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# Regulatory Impact Analysis Statement

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## Executive summary

**Issue:** Canada's refugee determination system is respected internationally for its high degree of fairness and the quality of its proceedings and decisions. However, to address long wait times and a significant backlog of cases, the Balanced Refugee Reform Act (BRRA), introduced by the Minister of Citizenship, Immigration and Multiculturalism, was passed by Parliament on June 29, 2010. The BRRA included legislative amendments to the Immigration and Refugee Protection Act (IRPA) that were intended to improve the efficiency of the refugee determination system in order to reduce the amount of time individuals wait to receive decisions on their claims. In order to further expedite the processing of refugee claims, the Protecting Canada's Immigration System Act (PCISA), which includes legislative amendments to the BRRA and the IRPA, received Royal Assent on June 28, 2012. In order to realize the efficiencies and objectives of the BRRA and the PCISA, there is a need for new Refugee Protection Division Rules (RPD Rules) and Refugee Appeal Division Rules (RAD Rules). The RPD Rules and RAD Rules provide clear and transparent direction on the practices and procedures of the IRB Divisions (or Tribunals) to parties and their counsel appearing before the IRB, decision makers (members) who render decisions on cases and the IRB staff who support the decision-making process. If new RPD Rules and RAD Rules are not made prior to implementation of the new system, it will be impossible to properly implement and operationalize the legislative amendments assented to in the BRRA and the PCISA.

**Description:** The following IRB Rules are being made:

- New Refugee Protection Division Rules (RPD Rules) - the rules that govern the processes of the Refugee Protection Division (RPD); and,
- New Refugee Appeal Division Rules (RAD Rules) - the rules that govern the processes of the Refugee Appeal Division (RAD).

New RPD Rules and RAD Rules will implement the procedural changes to the refugee determination system under the BRRA and the PCISA, and address recommendations of the Standing Joint Committee for the Scrutiny of Regulations (SJCSR) and the Office of the Commissioner of Official Languages (OCOL).

**Cost-benefit statement:** These RPD Rules and RAD Rules contribute to the systemic savings that will result from faster processing under the IRPA as amended by the BRRA and the PCISA. Overall, it has been estimated by Citizenship and Immigration Canada (CIC) that the PCISA will result in provincial savings estimated at \$1.4B in present value terms (PV) over 5 years (2012/13 - 2016/17) due to faster processing and faster removals largely as a result of failed claimants spending less time in Canada with access to social services. The RPD Rules and RAD Rules contribute to the faster processing of claims while maintaining fairness.

Additional costs associated with the new RPD Rules and RAD Rules are estimated to be \$1.9M (PV) over a 10-year study horizon (2012/13-2021/22) and are outlined below. All figures are in present value terms and are reflected in 2012 dollars. The additional costs are a result of process changes and new operational requirements resulting from the BRRA and the PCISA. All monetized costs will be absorbed by the IRB within existing resources and resources that the IRB has secured for the implementation of the BRRA reform package as a whole.

**"One-for-One" Rule and small business lens:** The "One-for-One" Rule does not apply to these RPD Rules and RAD Rules, as there is no change in administrative costs to business. These rules will also not impose any level of compliance costs and / or administrative costs on small business.

**Domestic and international coordination and cooperation:** These RPD Rules and RAD Rules require changes to the existing procedures of CIC and the Canada Border Services Agency (CBSA). Therefore, the IRB will continue to work closely with CIC and the CBSA in a manner which respects its status as an independent administrative tribunal to ensure that the RPD Rules and RAD Rules support a fair and efficient refugee determination system. Both CIC and the CBSA have expressed their support for these rules.

## Background

Canada's refugee determination system is respected internationally for its high degree of fairness and the quality of its proceedings and decisions. However, as a result of high intake over a sustained period, among other factors, Canada's refugee determination system has a backlog of cases, consisting of 34,000 claims at the end of August 2012. As a result, individuals who have made an in-Canada refugee protection claim currently wait an average of approximately 18 months for an initial decision on their claim.

To address these and other challenges, the Minister of Citizenship, Immigration, and Multiculturalism (the Minister) introduced Bill C-11, the Balanced Refugee Reform Act (BRRA). The BRRA, which received Royal Assent on June 29, 2010, included legislative amendments to the Immigration and Refugee Protection Act (IRPA) that were intended to improve the efficiency of the refugee determination system in order to reduce the amount of time individuals wait to receive decisions on their claims.

Thereafter, on February 16, 2012, the Minister introduced Bill C-31, the Protecting Canada's Immigration System Act (PCISA). The PCISA, which received Royal Assent on June 28, 2012, included legislative amendments to the BRRA and the IRPA that were intended to further expedite the processing of refugee claims.

# Issue

Subsection 161(1) of the IRPA provides that, subject to the approval of the Governor in Council, the IRB Chairperson of the Immigration and Refugee Board of Canada (IRB) may make rules respecting the activities, practices and procedures of each Division (also known as Tribunals). Each IRB Division has its own rules to govern its tribunal processes. Rules are necessary for the proper functioning of the IRB, as they provide clear and transparent direction on the practices and procedures of the IRB to parties and their counsel appearing before the IRB, the members who render decisions on cases and the IRB staff who support the decision-making process. This direction ensures that parties appear and present their cases before the IRB's Divisions in a consistent manner, thereby facilitating the fair and efficient administrative processing of cases. It also provides guidance to the Divisions to ensure that all cases are processed in a consistent manner that respects the principles of fairness and natural justice.

In order to implement changes to the IRPA and the BRRA introduced by the PCISA, there was a need to revise the proposed Refugee Protection Division Rules (RPD Rules) and Refugee Appeal Division Rules (RAD Rules) that were pre-published in the Canada Gazette, Part I, on July 2, 2011. As a result, new proposed RPD Rules and RAD Rules were pre-published in the Canada Gazette, Part I, on August 11, 2012. The RPD Rules and RAD Rules govern the processes of the Refugee Protection Division (RPD) and Refugee Appeal Division (RAD) respectively.

New RPD Rules and RAD Rules are necessary in order to implement the procedural changes to the refugee determination system under the BRRA and the PCISA. The relevant provisions of the BRRA and the PCISA will come into force on a day to be fixed by order of the Governor in Council.

# Objectives

The objective of the new RPD Rules and RAD Rules is to contribute to the changes to the IRPA introduced by both the BRRA and the PCISA.

The IRB is a quasi-judicial independent administrative tribunal currently composed of three Divisions, each being a separate Tribunal with a unique statutory mandate. The IRB is responsible for resolving immigration and refugee matters, efficiently, fairly and in accordance with the law.

The primary function of the RPD is to decide claims for refugee protection made by persons already in Canada. The Immigration Division (ID) conducts hearings with respect to persons alleged to be inadmissible to Canada and holds detention reviews for those detained for immigration reasons. Finally, the Immigration Appeal Division (IAD) hears appeals from refusals of sponsored applications for permanent residence made by family members, appeals by permanent residents and protected persons who are subject to a removal order, appeals by permanent residents determined by an immigration officer abroad not to have fulfilled their residency obligation, and appeals by the Minister of certain decisions made by members of the ID. The IRPA also created a fourth Division, the Refugee Appeal Division (RAD), to consider appeals of RPD decisions. The provisions creating the RAD were not proclaimed in force when the IRPA came into force on June 28, 2002; however, the RAD provisions in the IRPA, with amendments, will be brought into force at the same time that the BRRA and the PCISA provisions establishing the new refugee determination system come into force.

As a result of the BRRA and the PCISA, the following changes will be introduced upon coming into force of the relevant legislative provisions:

- A first-level hearing of refugee claims at the RPD conducted by public servant members at the IRB;
- A new RAD at the IRB with Governor in Council (GIC) appointed members;
- Greater rights and flexibility for the Minister to appeal and intervene in RAD proceedings;

- Limits on the jurisdiction of the RPD and the RAD to reopen previously decided claims and appeals;
- Limits on the types of claims that will have access to an appeal to the RAD;
- Provision for "Designated Countries of Origin" (DCO), for the purpose of requiring expedited scheduling of RPD hearings and barring access to an appeal to the RAD;
- A provision requiring RPD members who reject a claim to state in their reasons that the claim is manifestly unfounded if they are of the opinion that the claim is clearly fraudulent;
- Transfer of the Pre-Removal Risk Assessment (PRRA) function to the RPD (except applications where the applicant falls under subsection 112(3) of the IRPA, e.g. security grounds, serious criminality); and
- Transitional provisions regarding the processing of claims for refugee protection made before the coming into force of the relevant provisions of the BRRA and the PCISA.

The transfer of the PRRA function from Citizenship and Immigration Canada (CIC) to the RPD is expected to take place two years after the other changes to the refugee determination system come into force.

Accordingly, it is anticipated that in 2013-14 or 2014-15, the RPD Rules will be further amended to introduce the changes required by the transfer of the PRRA function from CIC to the RPD as outlined in the BRRA and the PCISA. These further changes to the RPD Rules will be made in time for this transfer.

In addition to the changes necessary to implement the BRRA and the PCISA, other proposed changes from the current RPD Rules and RAD Rules have also been made in response to recommendations of the Standing Joint Committee for the Scrutiny of Regulations (SJCSR) and the Office of the Commissioner of Official Languages (OCOL).

Furthermore, the IRB is also making new Oath or Solemn Affirmation of Office Rules Immigration and Refugee Board) (Oath Rules), which are the rules that govern the oath or solemn affirmation of office taken by IRB members. The

new Oath Rules are expected to come into force at the same time as the new RPD Rules and RAD Rules. A separate Regulatory Impact Analysis Statement has been prepared for the Oath Rules.

The IRB also anticipates making amendments to the Immigration Division Rules and to the Immigration Appeal Division Rules in 2013-14. These amendments will clarify and streamline IRB procedures, harmonize rules that are common to all of the IRB's Divisions, and address the SJCSR's recommendations.

## Description

Each Division (or Tribunal) is supported by its own rules. These rules provide clear and transparent direction on the practices and procedures of the Divisions to parties and their counsel appearing before the IRB, the members who render decisions on cases and the IRB staff who support the decision-making process. This direction ensures that parties appear and present their cases before the IRB's Divisions in a consistent manner, therefore facilitating the fair and efficient administrative processing of cases. It also provides guidance to the Divisions to ensure that all cases are processed in a consistent manner that respects the principles of fairness and natural justice. The efficient and fair administration of cases, facilitated by the use of rules, helps contribute to the overall objectives of the BRRRA and the PCISA.

If new RPD Rules and RAD Rules are not made prior to implementation of the new system, it will be impossible to properly give effect to the BRRRA and the PCISA. Accordingly, the following new RPD Rules and RAD Rules are being made.

# Refugee Protection Division Rules (RPD Rules)

The legislative amendments contained in the BRRA and the PCISA will impact the procedures at the RPD, whose primary function is to decide claims for refugee protection made in Canada. There will be several key changes to the procedures at the RPD. Refugee protection claimants will have to provide information regarding the basis of their claim within the time limits that are set out in the Immigration and Refugee Protection Regulations (IRPR). The RPD Rules require that this information be collected in a Basis of Claim (BoC) Form. The Government has indicated that the time limit for submitting the BoC Form to the IRB, which will be set out in the IRPR, will be no later than 15 days following referral of the claim for claimants who make their claim at a port of entry. For claimants who make their claim inland, that is, inside Canada, other than at a port of entry, the PCISA stipulates that the documents and information required by the rules of the Board regarding the basis of the claim are to be provided to the referring officer within the time limits provided for in the IRPR. The IRPR indicate that the time limit for submitting the BoC Form to the officer will be no later than the day on which the officer determines the eligibility of the claim.

Another key provision concerns the scheduling of the first-level hearing at the RPD. Under the PCISA, a referring officer at CIC or the CBSA will schedule the hearing in accordance with the IRPR, the rules of the Board and any directions of the Chairperson of the Board. The Government has indicated that the time limits for these hearings, which will be set out in the IRPR, will be as follows:

- Not later than 30 days after referral for DCO claimants who have made their claim inland;
- Not later than 45 days after referral for DCO claimants who have made their claim at a port of entry; and
- Not later than 60 days after referral for all non-DCO claimants.



The following RPD Rules have been made regarding the BoC Form and the first-level hearing:

- The way in which the BoC Form must be provided to the IRB by port of entry claimants and to an officer by inland claimants;
- Procedures for port of entry claimants to request an extension of time to provide the BoC Form;
- Abandonment procedures should claimants fail to provide a BoC Form within the regulated time limits; and
- How the referring officer fixes a date for the RPD hearing;

The RPD Rules also include the following provisions that are not included in the current RPD Rules <sup>1</sup>:

- The conduct of a hearing;
- Changes incorporating procedures currently contained in Chairperson's Guidelines and IRB policies, for example, regarding designating a representative, and changing the date and time of a proceeding;
- Changes requested by the SJCSR, including some substantive changes, such as a clarification that before a Division of the IRB acts on its own initiative, it will give prior notice to the parties and give them an opportunity to object, as well as corrections to technical errors and/or inconsistencies between the English and French versions of the RPD Rules;
- Changes requested by the OCOL regarding the language of RPD proceedings;
- Changes requested by stakeholders regarding vulnerable persons appearing before the RPD;
- Changes that shorten time limits for procedural matters in order to enable the RPD to comply with the time limits for the holding of hearings that will be set out in the IRPR. The time limits set out in the RPD Rules cover such matters as the disclosure of documents, changing the language of the proceedings, changing the language of interpretation, allowing a claim without a hearing, applications, responses and replies, and applications for changing the date and time of hearings;

- Notice by the RPD to the Minister of possible integrity issues before or during a hearing;
- In order to expedite the Division's appointment of a designated representative, the RPD Rules require officers at CIC or the CBSA, as well as counsel for the claimant, to notify the Division without delay if they believe that the RPD should designate a representative. The change also clarifies that their duty to notify the RPD does not apply in the case of a minor claimant whose claim is joined with the claim of their parent or legal guardian;
- The disclosure of country documentation by the Division may be done by providing a list of those documents or information as to where a list can be found on the Board's website;
- If a time limit under the RPD Rules ends on a day that is not a working day, it will be extended to end on the next day that is a working day;
- Amended abandonment procedures should a claimant fail to provide the BoC Form in time or fail to attend a hearing. The rules specify that for these defaults, officers at the time of referral will provide claimants with Notices to Appear for a special hearing at which they will have the opportunity to explain why the claim should not be abandoned. The rule also specifies when the proceeding must start or continue if the Division decides not to declare the claim abandoned;
- Clarification that if a party provides more than one document at a time, a list of those documents will have to be provided and the pages within the package of documents will have to be consecutively numbered;
- Unless an application to change the date and time of a proceeding is received by the Division no later than three working days before the proceeding, the party making the application must appear and make the application orally on the day of the proceeding, before the time the proceeding is scheduled to start;
- A special process for an application to change the date and time of a proceeding in situations where counsel is retained and/or information about the availability of counsel is provided no later than five working days after the hearing date was fixed by the referring officer;
- For the purpose of an application to have a proceeding conducted in public, the Minister will be considered to be a party whether or not the Minister takes part in the proceedings; and

- Rules regarding applications to reopen claims or applications reflect the amendment to the IRPA set out in the PCISA removing the RPD's jurisdiction to reopen a claim or application if the RAD or Federal Court has made a final determination on an appeal or application for judicial review, respectively.

The RPD Rules also incorporate other changes to the IRPA which came into force on June 30, 2011. The provisions regarding "authorized representatives" set out in the IRPR were replaced by new provisions in the IRPA regarding who may represent or advise a person for consideration - or offer to do so - in connection with a proceeding or application under the IRPA.

## **Refugee Appeal Division Rules (RAD Rules)**

The BRRA and the PCISA also amend and will bring into force the unproclaimed provisions of the IRPA regarding the RAD. With the establishment of the RAD, certain claimants and the Minister will have the right to appeal certain decisions by the RPD. The appeal may be made on a question of law, fact, or mixed law and fact.

New rules for the RAD are required in order to establish practices and procedures before the RAD. The RAD Rules include the following provisions:

- Time limits enabling the RAD to be able to comply with the time limits for decisions on appeals that will be set out in the IRPR. These time limits will cover such matters as responding to appeals, the preparation of the RPD record (a document that contains all of the information on the member relied upon at the hearing), and the date that a decision may be made without further notice to the parties;
- Separate rules for filing an appeal and for perfecting an appeal, by both the person and the Minister, so that the process is separated into two distinct steps, in accordance with the revised time limits for filing and perfecting an appeal to be set out in the IRPR;
- Practices and procedures before the RAD including:

- becoming counsel of record;
  - choosing the language of the appeal;
  - designating a representative;
  - using specialized knowledge;
  - providing a notice of constitutional question;
  - holding conferences;
  - providing documents;
  - making applications; joining or separating appeals;
  - conducting proceedings in public;
  - dealing with the United Nations High Commissioner for Refugees (UNHCR) and interested persons;
  - making applications for withdrawal, reinstatement or reopening, and;
  - rendering decisions
- Provisions applicable to appeals where a hearing will be held apply to a variety of elements related to hearings, including: notice of hearing; restriction of the hearing; the calling of witnesses; changing the location of a hearing; applications for postponements and adjournments of a hearing; and abandonment procedures;
  - Different practices and procedures for appeals made by the person who is the subject of the appeal and appeals made by the Minister; for example, there are different requirements for the person and the Minister respecting the manner in which an appeal is filed and perfected;
  - Rules regarding applications for extensions of the time to file and perfect an appeal by both the person and the Minister, to respond to a Minister's appeal, or to reply to a Minister's intervention or person's response (the factors for deciding applications for extensions of time to file and perfect an appeal are not set out in the RAD Rules as the legislation provides that those time limits, including the extension of those time limits, are to be set out in the IRPR; therefore, guidance on these factors may be provided in another IRB policy instrument);
  - The RPD record will only be requested by the RAD once an appeal has been perfected;
  - If a time limit under the RAD Rules ends on a day that is not a working day, it will be extended to end on the next day that is a working day;

- If a party provides more than one document at a time, a list of those documents would have to be provided and the pages within the package of documents would have to be consecutively numbered;
- A hearing can be requested by a party at the reply stage if it was not previously requested;
- The person will be required to provide an explanation in their submissions of how any of the documentary evidence they are relying on meets the requirements of subsection 110(4) of the IRPA;
- A party may provide either a full or partial transcript of the RPD hearing, if they are relying on it in the appeal;
- The rule regarding the participation of the UNHCR reflects the amendment to the IRPA set out in the PCISA which provides that the UNHCR may only participate in an appeal conducted by a panel of three members;
- Counsel's contact information will have to be included in an application to reinstate or to reopen an appeal, if the applicant is the person who is the subject of the appeal;
- Appellants explaining why their appeal should not be declared abandoned after a hearing date has been fixed will have to attend a special abandonment hearing; and
- The rule regarding applications to reopen appeals reflects the amendment to the IRPA set out in the PCISA removing the RAD's jurisdiction to reopen an appeal if the Federal Court has made a final determination on an application for judicial review.

The RAD Rules also incorporate other changes to the IRPA which came into force on June 30, 2011. The provisions regarding "authorized representatives" set out in the IRPR were replaced by new provisions in the IRPA regarding who may represent or advise a person for consideration - or offer to do so - in connection with a proceeding or application under the IRPA.

# Regulatory and non-regulatory options considered

Under subsection 161(1) of the IRPA, the IRB Chairperson, subject to the approval of the Governor in Council, may make rules respecting the activities, practices and procedures of each Division of the IRB.

Consideration was given to establishing instructions on the practices and procedures of the IRB's Divisions through the use of other instruments such as Chairperson's guidelines, policies, policy notes, or Chairperson's instructions.<sup>2</sup> However, it was determined that enshrining these practices and procedures in rules, the most authoritative instrument at the IRB's disposal will provide for more robust and transparent identification of the basic practices and procedures of the IRB. In addition, for persons appearing before an IRB Division, one comprehensive instrument is more readily accessible and easier to use than a series of instruments.

## Benefits and costs

### Overall Benefits associated with a Reformed Refugee Determination System

The RPD Rules and RAD Rules contribute to the systemic savings that will result from faster processing under the BRRA and the PCISA. Overall, it has been estimated by CIC that the BRRA and the PCISA will result in savings estimated at \$1.4B in present value terms (PV) [or \$310M (PV) in net savings] over 5 years due to faster processing and faster removals largely as a result of failed claimants spending less time in Canada with access to social services.

The RPD Rules and RAD Rules contribute to the overall objectives of the BRRA and the PCISA by supporting the fairness, integrity and efficiency of IRB proceedings, and thus, increase the overall fairness and efficiency of the

refugee determination system.

## Benefits and Costs associated directly with the RPD Rules and RAD Rules

The following sections, as summarized in Table 1, identify in quantitative and qualitative terms the costs and benefits associated directly with the RPD Rules and RAD Rules.

All costs and benefits were assessed in terms of incremental changes resulting from the RPD Rules and RAD Rules - these costs would not occur if not for these Rules. Costs that could be quantified were forecasted over a period of 10 years, from fiscal years 2012-13 to 2021-22, expressed in present value (PV) terms, and were discounted at a rate of 8% and are based on current program costs. Program costs were calculated on the basis that the IRB will be funded to process and finalize a volume of 24,500 RPD cases and 10,700 RAD cases in fiscal year 2012-13. In fiscal year 2013-14 and in ongoing years, the IRB will be funded to process and finalize 22,500 RPD cases and 9,800 RAD cases. Costs and benefits which could not be estimated reliably in monetary terms due to data limitations were addressed qualitatively.

**Table 1: Cost-Benefit Statement of the RPD Rules and RAD Rules**

Cost-Benefit Statement		2012-13 (Base Year)	2016-17	2021-22 (Final Year)	Total Present Value	Average Annual Value
A. Quantified Impacts in thousands of \$						
Benefits	Affected Stakeholder					

Cost-Benefit Statement		2012-13 (Base Year)	2016-17	2021-22 (Final Year)	Total Present Value	Average Annual Value
Savings	Canadian Public, Federal Government, Provinces and Territories	The RPD Rules and RAD Rules contribute to the savings that will result from faster processing under the BRRA and the PCISA. The benefits of the RPD Rules and RAD Rules have been estimated to contribute to part of CIC's estimated \$1.4B (PV) benefits over 5 years derived from the broader package of reforms under the BRRA and the PCISA.				
<b>Costs</b>						
New forms, documents, policies and case management manuals	IRB	\$376.6	--	--	\$376.6	\$37.6
Record of RPD Proceeding	IRB	\$32.4	\$95.2	\$64.8	\$842.2	\$84.2
Interpretation for RAD Hearing	IRB	\$2.3	\$69.7	\$47.4	\$595.2	\$59.5
Written Reasons for RPD positive decisions	IRB	\$466.6	\$342.9	\$233.4	\$3,381.6	\$338.2
Designated representative for RAD hearing	IRB	\$4.3	\$12.7	\$8.6	\$112.3	\$11.2
<b>Total Present Value</b> <u>3</u>		<b>\$882.4</b>	<b>\$520.8</b>	<b>\$354.4</b>	<b>\$5,308.2</b>	<b>\$530.8</b>
<b>B. Quantified Impacts in Non-\$ NOT APPLICABLE</b>						
<b>C. Qualitative Impacts</b>						



Cost-Benefit Statement		2012-13 (Base Year)	2016-17	2021-22 (Final Year)	Total Present Value	Average Annual Value
Benefits	Affected Stakeholder					
Fairness, integrity, and efficiency	Canadian Public, Federal Government, Parties before the IRB	The RPD Rules and RAD Rules contribute to the savings that will result from faster processing under the BRRA and the PCISA by increasing the efficiency and integrity of IRB proceedings, and thus increasing the overall efficiency and integrity of the refugee determination system, while maintaining fairness in the proceedings.				
Costs						
Medical Certificates	Federal Government, Provinces and Territories, Refugee claimants before the IRB	Requiring a person to obtain a certificate signed by a medical practitioner when requesting a postponement of a proceeding or in abandonment proceedings will place additional pressures on provincial health authorities in instances where a person's illness would prevent them from being able to attend a proceeding, but not so serious as to require them to visit a medical practitioner. Costs would be incurred by the parties in instances where medical practitioners charge a fee for the issuance of a medical certificate. Under the Interim Federal Health Program (IFHP) asylum claimants from DCOs may also be required to pay the cost of the medical visit.				
Conferences	Federal Government, Provinces and Territories, Parties before the IRB	As is the case in the current RPD Rules, the RAD Rules stipulate that the RAD may require the parties to participate in a pre-hearing conference to discuss issues, relevant facts, and any other matter in order to make the proceedings fairer and more efficient. Parties may incur costs in order to participate in conferences as they may choose to be represented by counsel at their own expense. Should the parties obtain representation through provincial or territorial legal aid services, costs would be borne by these organizations.				

<b>Cost-Benefit Statement</b>		<b>2012-13 (Base Year)</b>	<b>2016-17</b>	<b>2021-22 (Final Year)</b>	<b>Total Present Value</b>	<b>Average Annual Value</b>
Transcripts	Refugee Claimants and CIC/CBSA appearing before the RAD	The RAD Rules require the parties, should they choose to rely on the transcript of the RPD hearing at the RAD appeal, to submit a full or partial transcript of the hearing to the RAD. It is not expected that the parties would require a transcript in every appeal. Should parties chose a service provider, such as a professional transcription company, to complete the transcript, costs would be incurred. A review of billing schedules by service providers indicate that transcription companies charge on average \$300 to transcribe a complete RPD hearing.				
Summons	Refugee Claimants and CIC/CBSA appearing before the RAD	As is the case in the current RPD Rules, the RAD Rules provide that if a party wants the Division to order a person to testify, they must request a summons from the Division. If the Division decides to issue a summons, the Rules would require that the party pay, or offer to pay the summoned person the applicable witness fees and travel expenses set out in the Federal Court Rules. Should a party pay the summoned witness, the fees would range between \$20 and \$100 per case, where applicable, plus reasonable travel expenses, unless a party agrees to pay a greater amount.				

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3 Totals may not add due to rounding.

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## **Benefits associated directly with the RPD Rules and RAD Rules**

These RPD Rules and RAD Rules contribute directly to the integrity and efficiency of IRB proceedings while maintaining fairness, thus increasing the overall fairness and efficiency of the refugee determination system.

The RPD Rules and RAD Rules provide clear and transparent direction on the practices and procedures of the Divisions to parties and their counsel appearing before the IRB, members who render decisions on cases, and the

IRB staff who support the decision-making process. This direction ensures that parties appear and present their cases before the IRB's Divisions in a consistent manner, therefore facilitating the fair and efficient administrative processing of cases. It also provides guidance to the Divisions to ensure that all cases are processed in a consistent manner that respects the principles of fairness and natural justice.

### **Benefits: Medical Certificates:**

The following qualitative benefits will be derived from the new medical certificate requirements:

- a reduction in the number of cases that are rescheduled by deterring persons who are the subject of proceedings from making frivolous applications that are not supported by objective evidence;
- where explanations include medical reasons, those reasons will be supported by appropriate objective medical evidence: the objective evidence will allow the member to make an informed decision according to the circumstances of each application; and
- the IRB will schedule its proceedings efficiently and effectively by knowing in advance when a person would be able to participate in a proceeding.

### **Costs associated directly with the RPD Rules and RAD Rules**

While the RPD Rules and RAD Rules are generally cost neutral, there are specific costs, captured in Table 1 and outlined below, associated with process changes and new operational requirements as a result of the BRRA and the PCISA.

Any quantified costs for the IRB associated with new rules will be absorbed within existing resources and resources that the IRB has secured for the implementation of the BRRA and the PCISA reform package as a whole.

### **Operational and Process Requirements**

- The RPD Rules and RAD Rules require a number of new forms, documents, policies and case management manuals to be developed, and, in some cases, translated into multiple languages. These

materials will contribute to fair and efficient processes in the RPD and RAD. Examples of documents that will be needed include basic process information to be shared with claimants, notices to appear for various proceedings, notices of decision for the RAD, and forms for various RAD processes. The one-time cost for the development of these documents will not exceed \$376.6K (PV).

- Once an appeal to the RAD has been filed, the RPD will have to prepare a record and provide it to the RAD to share with all parties to the appeal. The creation of the RAD and the stipulation in the RAD Rules that the RPD must supply the record of the RPD proceeding represents an additional expense for the IRB. Based on the previously identified processing volume of RPD and RAD cases, the annual average present value cost for preparing the RPD record for the RAD will be \$84.2K (PV) over a 10-year period.
- In keeping with principles of fairness and natural justice that govern proceedings before the IRB, the RAD Rules provide for interpretation at the oral RAD hearing, if one is held. While the RPD requires interpreters currently, the additional demand on interpreters as a result of RAD hearings will create additional costs for the IRB. Additional interpreters will have to be recruited and certified to meet the demand, and the number of interpreter hours at the IRB will increase. Based on the previously identified processing volume of RAD cases, the annual average present value costs associated with an increased requirement for interpretation will be \$59.5K (PV) over a 10-year period.

### **Written Reasons for RPD Positive Decisions**

- The RPD Rules require RPD members in most cases to provide written reasons for positive decisions on claims for refugee protection. This new requirement represents an additional cost to the IRB, as written reasons for positive decisions are not currently provided on a routine basis. The overall cost includes the cost of the transcription of the relevant portion of the proceedings if the decision and reasons are delivered orally, as well as the cost of the time required of members and their support staff when drafting and editing reserved decisions and reasons (i.e. those not delivered orally at the hearing). The

average annual present value costs to the IRB associated with this requirement will be \$358.5K (PV) over a 10-year period.

## **Designated Representatives**

- A representative is designated when the person concerned is less than 18 years of age or, in the opinion of a Division, is unable to appreciate the nature of the proceedings. In certain circumstances, the IRB pays an honorarium to the individual acting as the designated representative. In addition to the designated representatives currently required for RPD claims designated representatives will also be required throughout the appeal process at the RAD. Based on previously identified processing volumes and the number of representatives designated in 2008-09 and 2009-10 at the RPD, the average annual present value costs to the IRB associated with this requirement will be \$11.2K (PV) over a 10-year period.

## **Conferences at the RAD**

- In accordance with the current RPD Rules, the RPD may require the parties to participate in a pre-hearing conference to discuss issues, relevant facts, and any other matter in order to make the proceedings fairer and more efficient. Conferences are not called in all proceedings, and are generally required to organize cases that are lengthier in nature, or to address procedural issues that require resolution prior to the actual hearing. Parties may incur costs to participate in conferences as they may choose to be represented by counsel at their own expense. Despite this, the RPD's experience with conferences has underscored the fact that they are cost-effective instruments as they make proceedings fairer and more efficient. As a result of this positive experience, the RAD Rules make similar provisions for conferences to make appeals fairer and more efficient. As is the case in the RPD, parties may incur costs when participating in conferences at the RAD should they choose to be represented by counsel at their own expense. Should the parties obtain representation through provincial or territorial legal aid services, costs would be borne by these organizations. Although the RAD is a new process, the IRB currently estimates that approximately 2.5% of all RAD appeals will

require conferences. The costs associated with this new process have not been quantified given that the number of parties who will choose to be represented by counsel at these conferences is unknown.

## Medical Certificates

- To fulfil its legislated mandate and meet the regulatory timelines for RPD hearings, the IRB must schedule its proceedings so that cases before its various Divisions are finalized as quickly as possible. Proceedings that are postponed and then rescheduled to a later date impact the IRB's ability to meet this objective. Moreover, significant costs are incurred by the IRB when a proceeding must be rescheduled. When an RPD hearing is postponed on the day it was scheduled to proceed the direct salary costs incurred by the IRB are \$251. In the case of a RAD hearing, it is anticipated that these costs will amount to \$289.<sup>4</sup>

The IRB is taking various steps to minimize the number of proceedings that are unnecessarily postponed and rescheduled. To support these measures, the RPD Rules and RAD Rules provide that if a party, other than the Minister, appearing before the RPD or the RAD wishes to change the date or time of a proceeding for medical reasons (other than those related to counsel), they must provide a medical certificate signed by a qualified medical practitioner.

The rules also require that a claimant at the RPD, or an appellant who is the subject of an appeal at the RAD, must provide a medical certificate in instances where the claimant or the appellant is explaining why a claim or an appeal should not be declared abandoned and the explanation includes medical reasons (other than those related to counsel).

Finally, the rules require that a claimant at the RPD must provide a medical certificate in instances where the claimant is explaining why they should be granted an extension of time to complete their BoC Form and the explanation includes medical reasons (other than those related to counsel).

However, the IRB has provided a *controlled relief* from the requirement for a medical certificate in those situations where the person can show, with corroborating evidence, that he or she tried to obtain the required medical certificate but was unable to do so. The person must still provide particulars of the medical reasons for their application, supported by corroborating evidence, and an explanation of how their medical condition prevents them from participating in the hearing or prevented them from pursuing their appeal, as the case may be.

The rules specify that the certificate must include information regarding:

- the particulars of the medical condition, without specifying the diagnosis, that prevent(ed) the party from participating in the hearing or completing their BoC Form on the date fixed; and
- the date on which the party is expected to be able to participate in the proceeding (or pursue their appeal for explanations regarding abandonment of an appeal).

**Costs: Medical Certificate to support Extension of Time to file a BoC Form, in support of an application for a change of date or time of a hearing or in the context of abandonment proceedings**

Costs will be incurred by persons who are the subject of proceedings in instances where a person is applying for an extension of a filing deadline or for a change of date or time for their proceeding due to medical reasons and a cost is incurred on the part of the person to access a medical practitioner and/or obtain a medical certificate. Costs may vary according to the province and the type of visit and/or the reason for the visit.

Under the Interim Federal Health Program (IFHP), claimants from non-Designated Countries of Origin (DCOs) receive coverage for medical visits if of an urgent or essential nature; while claimants from DCOs receive coverage under the IFHP for the cost of the services of a doctor or registered nurse to diagnose, prevent or treat a disease posing a risk to public health or a condition of public safety concern. If the condition or disease that is the reason for the certificate does not meet these criteria, and depending on the

jurisdiction in which the claimant is located, in addition to the cost of the certificate, asylum claimants from DCOs may also be required to pay the cost of the medical visit.

In circumstances where a person's explanation includes medical reasons, it is reasonable to expect that they would seek medical assistance regardless of the requirement set out in the rules. However, it is anticipated that in instances where a person's illness might prevent them from attending a hearing but is not sufficiently serious to warrant a visit to a medical practitioner, this requirement may place pressures on health care services and a cost burden on persons appearing before the RPD or the RAD.

Taking into account the cost of rescheduling a proceeding, it is estimated that the qualitative benefits will outweigh the costs to individuals appearing before the RPD or the RAD and provincial health authorities. The total annual monetized costs and benefits of this requirement have not been estimated as the benefits are qualitative, and it is impossible to reliably estimate the decrease in postponements that could be attributed to this requirement or the number of times a person would have to visit a medical practitioner, as the IRB does not maintain systematic data on the number of applications to postpone a proceeding for medical reasons nor does it maintain data on the number of times an explanation for why a case should not be abandoned includes medical reasons.

## **Transcripts**

- The RAD Rules require the parties, should they choose to rely on the transcript of the RPD hearing at the RAD appeal, to submit a full or partial transcript of the hearing to the RAD. It is not expected that the parties will require a transcript in every appeal. Unlike what was indicated in the RIAS accompanying the RPD Rules and RAD Rules which were pre-published in the Canada Gazette, Part I, on July 2, 2011, the IRB will not, as a practice, provide parties with a transcript of the RPD proceeding for the purposes of filing an appeal at the RAD. The RAD Rules stipulate that a party must file with the RAD a full or partial transcript of the RPD hearing, if the party wishes to rely on the



transcript in the appeal. The RAD Rules do not stipulate how a party is to obtain a transcript, or who is to create the transcript. They state that the transcript must be full or partial and accompanied by a transcriber's declaration. An electronic recording of the RPD hearing will be made available to claimants and the Minister. It will therefore be for the parties to decide how they would obtain a transcript. The parties would incur monetized costs should they choose a service provider, such as a professional transcription company, to complete the transcript. A review of billing schedules by service providers indicate that transcription companies charge on average \$300 to transcribe a complete RPD hearing. The total costs associated with this new process have not been quantified given that it is unknown how many parties will choose to rely on the transcript of the RPD hearing, or how the parties will go about obtaining transcripts.

## **Summons**

- As is the case in the current RPD Rules, the new RPD Rules and RAD Rules provide that if a party wants the Division to order a person to testify, they must make a request to the Division for a summons. If the Division decides to issue a summons, which in the past has occurred only in extremely rare circumstances, the Rules require that the party pay, or offer to pay the summoned person the applicable witness fees and travel expenses set out in the Federal Courts Rules. Should a party pay the summoned witness, the fees would be \$20 per day plus reasonable travel expenses. The fees would be increased to \$100 per day plus reasonable travel expenses if the witness is an expert witness. The parties will also be able to pay a witness a greater amount equal to the expense or any loss incurred by the witness in attending a proceeding. A party may also pay the expert witness a greater amount established by contract for his or her services in preparing to give evidence and giving evidence. The total costs associated with this new process have not been quantified given that it is unknown how many summons will be requested and granted, and how many parties will have to pay the summoned witness the fees described above.

## **"One-for-One" Rule**

The "One-for-One" Rule does not apply to the RPD Rules and RAD Rules, as there is no change in administrative costs to business.

## **Small Business Lens**

The RPD Rules and RAD Rules do not impose any level of compliance costs and / or administrative costs on small business.

# **Consultation**

## **The Balanced Refugee Reform Act(BRRA)**

The proposed RPD Rules and RAD Rules, pre-published in July 2011, were originally drafted to ensure consistency with the BRRA. As part of their development, the IRB held information sessions in the fall of 2010 for stakeholders in Montréal, Toronto and Vancouver, as well as conducting written consultations in which portfolio organizations within the federal public service and stakeholders were provided with draft copies of the proposed RPD Rules and RAD Rules and asked to submit written comments.

Those proposed RPD Rules and RAD Rules, which were circulated to stakeholders and portfolio organizations, were received with a mixed level of support and opposition. While stakeholders were pleased that the proposed RPD Rules and RAD Rules incorporated changes that had been requested in the past, and portfolio partners were satisfied that the proposed RPD Rules and RAD Rules were consistent with the intent of the BRRA, a number of concerns were expressed. These concerns were reviewed and addressed to the extent possible in the proposed RPD Rules and RAD Rules that were pre-published in the Canada Gazette, Part I, on July 2, 2011. These proposed rules were open for public comment for a period of 30 days. The comments received were reviewed and given careful consideration to determine if changes to the text of the rules were required.

## **The Protecting Canada's Immigration System Act (PCISA)**

On February 16, 2012, the Minister introduced Bill C-31, the Protecting Canada's Immigration System Act (PCISA). The PCISA, which received Royal Assent on June 28, 2012, includes legislative amendments to the BRRA and the IRPA that are intended to further expedite the processing of refugee claims. As a result of these legislative amendments and anticipated regulatory changes, the proposed RPD Rules and RAD Rules were updated.

The updated RPD Rules and RAD Rules were pre-published in the Canada Gazette, Part I, on August 11, 2012, and open for public comment for a period of 30 days. As part of the consultation period, the IRB conducted information sessions for stakeholders in Montréal, Toronto, Vancouver, and Ottawa.

Written submissions were received from the Canadian Council for Refugees, the Legal Services Society of British Columbia, the United Nations High Commissioner for Refugees, the Association Québécoise des avocats et avocates en Droit de l'Immigration, Canadian Association of Refugee Lawyers, Canadian Bar Association, Rainbow Refugee, Vancouver Association for Survivors of Torture, Refugee Forum, Mouvement contre le viol et l'inceste, an academic and a certified immigration consultant. A total of 216 comments from stakeholder groups were received regarding the RPD Rules and RAD Rules. The vast majority were about specific changes to the RPD Rules and RAD Rules. The comments were reviewed and given careful consideration to determine if changes to the text of the rules were required.

The IRB received some comments that were outside the IRB's jurisdiction and/or authority to take into consideration, and thus the Board was unable to make an associated change to the rules. These comments largely related to new time limits for the first-level hearing of a refugee claim and the time limit for submission of the BoC Form to the IRB for those claims referred from a port of entry, which will be set forth in the IRPR. Other comments pertained to the discontinuation of the provision of transcripts of RPD proceedings, a decision taken by the Government as part of the federal deficit reduction action plan.

Several comments were also received on the language of the rules (choices of words/wording) which are primarily considerations for drafting. Where a comment related to wording and was significant to the meaning, application or underlying policy intent of the rule, the IRB considered the comment as a suggested rule change and deliberated on this appropriately.

The IRB also received submissions in which it appeared that there may be some confusion that the RAD will be an oral hearings tribunal. The RAD will primarily be a paper-based appeal with limited circumstances described in the IRPA when an oral hearing may be held. Furthermore, as a result of the fact that the IRPA uses the same test for an oral hearing at the RAD as is used for the PRRA, it appears that some confusion existed about the distinction between the RAD and PRRA. The RAD will consider appeals of an RPD decision based upon an error of law, fact, or mixed law and fact, whereas the PRRA process results in a new decision for protection based on new evidence since the date of the RPD decision; it is not an appeal of the RPD decision.

## **Comments on RPD and RAD Rules resulting in changes**

The IRB made changes to the RPD Rules and RAD Rules following pre-publication in the Canada Gazette, Part I, on August 11, 2012 as a result of comments received. These changes include:

### **Changes to RPD Rules:**

#### **Providing the Minister with the Basis of Claim Form, relevant identity and travel documents and amendments to the Basis of Claim Form**

Six respondents noted that the requirements for the claimant and/or counsel to provide the Minister with the Basis of Claim (BoC) Form, relevant identity and travel documents and any amendments to the BoC Form were particularly onerous. Respondents expressed concern regarding the costs involved, how and where to provide the documents and regarding the

requirement to provide proof of having submitted the documents.

Respondents also expressed confusion as to which Minister to provide the documents and under what circumstances.

In response to stakeholder concerns, changes were made to the RPD Rules to reflect that the RPD will provide the Minister with a copy of the relevant documents following receipt. To facilitate this change, claimants and counsel will be required to file two copies of each document with the IRB.

### **Application for Extension of time to provide a Basis of Claim Form (Port of Entry)**

Several respondents noted that the requirement to file a statutory declaration or affidavit when requesting an extension of time to file the BoC Form for those claims referred to the IRB from a port of entry is unnecessary and overly onerous.

In response to stakeholder comments, and anticipating that there might be an increase in unrepresented claimants before the RPD, the requirement to provide a statutory declaration or affidavit when requesting an extension to file the BoC Form has been removed.

### **Provision of Medical Certificates**

The vast majority of respondents noted that the requirement to provide a medical certificate - in the context of the application for an extension of time to provide the BoC Form, applications for a change of date and time, and abandonment proceedings - was overly onerous. Many respondents referred to the recent changes to the Interim Federal Health Program and noted concerns about claimant's ability to access medical practitioners and obtain medical certificates. Respondents felt that the rules were overly prescriptive in terms of the content of the medical certificate required.

In response to these comments, and noting that certain claimants may face challenges with regards to accessing medical treatment and care and/or incur significant costs in doing so, the IRB has provided a *controlled relief* from this requirement in those situations where the claimant can prove, with

corroborating evidence, that he or she tried to obtain the required medical certificate but was unable to do so. The claimant must still provide particulars of the medical reasons for their application, supported by corroborating evidence, and an explanation of how their medical condition prevents them from participating in the hearing or prevented them from pursuing their claim, as the case may be. The rules have been changed to reflect this approach. Further, the decision has been taken to remove that portion of the rule on applications to change the date or time of a hearing which required the medical practitioner to assess and state whether the claimant could participate if the proceeding or any part of it were conducted in writing or by means of live telecommunications.

### **Providing amendments to the Basis of Claim (BoC) form**

Respondents commented that the rule which addresses changes or additions to the BoC Form was overly complicated in its wording. Several respondents expressed confusion regarding how the requested explanations for any additions or deletions were to be provided. A respondent also suggested that the IRB ensure that claimants, when providing amendments to their BoC Form, be required to state that the changes are "true to the best of the claimant's knowledge".

In response to these comments, the IRB has: (1) simplified the language in this rule, (2) removed the requirement for an explanation of changes, and (3) included an additional requirement that claimants provide a declaration which states that the information given by the claimant in the BoC Form, together with the changes and additions, is complete, true and correct, which is consistent with the declaration in the BoC Form that claimants must initially sign.

### **Timelines with regard to applications for changing the date or time of a proceeding**

Several respondents expressed concern regarding the tight timelines in the rule pertaining to an application for a change of date or time of a proceeding. The rule required that the claimant, when requesting a change of date or

time, provide three days on which they would be available to proceed which fall within five working days after the date originally fixed for the proceeding. Respondents felt that this was unrealistic, particularly given the anticipated busy schedules of counsel.

Noting this concern along with the overall scheme of the IRPA and the IRPR as well as the scheme of the RPD Rules, the IRB has changed the rule such that claimants provide three dates within a window of **ten** working days. Similarly, the rules state that the new date fixed by the Division must be no later than *ten working days*, or as soon as possible thereafter.

## **Changes to RAD Rules:**

### **Providing the Minister with the Notice of Appeal and Appellant's Record**

One respondent commented that many persons may be unrepresented at the RAD and that for unrepresented persons it is unreasonable for the IRB to expect them to file their appeal with the Minister first and then provide proof to the RAD.

The IRB has changed this rule so that when the person is the appellant, they must provide the original and two copies of their written notice of appeal and the original and a copy of the appellant's record to the IRB and the IRB will provide these documents to the Minister. Furthermore, this approach has also been used for similar originating applications such as an application for an extension of the time to file and perfect, or an application to reopen an appeal. This rule change is also consistent with the scheme adopted for the RPD with respect to providing the BoC Form to the Minister.

### **Time to reply to Minister's intervention**

A comment was received that the time limit of 10 calendar days time limit for the appellant to reply to a Minister's intervention was inadequate. The IRB has changed the time limit to 15 calendar days which will give appellants more time to consider and prepare their reply to the Minister and is also consistent with other time limits in the RAD Rules.

## **Application to change the location of a hearing**

It was noted that there is an inconsistency in the time limits between the rule which provides the minimum notice of 10 days for a hearing, and the rule which requires 30 days notice for an application to change the location of a hearing. The IRB has an expectation that an application to change the location of a hearing will be made at the same time that a party requests that a hearing be held, which would be contained in the appellant's record, reply record or response record in the case of the person, and in the notice of intervention, appellant's record, if any, or reply record in the case of the Minister. However, the IRB has changed the time limit to apply for a change of location of a hearing from 30 calendar days to 20 calendar days before a hearing.

## **Order of questioning at a hearing**

Several comments were received on the conduct of the hearing including concerns raised about ensuring that the person has an adequate opportunity to question witnesses in an oral hearing. In response to these comments, the RAD Rules have been changed so that the standard order of questioning in a RAD hearing is that any witnesses, including the person, will be questioned first by the appellant, followed by any other party, followed by the appellant in reply, and the Division will question last. The RAD member who conducts the hearing will have discretion to change the order of questioning on a case-by-case basis.

## **Provision of Medical Certificates**

The vast majority of respondents noted that the requirement to provide a medical certificate in the context of an application for a change of date or time of a hearing and in abandonment proceedings was overly onerous. Many respondents referred to the recent changes to the Interim Federal Health Program which may have negative impacts on the ability of persons to access medical practitioners and obtain medical certificates. Respondents felt that the rules were overly prescriptive in terms of the content of the medical certificate required.



In response to these comments, and noting that certain persons may face challenges with regards to accessing medical treatment and care and/or incur significant costs in doing so, the IRB has provided a *controlled relief* from this requirement in those situations where the person can show, with corroborating evidence, that he or she tried to obtain the required medical certificate but was unable to do so. The person must still provide particulars of the medical reasons for their application, supported by corroborating evidence, and an explanation of how their medical condition prevents them from participating in the hearing or prevented them from pursuing their appeal, as the case may be. The rules have been changed to reflect this approach. Further, the decision has been taken to remove that portion of the rule on applications to change the date or time of a hearing which required the medical practitioner to assess and state whether the person could participate if the proceeding or any part of it were conducted in writing or by means of live telecommunication.

### **Comments on RPD Rules and RAD Rules not Resulting in Changes**

In general, many respondents noted that unrepresented claimants, vulnerable claimants (including those unable to appreciate the nature of the proceedings), unaccompanied minors, and detained claimants may face specific challenges with regard to navigating the reformed refugee determination system due to tighter time limits found in the IRPR and throughout the rules. Respondents referred to challenges associated with making timely applications for extensions of time for providing the BoC form, the requirements of the general applications rule, the time frames in which resumption dates are chosen and set, and time limits for disclosure, among others.

The IRB recognizes these challenges, however, except in those circumstances noted above, the IRB has not significantly revised its rules in response to these more general comments. Because considerations of natural justice and fairness are always paramount, the IRB member is always able to exempt a party, when appropriate, from the specific requirement of

any rule, with proper notice to parties. Members will remain alert to the specific challenges faced by these persons and will use their discretion to ensure that all those who appear before the IRB are provided with a fair and just resolution of their case.

## **Comments on the RPD Rules**

The following outlines key concerns raised by respondents that did not result in further changes to the RPD Rules.

### **Providing information to the claimant in writing**

Several respondents made comments regarding those rules which specify what information must be provided to the claimant by the officer at the point of the eligibility interview and subsequent referral of the claim. One respondent suggested that additional material and information on legal aid be provided to the claimant as early as possible in the process. While this does not necessitate a change to the rules, the IRB will endeavour to provide information on legal aid programs in its Claimant Kit, to be provided to the claimant at the inland office or port of entry.

Respondents also requested that the officer be required to clarify the concept of abandonment so that the claimant fully understands the impact of not providing the BoC Form in accordance with the time limits, or of not showing up to a hearing. As it falls outside the immediate mandate of the referring officer (CBSA and CIC), this comment has not resulted in a change to the rules. Instead, IRB material provided to the claimant in the Claimant Kit will emphasize the importance of the time limits for submission of the BoC Form, the dates on the Notice to Appear and the implications of abandonment.

### **The BoC Form**

Five respondents expressed concerns about rules related to the Basis of Claim (BoC) Form. Two respondents recommended that the BoC Form declaration should be changed to indicate that "the information is true and complete to the best of my knowledge," rather than "complete, true and

correct". It was indicated in the written comments that without legal advice, claimants cannot properly understand what is being asked of them and therefore cannot know if the information is complete.

The IRB has chosen to maintain the pre-published wording in the BoC Form declaration as this language is consistent with the language used in the Personal Information Form under the current RPD Rules. It remains reasonable to request that the claimant state that the information is "complete, true and correct". However, it should be noted that members will exercise necessary discretion as to any inferences they draw from omissions and whether or not such omissions affect credibility.

One respondent noted that illiterate claimants should be given flexibility in those situations in which the BoC Form is not filled out and signed as requested. As discretion rests with the member to provide an exemption from the requirements of a rule when necessary and after proper notice to parties, this comment did not necessitate a change in the rules.

One respondent commented that the rules were not clear in terms of what documents were to be attached to the BoC Form at the point of its submission to the IRB. The rules refer to travel and identity documents and a copy of *any other relevant documents* in the possession of the claimant. The respondent requested that the rules be drafted to clarify whether this means that all supporting documents be provided in support of the claim at this early stage. The IRB has not changed the rules as its view is that, when read in conjunction with additional rules governing the disclosure of documents, the process is sufficiently clear.

## **Time Limits**

The vast majority of respondents were critical of new time limits outlined in the rules which will govern various RPD procedures. Specifically, respondents suggested that the IRB reduce or eliminate the three-day time restriction for filing an extension of time request for providing the BOC Form, reduce or

eliminate the 10-day requirement for making amendments to the BOC Form, reduce or eliminate the 10-day disclosure period, and reduce the time limit for requesting a change of location.

The IRB has chosen not to change the rules noted above as the time limits are in keeping with the broader scheme of the RPD Rules and are necessary, from a strictly operational perspective, to ensure that files are ready to proceed to hearing when scheduled. Without time limits, the IRB would be poorly placed to ensure readiness for the hearing day with completed files, resulting in numerous, last minute postponements or adjournments.

### **Conduct of the Hearing**

Several respondents were critical of the RPD Rules which stipulate the order of questioning. One respondent suggested that RPD members be given the flexibility to determine an order of questioning that will best serve to bring forth all of the relevant evidence. The order of questioning will be retained as drafted. The rules are a codification of the RPD's approach as articulated in *Guideline 7, Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*. This Guideline was upheld by the Federal Court of Appeal in *Thamotharem*,<sup>5</sup> a decision in which the Court held that this approach to questioning did not breach a claimant's right to procedural fairness. Furthermore, the order of questioning set out in the RPD Rules is compatible with an amendment to the IRPA from the BRRRA, which provides that in any proceeding before it, the RPD may question the witnesses, including the person who is the subject of the proceeding.

Critical comments were also received regarding the limiting of questioning of witnesses. One respondent suggested that claimants or protected persons should not have their questioning limited if the questioning enhances the opportunity to substantiate their case especially if they are unrepresented. A comment was also received that the Minister, counsel for the claimant and the Division should not be permitted by the rules to cross-examine the claimant, protected person or other witnesses. However, a RPD hearing is an inquisitorial process and it is for the member to control the nature and

duration of questioning in order to ensure the proceeding is conducted fairly, efficiently and in accordance with the law. As such, no rule change is required.

Concerns were expressed that the issuance of an oral decision and reasons at the conclusion of the hearing may not serve the principles of fairness and natural justice. The RPD strives to achieve the objective of quality, fairness and timeliness in decision-making, as well as a more responsive and accessible administration of justice. Oral decisions and reasons delivered at the conclusion of a hearing contribute to these objectives and have been a policy of the IRB since 2000. <sup>6</sup>

Overall, with respect to the conduct of a hearing, the IRB has chosen to raise the procedures regarding rendering an oral decision and reasons, limiting the questioning of witnesses, and the order of questioning witnesses, to the RPD Rules. This serves to enshrine these practices and procedures in rules, the most authoritative instrument at the disposal of the IRB, which also provides for a more robust and transparent identification of the basic practices and procedures of the RPD to parties who appear before it.

However, the IRB recognizes that circumstances may arise where the order of questioning set out in the rules may not serve the principles of fairness and natural justice. The IRB also recognizes that rendering an oral decision and reasons at the conclusion of the hearing may not always be practicable. The RPD Rules allow for members to deviate from these procedures and processes as required.

### **Documents establishing identity and other elements of the claim**

Two respondents commented that the rule which requires claimants to provide acceptable documents establishing their identity and other elements of their claim was too vague and should be clarified to provide better guidance to claimants. The current RPD Rules contain the same requirement. As it is the claimant's responsibility to establish their identity and prove the elements of their claim, it is reasonable to request that the claimant provide acceptable documents to this end. The rule was not changed as a result of

these comments. The Claimant's Kit will highlight the claimant's responsibility to provide relevant documents and will help clarify what type of documents might be considered acceptable.

### **Counsel of Record**

Three respondents provided comments concerning the process to follow to be removed as counsel of record. Specifically, respondents requested that the rule which stipulates that counsel of record remain counsel of record until the request is granted be changed to state that counsel are released as of the Division's receipt of the written notification. While the IRB is unlikely to require counsel of record to continue to represent a claimant if a request has been made to the Division in a timely manner, the IRB maintains that it has discretion to deny the request in appropriate circumstances, such as where allowing it would impede the timely progress of a proceeding and cause an injustice. With this in mind, the rule has not been changed.

### **Designated Representatives**

Several respondents made comments regarding the rules which pertain to designated representatives. For example, a respondent would prefer to see the rules amended so a representative can be designated by the officer at the eligibility interview rather than only the Division. While the IRB agrees that a designated representative should be designated as early as possible in the process, the IRB lacks the jurisdiction to designate a representative prior to the referral of the claim, and the officer lacks the authority to do so at the eligibility interview. As such, the rule remains unchanged. However, the RPD Rules do require the referring officer to inform the RPD whether the claimant may need a designated representative and to provide the contact information for any proposed designated representative.

### **Disclosure of Personal Information**

A respondent commented on the revised rule regarding the disclosure of personal information from one claim to another, if the claims involve similar questions of fact or if the information is otherwise relevant to the

determination of the claim. The respondent did not feel that the safeguards outlined in the rules as structured went far enough in protecting the privacy of the individuals involved. The rule was drafted to be consistent with Privacy Act requirements. Therefore, the rules were not changed in response to stakeholder comments.

## **Integrity Issues**

Several respondents had comments pertaining to the rules on exclusion, integrity issues, inadmissibility and ineligibility. Five respondents requested that the rule regarding the requirement that the IRB notify the Minister if, in the opinion of the RPD, there is a possibility that issues relating to the integrity of the Canadian refugee protection system may arise from the claim, be removed. Several respondents, commenting specifically on that portion of the rule which provides *examples* of circumstances in which this notification *may* arise, stated that changes to the basis of claim should not be sufficient grounds to advise the Minister of possible integrity issues, since changes from the original basis of claim may not be uncommon, as many BoC Forms will be prepared without the assistance of counsel.

The IRB has not removed the rule as it is consistent with one of the objectives of the IRPA, specifically, the one set out in paragraph 3(2)(e) which refers to "maintain[ing] the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings". The rule exists to reflect how the IRB will contribute towards the fulfillment of this collective objective as outlined in the Act. The rule also exists to indicate in a transparent manner what *may* lead a member to notify the Minister of possible integrity issues. Finally, the rule limits its application by stipulating that the member must also believe that the Minister's participation will aid in the full and proper hearing of the claim.

Respondents also requested that the Minister be obliged to provide the factual basis on which the ground of intervention is based. The IRB believes that a rule change is unnecessary as the Minister is already obliged to state

the purpose for which the Minister will intervene and, in some circumstances, the Minister is obliged to state the facts and law on which the Minister will rely in their intervention.

### **Disclosure and Use of Documents**

Five respondents commented on the rules governing the disclosure and use of documents; most in relation to the time limits which are discussed above. One respondent stated that it was unrealistic to have only five days to respond to the Minister's material, if there is an intervention. While the IRB recognizes the challenges associated with this requirement, the rule has not been changed as the time limits fit within the greater operational scheme of the rules. Members will hear and decide on applications for exemptions from this requirement on a case-by-case basis.

### **Change of Date and Time**

Four respondents were critical of the rules concerning applications for a change of date or time of a proceeding. Specifically comments were received in relation to the time limits for applications for a change of date and time as well as the requirement for medical certificates in support of such an application. While the IRB has changed some requirements (specifically, time limits and certain elements of the requirement for medical certificates), there were other suggestions made by respondents which did not result in changes to the rules. For example, one respondent suggested that the rules be amended to state that the RPD must allow the application to change the date and time of the hearing when the application is reasonable, rather than in exceptional circumstances. A respondent also suggested that the rule be replaced by a simpler, more flexible scheme.

Because the tight but reasonable control of changes to date and time is central to the achievement of the time limits as stipulated in the IRPR, as well as the overall intent of the amended IRPA, the IRB has declined to remove the requirement for exceptional circumstances and has chosen to retain the overall structure of the rule as written.



## **Abandonment**

Several respondents were critical of rules around determining whether a claim will be declared abandoned. Comments included suggestions that the RPD show more flexibility in specific circumstances where claimants require more time to provide a completed BoC Form. As well, one comment suggested that the notice to appear for abandonment for failure to provide the BOC Form should not be included with the notice to appear for the hearing. It was also suggested that the language must be very explicit in the abandonment notice so that claimants have a clear understanding of the consequences.

With respect to flexibility, as noted earlier, members are always able to waive the requirement of a rule, with due notice to parties, in consideration of fairness and natural justice. Given the fact that there is already flexibility in the application of the rules when warranted, the rules on abandonment were not amended in this regard.

With respect to the notice to appear for abandonment, it is IRB's position that providing the claimant with this notice at the same time as their notice to appear for their hearing affords the claimant the maximum notification possible. Furthermore, the consequences of abandonment are clearly explained in the Claimant's Kit, which the claimant will receive at the same time as their notice to appear.

## **Decisions**

Comments were received suggesting that the RPD should require written reasons for all RPD decisions. The IRB may as a matter of practice issue written reasons for all decisions, but the IRPA does not provide the authority to make a rule in this regard. The IRPA requires the RPD to provide reasons (oral or written) for the final decision in all cases. The IRPA further requires written reasons to be provided if the RPD rejects a claim; if the RPD allows a claim, written reasons must be provided on request of the claimant or the Minister, or "in the circumstances set out in the rules of the Board". The RPD Rules require written reasons to be provided in almost all circumstances.

There was a comment that there should be a rule stating that the audio recording of the RPD proceeding will be provided to the claimant at the conclusion of the hearing or at the time the decision is rendered. The IRB will establish a practice to ensure claimants requiring access to the audio recording for the purposes of an appeal will receive one in a timely manner following the hearing or decision. As not all claimants require an audio recording, it would be inappropriate to require in the RPD Rules that one be provided in all cases.

## **Comments on RAD Rules**

The following outlines key concerns raised by respondents that did not result in further changes to the RAD Rules.

### **Filing and Perfecting, Extensions of Time**

Several respondents made comments related to rules on extensions of the time to file and perfect appeals at the RAD. For example, two respondents suggested that the rules should facilitate the granting of reasonable applications to extend the time in order to provide a transcript and evidence. Another suggested that the RAD Rules include a process for applying for an extension of time to file documents that are not currently available in support of an appeal. The factors governing the granting of extensions of the time to file and perfect an appeal are in the IRPR, namely, "reasons of fairness and natural justice". The IRB will consider applications on a case-by-case basis, and apply the factors set out in the IRPR. Therefore, it is not necessary to include rules prescribing when an application to extend the time to file and perfect an appeal will be allowed.

### **Affidavit in place of transcript**

A comment was also made that the RAD Rules should permit the submission of a detailed affidavit in place of a transcript. No rule change was required to address this comment since the RAD Rules do not require transcripts, nor do

they prohibit the submission of affidavits, since they constitute documentary evidence.

### **Transcriber's qualifications**

Another comment was made that the RAD Rules should set out qualifications for transcribers so that members can feel more confident in relying on the accuracy of the transcription. Setting out such qualifications is seen by the IRB as imposing an onerous requirement on parties. Furthermore, the member will always have a copy of the recording of the RPD proceedings, and therefore would not have to rely solely on the declaration of the transcriber in order to verify its accuracy. This practice of not requiring a transcriber's qualifications is also in keeping with the current practice of the IRB not to require the translator's qualifications when parties submit translated documents.

### **Scope of evidence and issues to be considered by the RAD**

A respondent suggested that a rule be added stipulating that if the RAD considers issues not identified by the person, all relevant evidence will be considered regardless of when it was available.

In this regard, the IRB's vision is that the process at the RAD will primarily be a party driven process and the RAD will determine issues identified by the parties. In the rare event that issues are considered which were not identified by a party, natural justice would require the parties to be informed. With respect to the issue of when certain evidence was available, this consideration will be governed by the relevant provisions of the IRPA; and in particular, s. 110 of the IRPA which sets out what evidence the RAD may consider. We note, however, that new evidence is not a requirement to appeal to RAD.

### **Filing of RPD audio recording**

Two respondents suggested that the rules should be amended to permit the filing of the audio recording of the RPD proceeding instead of a transcript and that this audio recording should be provided to the person at the conclusion of

the RPD hearing.

The IRB maintains that there is no need to file the audio recording since the RAD Rules already provide for the audio recording to be part of the RPD record that the member will be referring to in making their decision. Nothing precludes a party from referring to a section(s) of the recording in their submissions.

### **Automatic Joining of Appeals**

One respondent raised a concern about the automatic joining of appeals where the related claims had been joined at the time of the RPD decision and asked that there be an opportunity to object to the joining. The IRB considered this comment and determined that the RAD Rule already provides sufficient opportunity for any person to object to automatic joining of appeals via an application to separate the appeals.

### **Conduct of Hearings at the RAD**

In addition to the above comments pertaining to the conduct of RPD hearings, a respondent was also critical of the RAD's ability to limit questioning of witnesses. The respondent contended that persons should not have their questioning limited if the questioning enhances the opportunity to substantiate their case, especially when they are unrepresented.

The rule regarding the ability to limit questioning of witnesses is well supported by jurisprudence and, in light of the fact that RAD hearings will be restricted in scope, and that the member will be the last to question witnesses, the IRB believes that it is particularly important to set out this ability in the RAD Rules.

### **Policy Instruments, Forms and Operations at the RAD**

One respondent suggested that the RAD provide forms that would help appellants with their proceedings before the RAD. Specifically, it was suggested that the process for appealing and requesting an extension could be facilitated with simple forms which could be filled out by unrepresented

persons. It is the intention of the IRB to provide such forms and the Division has engaged in informal consultations with regard to these forms. However, since these forms are not part of the RAD Rules, no rule change was required.

One respondent commented that the RAD should publish information about upcoming cases before a three-member panel in a way that protects a person's privacy so that potential interested persons can consider whether to bring an application to participate. The IRB intends to provide more details about the process for the assignment and conduct of appeals by three-member panels, including the application by a third party to participate in other policy instruments. Therefore, no change to the RAD Rules was required.

### **Vulnerable Persons**

Several respondents raised concerns around vulnerable persons. It was suggested that Guideline 8, Guideline on Procedures with Respect to Vulnerable Persons Appearing before the IRB, be observed at the RAD. As the IRB intends to review and update this Guideline so that it explicitly applies to the RAD, no RAD Rules change was required.

One respondent suggested that the Board use positive discretion for vulnerable persons regarding the use of documents, without requiring them to resort to the general applications rule as is the case for the Minister. Another respondent indicated that there should be greater flexibility for procedural requirements concerning the format and language of documents for unrepresented and detained persons.

The RAD will make accommodations for parties on a case-by-case basis. As with all procedural requirements, the Division will consider any such requests, taking into account the requirements of fairness and natural justice. Where accommodations are made proper notice will be provided to parties.

## **Rationale**

As stated above, the RPD Rules and RAD Rules make an important contribution to the overall objectives of the BRRA and the PCISA and are consistent with the legislative amendments set out in them. The objective of new RPD Rules and RAD Rules is to ensure harmony and clarity between the RPD Rules and RAD Rules and the IRPA as modified by the BRRA and the PCISA.

Furthermore, the RPD Rules and RAD Rules provide clear and transparent direction on Division practices and procedures to parties and their counsel appearing before the IRB, members who render decisions on cases and the IRB staff who support the decision-making process. This direction ensures that parties appear and present their cases before the IRB's Divisions in a consistent manner, therefore facilitating the efficient administrative processing of cases. It also provides guidance to the Divisions to ensure that all cases are processed in a consistent manner that respects the principles of fairness and natural justice. The efficient administration of cases, facilitated by the use of rules, helps contribute to the overall objective of the BRRA and the PCISA.

As previously stated, if new RPD Rules and RAD Rules are not made prior to implementation of the new system, it will be impossible to properly give effect to the BRRA and the PCISA.

## **Implementation and enforcement and service standards**

The implementation of the RPD Rules and RAD Rules will include activities related to the development of new processes, forms, documents, policies and case management manuals to support the rules, as well as training for personnel affected by the RPD Rules and RAD Rules.

All of these activities are being pursued as a part of the overall implementation strategy for the BRRA and the PCISA.

## Performance measurement and evaluation

Three years after the implementation of the new refugee determination system under the BRRA and the PCISA, an evaluation of the new system will be carried out by CIC. The evaluation will be coordinated by CIC and will involve all partners involved in implementing the BRRA and the PCISA. The IRB will participate in a manner which respects the IRB's status as an independent administrative tribunal.

## Contact

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## Notes

- 1        Refugee Protection Division Rules, SOR/2002-228.
- 2        See Policy Instruments for a description of the policy process at the IRB, including governance of policy development and definitions of the seven policy instruments the IRB uses to promote consistency, fairness and transparency.

- 4 It is estimated that if an RPD hearing is postponed more than 48 hours before it was scheduled to occur, the direct salary costs related to such a postponement are \$137. In the case of a RAD hearing, it is estimated that these costs will be \$172.
  - 5 Thamothearem v. Canada (Minister of Citizenship and Immigration), [2008], 1 F.C.R. 385 (F.C.A.).
  - 6 Policy on Oral Decisions and Oral Reasons. Immigration and Refugee Board of Canada. Effective July 1, 2000 and re-issued September 10, 2003.
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