Bill C-11, *Balanced Refugee Reform Act*

NATIONAL CITIZENSHIP AND IMMIGRATION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Citizenship and Immigration Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Citizenship and Immigration Law Section of the Canadian Bar Association.

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EXECUTIVE SUMMARY

The Canadian Bar Association's National Citizenship and Immigration Law Section (CBA Section) appreciates the opportunity to comment on Bill C-11, the *Balanced Refugee Reform Act*. Although we recognize the Bill contains positive features that could streamline the refugee determination process, the fairness of the proposed system and its ability to properly determine applications by persons in need of protection or requiring humanitarian consideration are equally important considerations.

Below, we suggest a number of amendments to that Bill to ensure that fairness and accuracy is preserved while still satisfying the objective of faster processing and administrative efficiency.

Problems with the Current System

The current system is bottlenecked in several places: the eligibility determination by the Canada Border Services Agency (CBSA), presenting the Personal Information Form, scheduling the hearing, the Pre-Removal Risk Assessment (PRRA). However, judicial review at the Federal Court, applications for consideration based on humanitarian and compassionate (H and C) grounds, or applications for temporary resident permits, do not add significantly to the delays in the system and augment fairness and individualized justice. To the extent that Bill C-11 focuses on eliminating these latter safeguards in the pursuit of a quicker process, it is misdirected.

Overview of the New Proposals

A fair, fast and efficient determination process favours genuine refugees. Therefore, any refugee reforms should be measured against the twin criteria of fairness and expeditiousness, both in the determination of claims and the removal of failed refugee claimants. Expeditiousness without fairness leads to capriciousness and possible injustice. Fairness without expeditiousness leads to legitimate claims languishing in the system and encourages the proliferation of unmeritorious claims. Below is an evaluation of the proposals in Bill C-11 based upon this approach.

Refugee Appeal Division

Induction of the Refugee Appeal Division (RAD) is a key innovation, and one which the CBA Section has supported for many years. Under Bill C-11, however, access to the RAD is restricted for those applicants whose country of origin is on a list that the government proposes to implement (discussed in detail below). Also, there are restrictions on the RAD's ability to receive evidence – evidence must be "new" or not reasonably available prior to the rejection of the claim by the Refugee Protection Division (RPD). Given these restrictions, the legislation should state explicitly that anything on the tribunal record is not subject to this test, and enshrine the standard test applicable to receiving evidence on appeal (namely, the Division should consider, among other things, "the efforts that the subject of the appeal made at the time of the initial hearing to obtain the evidence, the relevance of the evidence to the appeal, and its importance to the determination of the appeal"). Last, s.110(6), setting out the conditions for holding a hearing, should be changed from "may" hold a hearing to "shall." We know of no circumstances that would justify the RAD conducting a written appeal where the documentary evidence raises a serious issue of credibility central to the decision, which could influence the outcome.

Designated Countries of Origin

The CBA Section believes there are serious problems in empowering the government to designate a list of countries considered democratic and "safe," but from which a significant number of unfounded refugee claims are made, for the purposes of eliminating procedural rights for these countries' refugees. Not only is refugee determination an individualized assessment, of even greater concern is the likelihood that the list will become politicized. The CBA Section is of the view that this provision should be eliminated.

Alternatively, if it remains, the risk of politicization should be minimized. This could be accomplished by ensuring that the legislation restricts the use of the list to situations that meet strict human rights and state protection criteria, includes a "sunset clause" requiring re-evaluation of countries after one year, and provides a requirement for public input before the designation is final. We therefore propose adding the following clauses to the Bill:

> 109.1 (3.1) A country shall not be designated under this section unless the number of claims by nationals of the country exceeds, in the three month period prior to the designation, ten percent of the

> total number of claims referred to the Refugee Protection Division during that period.
>
> 109.1(3.2) A country shall cease to be considered to be designated pursuant to section 109.1 (1) one year after the date on which it was designated, unless the Minister designates the country again prior to the expiry of the anniversary of the designation.
>
> 109.1 (3.3) The Minister may only designate a country pursuant to this section if the Minister has received a recommendation from the Advisory Committee appointed under this section.
>
> 109.1(3.4) Prior to designating a country pursuant to this section, the Minister must provide notice of his intention to do so and shall allow interested parties to make representations regarding the designation.
>
> 109.1 (3.5) For the purpose of determining whether or not a country ought to be designated under this section the Minister shall create an advisory committee. The Advisory Committee shall include two members who are Public Service employees who have expertise and experience in human rights law and two independent human rights experts designated in consultation with stakeholder groups. The Committee shall, at the request of the Minister, consider whether or not a country ought to be designated under this section and shall receive representations made pursuant to section 109.1 (3.4).

Expedited processes – Replacing personal information form filed within 28 days with an interview within eight days and a hearing within 60 days.

The Bill provides for a new process of an initial hearing by an RPD officer, who then sets a hearing date. It does not specify the above-noted time periods. However, the government has stated them as operational requirements. It will be difficult to ensure that the claimant has proper access to counsel and time to properly advance their case within this time frame. Given the importance of any initial statements and the potential adverse inferences from an incomplete or inaccurate statement, a more appropriate time frame for the initial interview would be 28 days. The federal government should also ensure access to legal aid, or at the very least, duty counsel to provide claimants with initial advice prior to meeting with the officer. Failure to respect a claimant's right to counsel could result in an increase in judicial review applications, increasing cost and delay. Thus, the CBA Section recommends that proposed s.100(4.1) state that a person who attends an interview with an official of the Board has a right to be represented by legal or other counsel.

There are similar concerns with respect to hearings within 60 days. Applicants and counsel need time to prepare the case, disclose documents, and in many cases, retain expert

witnesses, such as psychologists and doctors. A rush to judgment will prejudice claimants with legitimate claims who are not able to adequately prepare, and prompt adjournment requests. From a practical perspective, changing the requirement to hearings within four months will not result in any greater delay.

Further, fundamental fairness requires that clause 24 of the Bill include an opportunity for a claimant to explain non-attendance at an interview before the claim is deemed to be abandoned.

Restrictions on Access to Other Immigration Procedures for One Year

Bill C-11 prevent persons who are making or have made refugee claims from applying for a temporary resident permit for twelve months after their claim has been made, and bars the Minister from considering humanitarian and compassionate (H and C) applications from anyone who has a protection claim pending and for a further one year from rejection of the claim. The ability to apply for a temporary resident permit or for an exemption on humanitarian and compassionate grounds does not impede removal, either by statute or otherwise. The Federal Court will grant a stay on the basis of an outstanding permit or H and C application only in exceptional circumstances.

The CBA Section is particularly concerned by the one year bar to H and C applications. They provide a vital safeguard to ensure that persons have a remedy in circumstances of rights violations that do not meet the stringent test for refugee claims. At the very least, there is no reason why an application for refugee status that has been withdrawn should be a bar to consideration of an H and C claim. If the provision remains, which we strongly oppose, it should be amended to allow persons who withdraw their refugee claim before it is heard to make an H and C application.

Clause 4 also restricts the scope of the humanitarian review so as to preclude overlap between refugee claims and humanitarian claims. There is already jurisprudence which recognizes that risk factors can be raised in an H and C application. Precluding the consideration of risk in H and C applications will not only be extremely difficult to enforce, it may be unconstitutional. This is particularly so if the claimant has not made a refugee protection claim or is precluded from making such a claim, resulting in decision-makers giving no consideration of risk factors at all.

We believe there are other options to conduct a fast, fair and efficient H and C process that complies with the *Charter* and eliminates any concern over delayed removals. The first option is an expedited form of the current system, with decisions over H and C applications remaining with Citizenship and Immigration Canada. This option would merely require administrative changes under the *Immigration and Refugee Protection Act.* Refugee claimants would continue to be entitled to make a concurrent H and C application, or alternatively, would be able to withdraw their refugee claim and file a humanitarian application with certain procedural safeguards in place to ensure this remains a meaningful remedy in deserving cases.

The second option would require centralizing H and C processing in a dedicated processing centre, except in rare cases where an interview is required. In those rare cases, the file would be sent to the region for a decision. If the H and C application were submitted before a final decision is rendered on the refugee claim, there would be an automatic deferral of the claimant's removal while the application is being processed. This would enable claimants to opt out of the refugee system without being subject to immediate removal.

Option three would grant the RAD H and C jurisdiction for those claims that do not meet the stringent test for refugee status. The amount of additional time required to determine the limited H and C factors in a RAD appeal would be minimal.

If the substance of clause 4 remains the same, there are a number of superfluous provisions and technical problems. For example, clause 4 removes "or by public policy considerations" from the current s.25(1) without reflecting this in the text of the Bill, and clause 5 adds proposed 25.1(3) to require that the Minister consider provincial selection criteria (which are economic, and antithetical to a focus on compassionate considerations).

Clause 15 contains another, similar, one-year procedural bar for Pre-Removal Risk Assessments (PRRA). This proposal is too cumbersome and also potentially unconstitutional. Undoubtedly, there will be circumstances where new information comes to light after the decision was rendered which establishes a risk to a person. Although the Bill provides the Minister with the power to exempt classes of persons from this ineligibility provision, the Minister does not have the power to exempt individuals from this provision. Under the proposed legislation there would be no recourse for the claimant to bring it

forward during the twelve month period. If one claimant successfully demonstrates that this bar places them at risk, then the clause will be declared of no force or effect. Clause 15 should be removed.

A better solution is to allow applications for reopening at the Refugee Appeal Division. The application would have to set out the fresh evidence and the grounds for the application. If the RAD concluded that there was no fresh evidence, it could dispose of the matter summarily without reasons. The RAD would allow a new hearing only if the new evidence provided could have affected the outcome. In addition, if a person were already given a removal date, the person would be required to notify the Division of the date of removal and the application would be expedited. Such a proposal would make the PRRA unnecessary except in cases where the applicant has not appealed to the RAD, where the person has been excluded under Article 1 E of F of the Refugee Convention, or found ineligible to make a refugee claim or appeal.

GIC appointments

The CBA Section supports eliminating the influence of political patronage in appointments to the RPD, by making them members of the public service. However, precautions should be taken to avoid the criticisms made against the Immigration Division appointment process, which was perceived to favour persons from within the system and result in decision-makers biased in favour of the government. The CBA Section believes that the legislation should state that the selection process must be open to members of the public service as well as any other qualified person, in accordance with merit-based selection criteria.

Delayed Implementation

Bill C-11 does not come into force as a package, despite being presented as such. In particular, claimants will not have the right to appeal to the RAD for another two years after Royal Assent (unless an earlier date is set by the Governor in Council), whereas the one year bar to H and C applications comes into effect immediately upon Royal Assent. This is unacceptable. A promise of more balance later still means unbalanced now. The staged implementation of the Bill is a fatal flaw and will be disastrous for refugee claimants.

Conclusion

The objective of reforms to the refugee system ought to be the same as with any government program – to ensure the provision of fair, effective service to those who need it.

The CBA Section supports attempts to streamline the refugee system and make it responsive to the needs of legitimate refugees. It also accepts that innovations are needed in order to make the system less attractive to those who make groundless refugee claims. However, fundamental fairness and individual rights must not be injured in the process. Our recommendations are aimed at respecting the intent of Bill C-11, but rectifying what we see as risks of real injustice and ultimately risks to the lives of refugees who are placing their trust in Canada to do the right thing for them and their families.

Bill C-11, *Balanced Refugee Reform Act*

I. INTRODUCTION

The Canadian Bar Association's National Citizenship and Immigration Law Section (CBA Section) appreciates the opportunity to comment on Bill C-11, the *Balanced Refugee Reform Act*, which was introduced in March 2010. The government's stated intention in introducing these reforms was to "deliver quicker decisions on asylum claims and provide faster protection to those in need."[1] Although the Bill contains positive features that could streamline the refugee determination process, the fairness of the proposed system and its ability to properly determine applications by persons in need of protection or requiring humanitarian consideration are equally important. This requires a hearing before an independent and competent decision maker with the possibility of an appeal on the merits. A fair, fast and efficient determination process favours genuine refugees.

We suggest a number of amendments to the Bill to ensure that fairness and accuracy is preserved while still satisfying the objective of faster processing and administrative efficiency.

II. PROBLEMS WITH THE CURRENT SYSTEM

The current system is bottlenecked in several places:

- Eligibility determination by Canada Border Services Agency (CBSA)

  IRPA deems that a person's claim is referred to the Immigration and Refugee Board (IRB) within three days but IRB policy is not to consider cases until the CBSA signs off on eligibility concerns, which are mostly related to security. In some instances, there have been lengthy delays of a year or longer while the CBSA does security clearances.

- Presenting the Personal Information Form

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[1] Citizenship and Immigration Canada, "New Release – Balanced Reforms Planned for Canada's Asylum System" (March 30, 2010), online: http://www.cic.gc.ca/english/department/media/releases/2010/2010-03-30.asp

Under the current system, a claimant is required to present a personal information form within 28 days. There are often delays in presenting the form due to the claimant's difficulty in retaining counsel, requiring a request for an extension.

- Scheduling the hearing

  Given the volume of cases that often confronts the IRB, there can be a delay of a year and a half or longer between the initiation of the claim and the scheduling of a hearing. At different times, the IRB has not had a full complement of members, and the Board's capacity to hear claims was significantly diminished. This created a large backlog.

- Pre-Removal Risk Assessment

  Pre-Removal Risk Assessment (PRRA) is an administrative process conducted by officers to provide a timely assessment of risk prior to removal. It was established to acknowledge lengthy delays between the initial rejection of a claim and the actual removal, during which time circumstances affecting a person's risk of persecution or torture in their home country may change. Once a person applies for a PRRA, his or her deportation is stayed until the PRRA is decided.

  The difficulty with the PRRA process is that although there is no oral hearing, it is still time-consuming. PRRA officers usually can decide one or two cases a day. Given the large volume of PRRA applications, the average time from rejection of a refugee claim to when the claimant's PRRA is decided can easily exceed one year.

However, the following steps in the process do not significantly add to delays and augment the fairness and ability of the system to respond to an applicant's individual circumstances:

- Judicial Review at the Federal Court

  Under the current system, in most cases, a person who makes a claim for refugee protection that is rejected has a right to seek leave to apply for judicial review in the Federal Court. Deportation may be stayed until leave is determined. In the past, there were significant delays and backlogs in processing applications for leave. However at the present time the Court has no backlog in deciding leave cases and if leave is dismissed this will usually be communicated to the claimant within six weeks of the leave being perfected. There is some delay in setting down cases where leave is granted but only ten to fifteen percent of the cases get leave.

- Humanitarian and Compassionate Applications and Applications for Temporary Resident Permits

  Despite suggestions to the contrary, applications for consideration based on humanitarian and compassionate (H and C) grounds, applications for a temporary resident permit, and applications to defer removal, in and of themselves, do not cause delay. There is no statutory requirement to

> defer removal pending these applications. There is only a stay of removal if the Federal Court orders one in exceptional circumstances, on application by the person concerned. The number of stays granted by the Federal Court in a given year is likely not more than a few hundred.
>
> Therefore, there is no basis to argue that H and C applications, temporary resident permit applications or applications to defer removal cause delays in the system. At the same time, the availability of these applications helps ensure that Canada respects its humanitarian traditions and legal obligations, such as the U.N. Convention on the Rights of the Child.

To the extent that Bill C-11 focuses on eliminating these latter safeguards in the pursuit of a quicker process, it is misdirected.

III. OVERVIEW OF THE NEW PROPOSALS

Refugees want a quick, expeditious and fair determination of their claim. This requires a hearing before an independent and competent decision maker, with the possibility of an appeal on the merits. A fair, fast and efficient determination process favours genuine refugees. It also acts as a disincentive for claimants who do not have genuine fears if their claims are disposed of quickly and removal falls shortly after. Any refugee reforms should therefore be measured against the twin criteria of fairness and expeditiousness, both in the determination of claims and the removal of failed refugee claimants. Expeditiousness without fairness leads to capriciousness and possible injustice. Fairness without expeditiousness leads to legitimate claims languishing in the system and encourages the proliferation of groundless claims.

We now turn to the evaluation of the proposals in Bill C-11 based on this approach.

A. Refugee Appeal Division

Clause 13 of the Bill provides for the implementation of the Refugee Appeal Division (RAD). It requires a written review based on the record; allows for the submission of new evidence which arose subsequent to the decision or was not reasonably available at the time of the decision. It allows for an oral hearing if credibility issues arise as a result of the new evidence adduced.

Induction of the RAD is a key innovation, and one which the CBA Section has supported for many years. The only review available to claimants at this time is to seek leave to commence an application for judicial review in the Federal Court. Applying for leave is complex and, even if granted, judicial review is highly constrained. The Federal Court cannot review factual issues. It cannot receive fresh evidence but only make the determination based on the evidence before the panel at the time of the hearing. As a result, the effectiveness of judicial review as a remedy to cure unjust decisions is extremely limited.

Under Bill C-11, however, there is no access to the RAD by claimants whose country of origin is on the list that the government proposes to implement (discussed in detail below). Also, given the strict test for the RAD's receipt of new evidence, it should be made clear that anything on the tribunal record is admissible at the RAD and not subject to this test. We also recommend that the standard test for admitting evidence on appeal be incorporated into the legislation to provide some guidance to the new RAD.

RECOMMENDATION

> **The CBA Section recommends that s.110(4) be revised to read as follows:**
>
> > **(4) On appeal, the person who is the subject of the appeal, in addition to the tribunal record which forms part of the record before the Division, may present only other evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.**

RECOMMENDATION:

> **The CBA Section recommends that a new s.110(4.1) be added to Bill C-11:**
>
> > **(4.1) When considering whether or not to accept the additional evidence, the Refugee Appeal Division shall consider, *inter alia*, the efforts that the subject of the appeal made at the time of the initial hearing to obtain the evidence, the relevance of the evidence to the appeal, and its importance to the determination of the appeal.**

Last, we recommend that the wording of proposed s.110(6), be changed from "may" hold a hearing to "shall" hold a hearing if the stated criteria are met. We know of no circumstances

where these criteria would be met – that the documentary evidence raises a serious issue of credibility central to the decision, and if accepted would justify allowing or rejecting the refugee claim – and it still would be appropriate for the RAD to proceed without hearing from the appellant. As the Supreme Court noted in *Singh*:

> I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.[2]

RECOMMENDATION:

> **The CBA Section recommends that wording of proposed s.110(6) be changed from "may" to "shall."**

B. Designated Countries of Origin

Proposed s.109.1 would allow the Minister to designate countries, with the result that claimants from those countries will lose their right to an appeal before the RAD. While not part of the Bill, we understand the intent is to designate countries considered democratic and "safe," but from which a significant number of unfounded refugee claims are made.

At first blush, designating a country list seems attractive because intuitively such countries could be easily identified. However, we see serious problems. First, refugee determination is an individualized assessment. There may well be circumstances where a claim is founded even though it comes from a country which we might consider democratic. Of even greater concern, however, is the likelihood that the list will become politicized. The CBA Section is therefore of the view that this provision should be eliminated.

Alternatively, if it remains, the risk of politicization should be minimized. This could be accomplished by having the list vetted first by an advisory committee composed of human rights experts who ensure the list is restricted to situations that meet strict human rights and state protection criteria, subjecting the list to a "sunset clause," that would require the re-evaluation of each country's inclusion in the list after one year, and requiring public input into the process before the designation is final.

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[2] *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at para. 59.

RECOMMENDATION

The CBA Section recommends that the regime for Designated Countries of Origin be eliminated from the Bill.

If the regime remains, the CBA Section recommends that the following clauses be added:

109.1 (3.1) A country shall not be designated under this section unless the number of claims by nationals of the country, exceeds in the three month period prior to the designation, ten percent of the total number of claims referred to the Refugee Protection Division during that period.

109.1(3.2) A country shall cease to be considered to be designated pursuant to section 109.1 (1) one year after the date on which it was designated, unless the Minister designates the country again, pursuant to s.109(3.5), prior to the expiry of the anniversary of the designation.

109.1 (3.3) The Minister may only designate a country pursuant to this section if the Minister has received a recommendation from the Advisory Committee appointed under this section.

109.1(3.4) Prior to designating a country pursuant to this section, the Minister must provide notice of his intention to do so and shall allow interested parties to make representations regarding the designation.

109.1 (3.5) For the purpose of determining whether or not a country ought to be designated under this section the Minister shall create an advisory committee. The Advisory Committee shall include two members who are Public Service employees who have expertise and experience in human rights law and two independent human rights experts designated in consultation with stakeholder groups. The Committee shall, at the request of the Minister, consider whether or not a country ought to be designated under this section and shall receive representations made pursuant to section 109.1 (3.4).

C. Expedited processes - Replacing personal information form filed within 28 days with interview within eight days and hearing within 60 days.

Clause 11 of the Bill requires the claimant to attend an interview and produce the required documents, and requires the officer at the interview to set a date for a hearing. The Bill does not specify the time periods for the first interview or for the setting of the date of the hearing. However, the Minister has indicated that the interview will be required to take place within eight days and the hearing within 60 days.

It will be difficult for the claimant to access counsel and have time to properly advance their case within this time. The initial interview will be extremely important as an information-gathering exercise. If the claimant omits information, this could result in an adverse inference later on. Retaining experienced counsel takes time. A more appropriate time frame for the interview would be 28 days.

Alternatively, given the importance of any initial statements and the adverse consequences that might flow from an incomplete or inaccurate statement, arrangements must be made for legal aid. In 1989 when the Immigration and Refugee Board was created, the federal government entered into agreements with the provinces to provide legal aid at initial refugee hearings. The government should make a similar commitment to provide funding on the implementation of Bill C-11. It is essential to the fairness of the procedure that the person's right to counsel be respected. Failure to do so could result in an increase in judicial review applications, increasing cost and delay, thereby contradicting the purpose of the Bill.

At the very least, duty counsel should be provided as a relatively inexpensive way of allowing claimants to get some initial legal advice prior to meeting with the officer at the eight-day stage. The role of duty counsel would not be to fully understand the claim but to advise the claimant about the significance of the interview, the importance of being candid, and the scope of relevant information. Duty counsel would also ensure that it is a fair and open interview, that the claimant receives a record of the interview (disc) and that they understand how to obtain legal aid and retain counsel.

RECOMMENDATION:

> **The CBA Section recommends that proposed s.100(4.1) in clause 11 be amended to add:**
>
> > **A person who attends an interview with an official of the Board has a right to be represented by legal or other counsel.**

With respect to hearings within 60 days, there are, again, obvious concerns about implementation. Applicants and counsel need time to prepare the case, disclose documents, and in many cases, retain expert witnesses, such as psychologists and doctors. Credible expert opinion on psychological conditions often requires multiple meetings between the expert and the applicant. In some cases, claimants require time to obtain documentation

from the country from which they fled. Claimants who fail at this hearing and who have a right to appeal to the RAD face limitations on adducing "new" evidence. A rush to judgment will prejudice claimants with legitimate claims who are not able to adequately prepare. If sufficient time is not provided, the IRB will be bogged down in adjournment requests. From a practical perspective, changing the requirement to hearings within four months will not result in any greater delay.

RECOMMENDATION:

> **The CBA Section recommends that the operational requirements for the new process under the Bill be changed to 28 days for the initial interview and four months for the hearing.**

Further, fundamental fairness requires an opportunity for a claimant to explain non-attendance at an interview before the claim is deemed to be abandoned.

RECOMMENDATION

> **The CBA Section recommends the following additions to clause 24, amending IRPA s.168:**
>
> > **168 (2) Prior to determining a refugee claim to be abandoned for failure to attend the interview referred to in subsection 100(4), the Division must allow the claimant an opportunity to explain the reason for their non-attendance at the interview.**
> >
> > **168 (2.1) Where the explanation is found to be reasonable, the Division shall set a date for the claimant to be interviewed.**

D. Restrictions on Access to Other Immigration Procedures for One Year

Clause 3 of the Bill seeks to prevent persons who are making or have made refugee claims from applying for a temporary resident permit for twelve months after their claim has been made. Clause 4 bars the Minister from considering H and C applications from anyone with a protection claim pending and for a further one year from rejection of the claim. Clause 5 gives the Minister the power to examine an application on humanitarian grounds on his or her own initiative and to exempt the person from paying a fee. The latter clause would give broad power to the Minister to grant status to any person regardless of their inadmissibility, although the individual would not be permitted to initiate any application on their own during the period set out in Clause 4.

The rationale for these provisions is to facilitate the removal of failed refugee claimants by eliminating impediments to removal and to discourage persons who have other grounds for wishing to remain in Canada from making a refugee claim. However, an application for a permit or to remain on H and C grounds can only impede removal if it forms the basis for an application for a stay of removal. The case law is clear that such an application does not warrant a stay unless there are exceptional circumstances (for instance, lengthy delay in processing the H and C claim[3]. In most cases, stays are denied. It may in fact be counter-productive to adopt a one-year ban on other immigration procedures if the government's objective is to enable prompt removal of failed refugee claimants. The one year ban might actually encourage failed refugees to evade removal for a one year period so that they can access the Pre-Removal Risk Assessment (PRRA), discussed below, and H and C processes.

The CBA Section is particularly concerned by the one year bar to H and C applications. They provide a vital safeguard to ensure that persons have a remedy for rights violations in circumstances that do not meet the stringent test for refugee claims. Consider the case of a person whose appeal to the RAD is rejected. A week after the rejection, he receives a notice that his home in his country of origin has been searched and that police arrived and threatened his family that he would be detained if apprehended. This information was not available at the time of the hearing. It is case specific information and would not be covered by any ministerial committee reviewing general country conditions. The person would be subject to all the one year bars and would have no remedy. The *Charter* will likely dictate that one be provided. The constitutionality of the one year bar on H and C applications is in serious question.

At the very least, there is no reason why an application for refugee status that has been withdrawn should be a bar to consideration of an H and C claim. Indeed, this will discourage persons who might wish to withdraw their claim and submit an application on humanitarian grounds. If the provision remains, which we strongly oppose, it should be amended to allow persons who withdraw their refugee claim before it is heard to make an H and C application. The other safeguards discussed in the options below, including a deferral of removal until a decision is rendered on the application, should also be included.

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[3] *Williams v Minister of Public Safety* 2010 FC 274.

Clause 4 also restricts the scope of the humanitarian review to preclude overlap between refugee claims and humanitarian claims. Jurisprudence already recognizes that factors of risk that are part of a refugee analysis can be raised in the H and C application.[4] The Bill might preclude applicants from raising risk as part of the broader context. This is so even if a claimant has not made a refugee protection claim (or is precluded from making the claim). This provision will be extremely difficult to enforce and could lead to risk factors being excluded entirely. This would also violate the *Charter*. The provision should be clarified or removed completely.

We believe there are other options to conduct a fast, fair and efficient H and C process that comply with the *Charter* and eliminate the concern over delayed removals (notwithstanding that stays of removal are in fact exceptional). Below are two options. The first is an expedited form of the current system with decisions over H and C applications remaining with Citizenship and Immigration Canada. The second grants jurisdiction to the RAD to consider these applications.

Option One

Option one would adapt and streamline the current system by emulating the administrative mechanism used in inland spousal applications. This option would merely require administrative changes under IRPA. Refugee claimants would continue to be entitled to make a concurrent H and C application, or withdraw their refugee claim and file a humanitarian application with procedural safeguards in place to ensure this remains a meaningful remedy in deserving cases.

This option would centralize H and C processing. Currently, all H and C inland applications are sent to CPC Vegreville. There, it takes approximately five months to open a file, check if fees are paid, and return the file to the CIC office in the applicant's region. Interviews are rare. This system is wasteful and slow. We suggest a "one stop" process wherein a dedicated processing centre would render a decision on all H and C applications, *unless an interview is required.* In those rare cases, the file would be sent to the region for a decision. If the H and C application were submitted before a final decision is rendered on the refugee claim, there would be an automatic deferral of the claimant's removal while the application

[4] See *Pinter v. Canada* (M.C.I.)2005 FC 296.

is being processed. This would enable claimants to opt out of the refugee system without being subject to immediate removal.

Option Two

Option two would grant the RAD H and C jurisdiction for claims that do not meet the stringent test for refugee status, but still warrant the granting of some relief. This is analogous to the Immigration Appeal Division's jurisdiction to consider "all the circumstances of the case."

Over the past few years, the IRB has moved towards an "integrated Board." This means that tribunal officers and Board members flow between the Refugee Protection Division (RPD) and the Immigration Appeal Division (IAD). If the "integrated Board" approach is also applied to the RAD and RAD members would have experience with H and C factors in their role as IAD members. The additional training required would be minimal.

Under Bill C-11, the RAD will be a paper hearing in most cases. The additional time required to determine the limited H and C factors would be minimal. The limitation of this option is that it would exclude claimants from the designated countries, as these claimants would not have recourse to the RAD. On the other hand, this would eliminate the need for concurrent claims by those before the RPD. More importantly, there would be a single decision maker, and a single decision for refugee appeals and H and C claims, avoiding duplication of resources. Further, there would be only one potential judicial review application.

RECOMMENDATION

The CBA Section recommends that the one-year bar on temporary resident permits and H and C applications be withdrawn from the Bill.

If the one-year bar is not withdrawn, the CBA Section recommends that, at the very least, the bar should not apply where an application for refugee status has been withdrawn.

The CBA Section's Option 1 or Option 2 should be considered for incorporation into the H and C application process. If Option 1 is

selected, the CBA Section recommends that Citizenship and Immigration Canada make the appropriate administrative changes to centralize H and C application processing in CPC Vegreville, except where interviews are required.

If Option 2 is selected, the CBA Section recommends the following addition to clause 13(1), amending s.110(1):

> **The Refugee Appeal Division must also determine whether the person merits protection on the basis of humanitarian and compassionate grounds.**

At the very least, if the substance of clause 4 remains the same, the following technical problems should be rectified in clauses 4 and 5:

- Clause 4 eliminates "or by public policy considerations" from the current IRPA s.25(1). The Bill does not indicate that this was done, nor is there any rationale for this change. If this is an intentional deletion, it should be explicitly indicated in the Bill and properly explained to Parliamentarians. We see no reason for the deletion and recommend its reinstatement.

  The public policy considerations removed from section 25(1) reappears in clause 5 adding proposed s.25.2(1). The shift has the effect of removing the obligation to consider such criteria where the fee is paid and the person is in Canada. Again, the rationale for this shift is not apparent, as public policy considerations are normally part of any application on H and C grounds. The previous law is preferable to this proposed change.
- Proposed section 25(1.1) is unnecessary. It is already consistent with law and practice for a fee to be paid before an application is to be considered. The same may be said for proposed s.25.2(2).
- Proposed section 25(1.2)(a) requires the Minister to refuse the request if there is already another request pending. This is confusing, as it is unclear if it is meant to apply to the situation where an applicant is simply adding information to a request. In our view, it is superfluous and could be deleted. If it remains, there needs to be a clarification that the clause does not prevent the adding of new information to an old application.
- Proposed 25.1(3) indicates that the Minister may not grant permanent residence status to a person who does not meet provincial selection criteria. These criteria are typically economic. A major purpose of humanitarian applications is to overcome the obstacles posed by these criteria and their federal counterparts. To reinsert them this way to is to gut humanitarian applications almost entirely of meaning. This provision should be excised. Similarly, 25.2(3) should also be eliminated.

RECOMMENDATION

If the substance of clause 4 remains the same, the CBA Section recommends the following revisions to clauses 4 and 5:

- **Clause 4 should ensure that the phrase, "or by public policy considerations" is maintained in IRPA s.25(1).**
- **Proposed ss. 25(1.1) and 25.2(2) should be deleted.**
- **Proposed s. 25(1.2)(a) should be deleted or clarified so that it does not permit the addition of new information to an old application.**
- **Proposed ss. 25.1(3) and 25.2(3) should be deleted.**

Clause 15 contains a similar, one-year procedural bar for Pre-Removal Risk Assessments. The reasoning is that there it is unlikely to be sufficient changes in country conditions to require a reconsideration of a claim within twelve months. As a safeguard, the provision allows for the Minister to exempt countries from the provision by regulation. The intention appears to be to allow for the possibility of a further risk review though the PRRA if there is a significant change in country conditions.

This proposal is too cumbersome and will not alleviate the concerns of those who believe that a bar is unconstitutional and problematic. If there is a possibility of a person being deported to a country where they risk torture, the legislation may not be compliant with *Charter* s.7 and the Supreme Court of Canada's ruling in *Suresh v. Canada* (M.C.I.).[5] Undoubtedly, there will be circumstances where new information establishing risk to a person that comes to light after a decision is rendered. Although the Bill provides the Minister with the power to exempt classes of persons from this ineligibility provision, the Minister does not have the power to exempt individuals. Under the proposed legislation, there would be no recourse for him or her to bring this new information forward during the twelve month period. If one claimant successfully demonstrates that this bar places them at risk, then the clause will be declared of no force or effect. Clause 15 should be removed.

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[5] [2002] 1 S.C.R. 3.

A better solution is to allow for applications for reopening at the RAD. While this would allow persons to make last minute applications, clearly establishing the procedure as a summary one will alleviate concerns about delay.

The application would have to set out the fresh evidence and the grounds for the application. If the RAD concluded that there was no fresh evidence, it could dispose of the matter summarily without reasons. If new evidence was provided, then the RAD would be required to review it and determine whether it could have affected the outcome. Only then would a new hearing be allowed. In addition if a person was already given a removal date, they would be required to notify the RAD of the date and it would decide the application on an expedited basis. This proposal would make the PRRA unnecessary except in cases where the applicant has not appealed to the RAD or where the person has been excluded under Article 1 E of F of the Refugee Convention or found ineligible to make a claim or appeal to the RAD.

RECOMMENDATION:

The CBA Section recommends that, instead of the one-year procedural bar to PRRA in clause 15, the following additions should be made to the Bill:

111.1 APPLICATION FOR REOPENING AT REFUGEE APPEAL DIVISION

(1) A person whose appeal has been dismissed at the Refugee Appeal Division may make an application in writing for an order reopening the appeal at least three business days prior to removal. If a person whose appeal has been dismissed at the Refugee Appeal Division has been given less than three days notice of removal, they may make an application in writing for an order reopening the appeal as soon as is practicable prior to removal.(2) The application must be made in accordance with the Rules and must clearly and concisely state:

(a) the grounds upon which the application is made;

(b) the new evidence that the applicant seeks to rely on;

(c) the reasons why the evidence was not available at the time of the hearing of the appeal;

(d) how the new evidence would have altered the Division's previous decision;

(3) An application for reopening must be made in a timely fashion as soon as the applicant has in his or her possession the new evidence referred to in subsection (2).

(4) Once an application is made it shall be referred to the Minister who may make submissions in opposition to the Application within such other time period as directed by the Division.

(5) Upon receipt of the submissions by the Applicant and the Minister, or upon the expiry of the time for submissions by the Minister, the Division shall expeditiously dispose of the application.

(6) In the event that the Division reviews the application and determines that no new evidence has been presented it may dismiss the application without reasons.

(7) In the event that the Division reviews the application and determines that new evidence has been presented it shall:

(a) allow the application, and direct that the matter be referred forthwith for a hearing before the Refugee Appeal Division;

(b) dismiss the application and provide reasons as to why it has dismissed the application.

EXPEDITED PROCEEDINGS FOR REOPENINGS IN CASES WHERE REMOVAL HAS BEEN SCHEDULED:

(8) An applicant who has made an application for a reopening before the Refugee Appeal Division and whose removal has been scheduled prior to the application being filed at the Division must, at the time of filing, notify the Division that removal has been scheduled and the date of removal.

(9) Notwithstanding subsection (8) no application can be made under this section if removal is scheduled less than two business days prior to the commencement of the application.

(10) An applicant who has made an application for a reopening before the Refugee Appeal Division and whose removal has not been scheduled prior to the application being filed at the Division, must within two business days of being notified of a removal date, advise the Division of the removal date.

(11) Upon being advised of the removal date, the Division must, within two business days review the application and determine whether or not any new evidence has been presented that meets the criteria set out in subsection 110 (4).

(12) If the Division determines that there is no new evidence that meets the criteria set out in subsection 110 (4), then it shall forthwith dismiss the Application pursuant to subsection (6).

(13) If the Division determines that there is evidence that meets the criteria set out in subsection 110 (4), it shall review that evidence forthwith to determine whether it gives rise to a serious possibility that the division might reopen the Appeal.

(14) If the Division determines that there is evidence that meets the criteria set out in subsection (13) it shall order that the application

> **be provisionally accepted and shall set out timeframes for further submissions from the Minister and the Applicant and shall then determine the matter in accordance with the rules of the Division and subsection (7).(15). The removal of the applicant shall be deferred while the Division is determining the application for reopening the appeal.**

E. GIC Appointments

Clause 26 allows for RPD members to be public service employees as opposed to Order in Council appointees. This would eliminate the possibility of political patronage,which has been endemic in the history of the Board.[6]

There have been efforts to rectify the problem of political patronage through the creation of independent selection committees, which make recommendations to the Minister. Although the committees can eliminate people who are clearly not competent, their power to have direct input in the appointment decisions is limited, as they are required to approve a large number of applicants for a limited number of vacancies.

For the Immigration Division, appointments have been made through the public service application process. That procedure has been criticized for favouring those within the system who have, for a long period of time, represented the Minister as an advocate and as a result may be seen to be biased in favour of the Minister.

Some of our members point out that the rejection rate for PRRA performed by public servants is extremely high. This is similar to high negatives produced by public servants for refugee determinations in other countries. The reasons for this are complex. Many public servants come from enforcement agencies, or other agencies concerned with economic, political and diplomatic considerations which in principle should not be considered in the refugee determination context. Even if this is not the case, they are from a government culture, delivering government policy, and it may be difficult to depart from that organizational perspective.

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6 See the CBA Section's April 16, 2007 submission to this Committee: online: http://www.cba.org/CBA/submissions/pdf/07-22-eng.pdf

The CBA Section believes that the legislation must state that any application process is an open one, and that persons within the public service must not be given priority. This is essential to ensure both fairness and quality decision-making that refugees deserve.

RECOMMENDATION:

The CBA Section recommends that Clause 26(2), amending s.169.1(2), be revised as follows:

> **The members of the Refugee Protection Division are appointed by a selection process established by the Chair of the Immigration and Refugee Board. The selection process must be open to members of the public service as well as any other qualified persons, in accordance with merit-based selection criteria established by the Chair.**

F. Delayed Implementation

Bill C-11 would not come into force as a package, despite being presented as such. Section 42 states that the Bill would come into force within two years of Royal Assent (or earlier date set by Governor in Council), except for clauses 3-6, 9, 13, 14, 28 and 319, 13, 14, 28 and 31, which will come into force on Royal Assent. However, clause 31 amends the "coming into force" provision of IRPA (section 275), affecting certain sections, including the one establishing the RAD (section 110). The result is that claimants will not have the right to appeal to the RAD for another two years after Royal Assent (unless an earlier date is set by the Governor in Council).

Bill C-11's restructuring of refugee determinations needs to be considered in its entirety. Our concerns about Bill C-11 become even greater with staged implementation. In particular:

- Our greatest concerns relate to restricting access to H and C applications, denying access to PRRA and forcing early determination of claims. These will be implemented without the positive addition of a RAD appeal, perhaps for two years. This is unacceptable.
- There is no explanation for the need for delayed implementation, particularly the RAD.
- The delay of RAD implementation continues the failure to implement the RAD promised in IRPA legislation since 2002. We are concerned that this failure to implement will carry on, as it has for the past eight years.

The whole notion of the Bill is conveyed in its title, the *Balanced Refugee Reform Act.* In our view, staged implementation fundamentally betrays the notion of "balanced refugee reform." A promise of more balance later still means unbalanced now. The staged implementation of the Bill is a fatal flaw and will be disastrous for refugee claimants.

RECOMMENDATION:

> **The CBA Section recommends that all portions of Bill C-11 come into force concurrently. Under no circumstances should the one year bars on other immigration procedures come into force before the RAD.**

IV. CONCLUSION

From its inception the experience of a refugee puts trust on trial. The refugee mistrusts and is mistrusted. In a profound sense, one becomes a refugee even before fleeing the society in which one lives and continues to be a refugee even after one receives asylum in a new place among new people.[7]

We cannot change the refugee system beginning from the premise that refugee claimants are attempting to "game" the system and therefore should be regarded with suspicion and, upon any missteps in proving their claims, escorted from Canada as quickly as the law permits. While preventing abuse and delay is important to refugees and to the Canadian public generally, the objective of reforms to the refugee system ought to be the same as with any government program – to ensure the provision of fair, effective service to those who need it.

The CBA Section supports attempts to streamline the refugee system and make it responsive to the needs of refugees. Innovations are needed to make the system less attractive for those who make groundless refugee claims to enter Canada and capitalize on current systemic delays. However, fundamental fairness and individual rights must not be injured in the process. Reforms will not be effective if they are vulnerable to judicial intervention under the *Charter*. Our recommendations are aimed at respecting the intent of Bill C-11, but rectifying the risks of injustice and ultimately risks to the lives of refugees who

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[7] E. Valentine Daniel and John Chr. Knudson, *Mistrusting Refugees* (Berkeley: University of California Press, 1995) at 1.

are placing their trust in Canada to do the right thing for them and their families. Let us show them that their trust is not misplaced.