview or hearing. On an application to reopen they should be given an opportunity to explain these reasons.

#### **RECOMMENDATION #7:**

The Rule regarding the reopening of decided or abandoned cases should be different since different factors are at play in each situation. In the case of claims declared abandoned regard should be given to factors such as: did the claimant have counsel, when in the process the abandonment was declared, and did the claimant have an opportunity to explain the reasons for the abandonment. The criteria for reopening after a hearing could be similar to the current Rule 63 criteria.

#### **Rule 66 - Declaring claims abandoned**

Rule 66 permits the RPD to declare a claim abandoned for a failure to attend an interview without providing notice of abandonment to the claimant unless the claimant provides the RPD with a written explanation within five days after the date of the interview

Given the short time frames claimants may be overwhelmed with the refugee claim process and the challenges of settlement and may inadvertently miss an interview and not have the capacity (e.g. emotionally or linguistically) to provide a written explanation to the RPD. These claimants should receive notice of an abandonment hearing and be given an opportunity to appear to give reasons for their failure to attend the interview.

The Rule regarding abandonment for failure to attend an interview should be the same as for failure to attend all other proceedings.

**RECOMMENDATION #8:**

Rule 66 should be amended to provide that a claimant is entitled to notice of an abandonment proceeding and is entitled to an opportunity to provide reasons for their failure to attend an interview at that proceeding.

**SPECIFIC RECOMMENDATIONS: RAD RULES**

**Costs and Fairness Considerations**

**Rule 9 - Filing and perfecting an appeal**

Rule 9(5)(b) provides that the appellant must provide a full transcript of the RPD hearing if they want to rely on the transcript at the appeal.

The cost/benefit analysis of the Regulatory Impact Analysis Statement indicates that the IRB would, as a practice, provide parties with a transcript of the RPD hearing for the purpose of pursuing an appeal at the RAD. The rationale for this statement is that this would be the practice of the IRB as the rules do not specify that the parties must provide the transcript at their own cost.

However, given that the RAD Rules say the appellant must file an appeal record containing the full transcript of the RPD hearing, LSS anticipates that appellant's counsel will seek to have the transcript paid for as a disbursement by legal aid. LSS does not have the financial resources to fund hearing transcription costs.

**RECOMMENDATION #9:**

We recommend that Rule 9 be clarified to state that the RPD will file a full transcript of the hearing with the RAD.

**Rule 9 (9) - Extension of time to file an appeal**

Rule 9(9) states that a request for an extension of time made after the time limit set must be accompanied by a notice of appeal and an appellant's record. The Rule does not address an extension of time within the time limit.

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 supporting documents. Given these time constraints it would be helpful if the Rules permitted the claimant or counsel to apply to the RAD to extend the time to file an appeal pending the review of the claimant's application for legal aid and the appointment of counsel. These time constraints will be particularly harsh where the RPD reserves making its decision on a claim, and a claimant only receives written notice of a negative decision at a later date.

## **RECOMMENDATION #10:**

LSS recommends that a Rule be added that provides a mechanism for appellants to request an extension of time within the initial 15 day period to file a notice of appeal and/or the appeal record. This Rule should also clarify the impact of requesting an extension on the 15 day deadline. For instance, where the RPD reserves making its decision on a claim, and an appellant later receives written notice of a negative decision, the impact of requesting an extension should be an automatic 15 day extension to file the notice of appeal and the appeal record under most circumstances.

## **Rule 10 - Division record**

## **RECOMMENDATION #11:**

As noted above under Rule 9, LSS recommends that the RPD be responsible for filing a transcript of the hearing with the RAD. This should become part of the hearing record.

## **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 with transcripts and ensuring transcript costs are not borne by legal aid providers. For interview transcripts, the claimant should need to file relevant portions only, and for hearing transcripts, production costs should be borne by the IRB.

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**

### **RPD RULES**

#### **RECOMMENDATION #1:**

A Rule should be included, in addition to Rule 24, to allow the RPD to schedule an expedited interview. If the claim is not allowed by the expedited interview process then the claim would proceed to a full RPD hearing.

#### **RECOMMENDATION #2:**

Rule 36 should be amended to allow the RPD to play relevant portions of the interview audio recording at the hearing at the first instance, or as an alternative to filing the interview transcript.

Alternatively, the Rule should be amended to provide that if a party wishes to rely on a recording of the interview the party must provide, at their own expense, a transcript of the relevant portions of the interview only.

#### **RECOMMENDATION #3:**

Rule 69 should be amended to add a requirement that when the RPD makes a decision to deny a refugee claim, the RPD will provide the claimant with a copy of the transcript of the hearing along with the written notice of decision.

#### **RECOMMENDATION #4:**

Rule 3(b)(iv) should be amended to state that written information about provincial legal aid plans be provided to the claimant.

#### **RECOMMENDATION #5:**

Rule 22 should state that the RPD shall not disclose to a claimant personal information regarding another claimant unless the other claimant is notified that the information may be disclosed and is given an opportunity to respond. If the claimant cannot be notified than the information should not be disclosed.

Rule 22 should also state that the Division must notify the claimant of the reasons for the release of personal information so that the claimant whose information the Division is seeking to release has an adequate opportunity to balance the reasons for disclosure against the claimant's privacy/safety concerns. The Rule should clarify that the onus of establishing that (a) there is sound reason to disclose the personal information and (b) the disclosure will not endanger the life, liberty or security of any person or cause an injustice rests with the Division.

**RECOMMENDATION #6:**

The criteria set out in Rule 55(5) should apply to all proceedings including an application to change the date and time of the interview.

**RECOMMENDATION #7:**

Rule 63 regarding the reopening of decided or abandoned cases should be different since different factors are at play in each situation. In the case of claims declared abandoned regard should be given to factors such as: did the claimant have counsel, when in the process the abandonment was declared, and did the claimant have an opportunity to explain the reasons for the abandonment. The criteria for reopening after a hearing could be similar to the current Rule 63 criteria.

**RECOMMENDATION #8:**

Rule 66 should be amended to provide that a claimant is entitled to notice of an abandonment proceeding and is entitled to an opportunity to provide reasons for their failure to attend an interview at that proceeding.

**RAD RULES****RECOMMENDATION #9:**

Rule 9 should be clarified to state that the RPD will file a full transcript of the hearing with the RAD.

**RECOMMENDATION #10:**

Rule 9 should be amended to add a mechanism for appellants to request an extension of time within the initial 15 day period to file a notice of appeal and/or the appeal record. This Rule should also clarify the impact of requesting an extension on the 15 day deadline. For instance, where the RPD reserves making its decision on a claim, and an appellant later receives written notice of a negative decision, the impact of requesting an extension should be an automatic 15 day extension to file the notice of appeal and the appeal record under most circumstances.

**RECOMMENDATION #11:**

The RPD should be responsible for filing a transcript of the hearing with the RAD under Rule 10(2). This should become part of the hearing record.