A Short Brief to the Standing Committee on Citizenship and Immigration
Re: Bill C-11, *Balanced Refugee Reform Act*

Submitted by:

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* I am a British Columbia immigration and refugee lawyer with over a decade of experience with the in-Canada refugee determination system. I have also worked in overseas refugee camps, been involved in refugee resettlement and church sponsorships of overseas refugees. I have represented a broad range of clients, many of whom have been survivors of torture, women, severely traumatized, and mentally ill.

i. Introduction

I urge Parliament to reject Bill C-11, *Balanced Refugee Reform Act.*

Bill C-11 proposes changes of immense magnitude that will negatively affect the lives of refugees and won't achieve the government's stated objective of an efficient, fair, and "balanced" refugee determination system. Bill C-11 will lead to greater backlogs, clogging of courts with litigation, and larger numbers of people going underground because they will not have been dealt with fairly. In the end, neither refugee claimants nor the government will gain from the Bill, and the Canadian public will be outraged with the waste of resources that will have gone into the failed reform.

Despite the magnitude of Bill C-11, we have been given very little time to voice our concerns about Bill C-11 and properly consider and debate it in a democratic process. The Refugee Lawyers' Association of Ontario ["**RLA**"], of which I am a member, filed a comprehensive brief which I support, so I will not repeat what is contained in that brief. Below are a few additional comments that I submit as an independent.

ii. Burden of Proof & Unattainable Timelines

Clause 11(1.1) of Bill C-11 states that the "burden of proof" is on the claimant, but then gives the claimant almost no time to prepare. The proposed 8-day and 2-month timelines for the subsection 100(4) "interview" and subsequent "hearing" are not attainable.[1]

Much evidence that refugee claimants have to gather is overseas, so it takes time and resources to obtain, and then translating once obtained. Moreover, refugee claimants arrive in Canada in a "raw" state—emotionally fragile and traumatized, and without knowledge of their rights and the process. It takes enormous amounts of time and care to interview them; this is particularly true for survivors of torture, women, severely traumatized, and mentally ill. Facts come out in a piecemeal, disorganized manner that

[1] While these timelines are not in Bill C-11, we understand from the Minister's public statements that they will be incorporated, I am assuming in the Refugee Protection Division Rules.

takes time to elicit and present in a coherent way. Particularly vulnerable claimants are disinclined to express the full facts of their cases until a relationship of trust has been developed over time with counsel.

Some cases take longer to gather evidence and prepare than others. In other Canadian court systems, scheduling is carried out based on a variety of factors, including the complexity of the case and ability to gather evidence and prepare. A murder trial would not be scheduled as quickly as a trial for theft of a candy bar. The refugee determination system is no different. Treating all cases "equally" does not mean that they are being treated "fairly". Nor does "fast" mean "efficient".

iii. Decisions on the Basis of Partial Evidence

Following from the above, Bill C-11 will put Members of the Refugee Protection Division ["**RPD**"] in the untenable position of making decisions with only partial evidence before them. No sincere Member will be able to make a decision on the basis of only partial evidence. The result will be a rush of postponement requests and, if no postponement is granted, then a huge risk that undeserving cases will nonetheless succeed because negative information is not before the Member and deserving cases will fail because the claimants won't have the time nor resources to adequately gather and present all relevant facts and evidence.

As a respected colleague of mine once said, is the most vulnerable and deserving claimants who are the least capable of presenting their claims and, therefore, need the most time and assistance, without which they fall through the cracks.

iv. Elimination of PIF & Lengthier Hearings

Bill C-11 appears to eliminate the Personal Information Form ["**PIF**"], which includes a written narrative of a claimant's fears. It appears from Bill C-11 that Members are expected to walk into a refugee hearing without knowing what the case is really about, other than perhaps the notes of the subsection 100(4) interviewing officer. This means that Members will be tasked with eliciting most of the facts orally. The PIF is a critical component of refugee determination, as it lays the foundation for the entire case and

allows a Member to have a full picture of what the case is about so that hearing room time can be focused and managed efficiently. Without the PIF, hearings will become unnecessarily lengthy, leading to further inefficiencies and backlogs.

From an efficiency perspective, Bill C-11 reverses past effective measures that improved efficiency, while maintaining fairness, at the Refugee Protection Division. In October, 2003, the RPD introduced *Guideline 7* reversing the order of questioning at refugee hearings, which successfully reduced a backlog of about 50,000 at the time by, I believe, about half. Hearings became more focused and shorter in duration, and the whole process began to smoothen.

However, the issue that then arose was the Conservative government's negligence in appointing new Board Members and a shift away from a merits-based appointment process, causing numbers to climb again. At one point in Vancouver, we were down to about three or four Board Members who were expected to hear approximately 2,000 hearings per year. The current backlog is not due to a "broken system" but, rather, the government's irresponsibility in providing the necessary resources for the refugee determination system to operate effectively.

v. Conflict of Interest & Subsection 100(4) "Interview"

The subsection 100(4) "interview" with an RPD official is problematic and should be scrapped. Firstly, there is an obvious conflict in the role of the RPD being both decision-maker and fact-gatherer, and it will be impossible for an RPD official to assist without giving "advice", which is the role of counsel, not the RPD. Secondly, as noted above, very little can be achieved in one interview and claimants are reluctant to speak to persons in authority. Depending on the complexity of a case, it normally takes between 15 to 30 hours of multiple interviews with a claimant to elicit facts and prepare the foundation for a case.

vi. Setting Claimants up for Appeal

Following from the above points, Bill C-11 "sets claimants up" for an appeal. If there is not a sound first-instance hearing, then almost all unsuccessful claimants will end up

filing valid appeals, leading to further inefficiencies, backlogs, and unfairness. An appeal is supposed to be a measure of last resort, to deal with those cases where errors truly occurred in first instance. However, because the first instance hearing is so systemically problematic, it *sets all claimants up for an appeal* and appeals will become an "automatic" part of the process for refugee determination--leading to more appeals than should be necessary. If the appeal deadlines are just as short as the hearing deadlines, then that process will also be fundamentally unfair, leading, in turn, to more judicial reviews in Federal Court. What a mess! Why not focus on getting it right the first time around at a sound refugee hearing where claimants have had a fair opportunity to prepare and present their cases?

Given the unlikelihood of a claimant being able to elicit adequate evidence at a first instance hearing, clauses 110(4) and 110(6) of Bill C-11, which adopt the language of the current Pre-Removal Risk Assessment application regime should be struck. *All* evidence should be allowed on appeal and *all* appellants allowed an oral hearing on appeal. Access to an appeal on the merits is an essential part of our refugee determination system which has been long-awaited, but the appeal proposed in Bill C-11 is neither fair nor efficient—see RLA brief for more.

vii. Empty Judicial Reviews

The fundamental issues related to eliminating the right of appeal to the Refugee Appeal Division for "designated" persons are outlined in the RLA brief.

While Bill C-11 maintains the option of a judicial review for claimants who come from designated countries, regions, and classes of persons, this is an empty alternative. Firstly, the jurisdiction for a judicial review is extremely narrow in scope and is no substitute for an appeal on the merits; *all* refugee claimants should have a right of appeal—see RLA brief. Secondly, in order to file a judicial review, you *need an evidentiary record in first instance*, which won't be possible with Bill C-11 because the time restrictions for gathering evidence are so tight.

viii. Undermining the Purpose of H&C, TRP, & PRRA Applications

The 12-month restrictions on pre-removal risk assessment applications ["**PRRA**"] (clause 15(1)), humanitarian and compassionate grounds applications ["**H & C**"] (clause 4(1)), and temporary resident permit applications ["**TRP**"] (clause 3) should be struck, as should the clause 4(1) proposal to eliminate section 96 and 97 factors in the assessment of H & C applications.

In addition to arguments outlined in the RLA brief, the H & C, PRRA, and TRP proposals in Bill C-11 *undermine the very purpose of these applications,* which is to allow exemptions in exceptional cases. The following are a few real case examples of mine:

> (1) Couple and minor children filed refugee claim. All were denied. Subsequent to the refugee claim, husband turned violently abusive, Canadian police were involved, charges laid, and wife and children went to transition home. Because of the husband's dominance, the refugee claim had been based on his fears, but not the wife's. Wife and children succeeded with PRRA on basis of wife's fears. This was a Mexican case.
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> (2) Single mother with minor children filed joint refugee claims, but had dual nationality, with one nationality being a "safe" Western European country, so they were turned down. Extenuating circumstances in the Western European country made it dangerous to return. Although the family's case did not fit within the definition of a protected person in section 96 or 97 of the *Immigration and Refugee Protection Act,* both the RPD Member and, on judicial review of the negative refugee decision, the Federal Court noted that there were compelling H & C factors for the family to remain in Canada. Family succeeded with an H & C application.
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> (3) Mother and minor child filed joint refugee claims which were turned down. Mother is citizen of a country to which Canada cannot remove. Child has citizenship in another country and is removable. Canada Border Services Agency enforcement officer refused to allow child to remain in Canada with mother unless a TRP was granted, which it eventually was.

(4) Parents and two minor children filed joint refugee claims. One of minor children succeeded with refugee claim, but parents and older child did not. Only way family unit could remain together was for parents and older child to file H & C applications. Alternatively, minor child would have been put in a foster home in British Columbia while parents and older sibling would have been deported and separated from minor child for life.

(5) Single mother with minor children filed refugee claims which were turned down. Mother was not acting in best interests of children. Oldest child had mental health issues, left the family, and proceeded on own with a PRRA which succeeded.

(6) Survivor of torture and severely traumatized refugee claimant incapable of coherently articulating refugee claim, which was denied. Once proper mental health treatment in place and time to prepare with counsel, H & C application was approved on the basis of significant compassionate circumstances.

(7) Husband and wife filed refugee claims which were denied. Both cooperated with removal proceedings which were delayed by the Canada Border Services Agency. Wife died unexpectedly in Canada and elderly husband developed brain disorder limiting his physical ability to move and coordinate. All of elderly husband's siblings were in Canada with status. Circumstances in country of origin worsened and no one in home country existed to take care of the elderly husband. H & C application succeeded.

(8) Husband and wife filed joint refugee claims. Although wife had independent fears, husband was "in charge" of the refugee claim and focused the case on the husband's fears, without mentioning the wife's fears. Husband had hired male lawyer and wife was too afraid and shameful to speak to a male about her fears. Wife's fears and hardships put forward in PRRA/H&C, with the H & C succeeding. I have dealt with many similar cases in which women would have remained unprotected had they not had the option of an H & C or PRRA.

ix. Conclusion

The proposals in Bill C-11 are so decontextualized from the reality of refugee determination that they do not make sense from either efficiency nor fairness perspectives. The Minister presents the refugee determination system as if it is a computer programme in which a few bits of raw data can be inputted and out pops a quick decision.

Huge resources will go into the implementation of Bill C-11 which will end up backfiring at great expense to the public purse and to people's lives. It is irresponsible for Parliament to rush a Bill of this magnitude through without careful and meaningful public consultation, thought, and analysis. The Bill is so replete with fundamental flaws that it cannot be "fixed" nor "improved" by minor amendments here and there.

x. Recommendation

Reject Bill C-11 in its entirety and engage in meaningful public consultations on the pressing issues regarding refugee determination in Canada before any changes are contemplated and proposed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED IN VANCOUVER, BRITISH COLUMBIA THIS 13TH DAY OF MAY, 2010.

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