Canadian Council for Refugees

Comments on proposed rules published in the Canada Gazette, 11 August 2012
RPD Rules

The Rules need to reflect and fulfil the following relevant objectives of the *Immigration and Refugee Protection Act* with respect to refugees:

> Section 2
> (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
> (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
> (c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;
> (d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;
> (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings.

Many aspects of the proposed rules fall short of these objectives, imposing timelines and highly technical procedures, which do not reflect the reality of the displaced and persecuted. Their reality often includes being traumatized, speaking neither English nor French, perhaps being illiterate in their own language, having no money and being without family or friends that could help out. Many will be unrepresented.

We need also to consider the particular barriers for claimants who are in detention as well as those who are in towns and cities where there is no IRB office. Meeting timelines and conforming to all the technical requirements proposed in the rules would be an even greater challenge for them.

The rules, and the manner in which they are applied, need to take into account these realities, as well as the fact that the refugee determination must grant "fair consideration to those who come to Canada claiming persecution." No refugee should be denied safe haven because they cannot comply with the rules.

We would also like to emphasize that refugee-serving organizations, many of them members of the CCR, will be placed under enormous pressure if the rules are adopted in their current proposed version. Unrepresented claimants (of whom there will likely be more under the new system) will turn to these organizations for help in understanding their complex obligations, translating documents, filling forms, making copies, serving the Minister, and so on, all within

extremely short timelines. These organizations are almost all severely underfunded and rely heavily on volunteers. It is unfair to expect them to fill the gap created by unrealistic expectations imposed on newly arrived refugee claimants.

Timeline for BoC

There needs to be much greater flexibility re. enforcing 15 day timeline.

The proposed regulatory timeline of 15 days for BoC is much too short, taking into account the realities facing refugees arriving in Canada. Refugees are not familiar with the Canadian context, don't have an established network of support and often speak neither English nor French. Many are suffering the physical and/or pyschological effects of persecution and flight. On arrival they have basic practical questions to resolve, such as finding a place to live. Services necessary to claimants as they go through the refugee system, including legal representation, interpretation and translation, if they are available at all, are not available within the short timelines foreseen by the proposed regulations.

We underline the particular difficulties faced by claimants in detention, who face formidable additional challenges in completing such forms, including the difficulty of accessing counsel, getting help with interpretation and translation and getting documents.

We note that it often takes claimants at least 15 days to find a lawyer. The implication is that many claimants will submit their Basis of Claim form without the assistance of a lawyer.

The short delays will also place great pressure on organizations serving refugee claimants, most of which receive no government funding for this work. Many of these organizations are members of the CCR. We anticipate that they will have to respond to claimants who are unable to find counsel and who need assistance in filling out the form within the 15 day timeline.

IRB Rules need to take this context into account and, in the interests of fulfilling the IRPA objectives listed above, provide flexible exceptions to the 15 day rule, including by:

- Not requiring applications for extensions 3 days before deadline
- Granting them readily

NB many CCR organizations will have claimants arriving at their doors 3, 2 or 1 day before the BoC deadline. It is not fair to them to put them under this kind of unrealistic pressure.

It is of course more importantly unfair to refugees, especially the most vulnerable.

Other timelines

We have similar concerns regarding other unrealistic timelines (disclosing docs, etc). There is a need for great flexibility, taking into account the huge barriers faced by refugees.

We note the particular difficulties of obtaining documents from a country in turmoil, and in most cases the need to translate documents submitted.

Board members will need to take into account that many refugees will not be able to provide much or any documentary evidence by the time of a 60-day hearing, let alone a 45 or 30 day hearing.

The IRB also needs to consider the issue of psychological reports for survivors of torture – often there will not be available within the proposed timelines. The RPD must allow extensions so that these can be obtained (unless claimants can be granted refugee status without them).

It is essential to remember that one of the objectives of the Act is to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted.

Declaration – Basis of Claim form

6(1)(a) requires claimants to sign a declaration saying that the BoC information is "complete, true and correct." It is not fair to ask claimants to swear that the information is complete. Without legal advice claimants cannot properly understand what is being asked of them and therefore cannot know if the information is complete.

The declaration should simply say that the claimant believes the information to be true.

Medical certificate

8 (3) It is unreasonable to require that the medical certificate "set out the particulars of the medical condition, without specifying the diagnosis". This might be difficult to do, and especially difficult for a claimant (probably not speaking English or French) to demand from a doctor.

Changes to BoC

Given the extremely short timelines for submitting the BoC, it is to be expected many, perhaps most claimants will need to make changes. The current draft rule makes this too complicated and legalistic, especially for unrepresented claimants. Claimants should not be required to indicate the reason for each change if there is a blanket reason. We are concerned that the process seems to invite credibility scrutiny, based on supposed inconsistencies. Given the compressed timelines, this is totally unrealistic.

Change of date for vulnerable person

54 - We appreciate the effort to recognize the particular situation of particularly vulnerable claimants, but providing for a new hearing date 5 days later is not useful.

Vulnerable persons are defined in Guideline 8 as follows:

> individuals whose ability to present their cases before the IRB is severely impaired. Such persons may include, but would not be limited to, the mentally ill, minors, the elderly, victims of torture, survivors of genocide and crimes against humanity, and women who have suffered gender-related persecution.

It is difficult to imagine a scenario where one of these categories of people would be in a better position to proceed 5 days after the original date scheduled for the hearing. For example, a person with psychiatric problems is almost certainly going to require more than 5 days before the condition has been stabilized. Similarly, a woman who is struggling with the effects of rape and who is in no condition to testify is not going to be better able to withstand the hearing 5 days later.

There should be no timeframe within which the hearing must be scheduled – instead the hearing date should be scheduled according to the needs of the particular case.

In the alternative, we propose that the Rules instead provide that, if the Division accepts the application, the originally scheduled hearing be converted instead into a case management conference, at which time a realistic plan can be made for a hearing date.

Serving the Minister

It is not fair or realistic to have unrepresented refugee claimants serve the Minister, especially given the short timelines. It will also not always be clear which Minister needs to be served, depending on who is intervening. We note that a significant burden will be placed on NGOs (many of them CCR members) who will be under pressure to assist claimant with this. NGOs do not have the resources to take this on. In the case of unrepresented claimants at least, they should only be obliged to provide to the IRB the BoC and other documents and applications. The IRB should be responsible for transmitting them to whichever Minister is appropriate. Especially given the resources and electronic communications available to IRB and its goverment partners, it will be much simpler for them to communicate the documents than for newly arrived refugee claimants without resources.

Reverse order questioning (ROQ)

This should not be in the Rule. Refugee claimants have the burden of proving their case and must be given a fair chance to present their case, as they see it. Under the proposed new system, the claimant has much more limited opportunity to prepare their case in writing (15 days for BoC versus 28 for PIF; 30, 45 or 60 days for hearing versus months if not years now). Also the current version of the BoC doesn't allow the claimant to provide a continuous narrative explaining their claim. If the default is for the hearing to start with questions from the RPD member, claimants are not being given a full opportunity to present their case. This is not only unfair, but in many cases will be inefficient as the member may later realize that many of their questions missed the mark.

Integrity issues

27 - The CCR considers the plans for CIC interventions at the IRB, based on vague criteria, as fundamentally problematic. The inclusion in the Rules of provisions calling for the IRB to invite such interventions is doubly problematic.

Interventions by the CBSA on the basis of the exclusion clauses make sense. There is a legal definition for excluded cases, and there is necessarily an adversarial dimension to the hearing when exclusion clauses are at stake, making the presence of the Minister appropriate.

"The integrity of the Canadian refugee protection system", on the other hand, is a vague concept that has no basis in law and is not defined, in the Rules or elsewhere. Different people may read into it widely different things, depending on their personal inclination or what they recently heard in the media.

The problem with the concept may perhaps be best seen in relation to 27(3)(b), which, it is proposed, might indicate an issue "relating to the integrity of the Canadian refugee protection system":

> "a substantial change to the basis of the claim from that indicated in the Basis of Claim form."

It is widely acknowledged that there are many reasons why a claimant may change the basis of the claim from that submitted in the Basis of Claim (including the claimant's ignorance of the legal definition and lack of representation within the 15 day timeline provided for the BoC). How are members to decide which might give rise to issues "relating to the integrity of the Canadian refugee protection system", given that this concept is nowhere defined? How are members to decide at what point a change becomes "substantial"?

We note that the function of the Refugee Protection Division is to make refugee determinations, and to this end members are trained and equipped to inquire into the evidence before them. It is not clear what CIC will add to what the member is already responsible for doing.

The non-adversarial character of the refugee hearing is an important value that needs to be preserved. The IRB should guard against extending adversarial hearings beyond those at which the exclusion clauses are at issue.

The proposed wording implies that there could be major infringement of the principle of the non-adversarial hearing for no clear advantage. According to the draft, if there is a <u>possibility</u> of an "integrity issue" and the Minister's participation "<u>may</u> help" in the hearing, the Division <u>must</u> notify the Minister. Logically, this could result in the non-adversarial character of many hearings being sacrificed where in the event it turns out that there were no "integrity issues" and/or the Minister's participation did not help.

It should also be noted that the introduction of the participation of the Minister adds an extra complexity to the hearing, which will add delays to the process. Given that one of the major objectives of the reform is to increase efficiency, it is counter-productive to introduce a new step and a new actor into the process, particularly without any requirement that the possible contribution of the Minister be balanced against the loss of efficiency. The result could easily be a situation where claims that could have been simply and expeditiously determined by the RPD end up being delayed and involved in needlessly prolonged hearings, based on a slender possibility that the Minister might contribute something to the hearing.

Also “claimant submitted documents that may be fraudulent” – any document that is submitted could be fraudulent, so this would seem to cover all claimants who submit documents.

We are concerned that inviting interventions in this broad and undefined manner will lead to the refugee hearing being used for fishing expeditions for enforcement purposes. This places the claiminant in a fundamentally unfair position, where they are caught between cooperating and possibliy being granted asylum and not cooperating and being denied.

Intervention by the Minister
29 (2) The Rule should include a requirement that the Minister provide the factual basis on which the ground of intervention is based.

65 Abandonment
Currently the draft rule says that a claimant who has not filed the BoC **must** provide the completed Basis of Claim form. There needs to be an exception to allow the circumstances of the case to be taken into account, where fairness requires that the claimant be given more time. (For example, if claimant has a psychiatric condition, or speaks only a language for which no interpreters are available, or has had an accident and been hospitalized for the last week).

Schedule 1
The CCR has already provided to the IRB detailed comments on the proposed questions in the draft BoC, many of which are highly problematic. We ask that these comments be taken into consideration here.

Refugee Appeal Division Rules

Filing and perfecting an Appeal
We continue to be profoundly disturbed by the unrealistically short timeline for filing and perfecting an appeal. In the interests of fairness, and in order to fulfil the objectives of the Act, the RAD must be ready to provide extensions of time.

Serving the Minister
As noted above re. RPD Rule, we believe it is unair and unrealistic to expect unrepresented refugee claimants to serve the Minister, especially given the short timelines. In the case of unrepresented claimants at least, the IRB should be responsible for transmitting them to whichever Minister is appropriate. Especially given the resources and electronic communications available to IRB and its goverment partners, it will be much simpler for them to communicate the documents than for newly arrived refugee claimants without resources.

Applications to appeal and request extension

The process for appealing and requesting extension should be facilitated with simple forms that can be filled in by unrepresented claimants.

Participation by interested persons

41 IRB should publish information about upcoming cases before a 3-member panel, in a way that protects the individual's privacy, so that interested persons can consider whether they can contribute to the process. While in some cases, counsel for the claimant may circulate to interested persons information about upcoming cases, cases where the claimant is not well represented, or is unrepresented, may not come to the attention of interested persons. These will likely be the cases where another perspective would be most helpful to the RAD.

The Rules do not address the question of how the claimant's private information will be protected in the case of particpation by interested parties. This needs to be considered.

Transcript

We understand that due to budget restrictions the IRB cannot provide transcripts of all RPD decisions, as previously promised. However, there needs to be some provision where the IRB does provide the transcript, where the claimant cannot afford it and where it is relevant. It would be unfair and contrary to the objectives of the Act if a refugee in need of protection were unsuccessful in an appeal simply because he or she was unable to produce a transcript as evidence of errors committed in the hearing.

Providing support to refugee claimants

In addition to our recommendation that the rules be greatly simplified to make them more adapted to the realities of unrepresented claimants, we urge the IRB to make available services to refugee claimants to help them understand the process and how to meet the requirements. Officers should be available, at IRB offices and by phone, to assist claimants in the technical aspects of presenting their claim.

This would be an important way of fulfilling the IRPA objective: "to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution".