IMBALANCED, AND UNFAIR TO THE MOST VULNERABLE

Brief to the Standing Committee on Citizenship and Immigration
re Bill C-11, *Balanced Refugee Reform Act*

May 10, 2010

The Refugee Lawyers' Association of Ontario

The Refugee Lawyers' Association of Ontario is a voluntary association of over 200 lawyers practicing refugee law in the province of Ontario, and has non-voting members from across Canada. It is the main body representing lawyers who practice in the field in Ontario. Its roles are to facilitate cooperation, communication among lawyers in the field and with community agencies, legal education, public policy education, and representations to government. It has often made representations to Parliamentary and Senate committees on issues related to refugee and immigration law. The association has also been involved in working with other law associations, making representations to Legal Aid and government to ensure the continued viability of Legal Aid.

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The Refugee Lawyers' Association of Ontario asks Parliament to reject Bill C-11, and to require the Government of Canada to engage in an open public discussion and consultation on the design of the refugee determination system, to ensure that Members of Parliament have adequate information and time to engage in a meaningful review of any proposed legislation. The Minister's rush to pass Bill C-11 makes for poor public policy planning as it means that there is inadequate scrutiny of the bill's implications. Changes that are made now to the refugee determination system are likely to remain in place for years to come, and we believe that some provisions will adversely affect tens of thousands of refugees and persons who seek Canada's protection.

With the so-called "safe" country list, the legislation introduces a politicization of refugee determination which will profoundly damage the independence and fairness of the entire refugee protection system. If implemented as currently written, the legislation also threatens to be fast and unfair –particularly to the most vulnerable refugees. Less understood is the possibility that the legislation will create new administrative costs and delays at the outset of refugee determination. In addition, the legislation does not come to terms with a fundamental issue the refugee determination system has been saddled with since its inception –ensuring that decision makers are both qualified and judicious.

Overview

The Refugee Lawyers' Association of Ontario (RLA) agrees with the Minister, the opposition parties and many commentators that there is an urgent need to address problems in Canada's refugee determination system. Based on our extensive experience with the refugee determination system and the broader immigration system, some of the most pressing concerns are as follows:

- Lack of an appeal on the merits of negative refugee determination decisions by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB). The Refugee Appeal Division (RAD) was an integral part of the package of reforms contained in the Immigration and Refugee Protection Act (IRPA), and was recognized at the time by both chambers of Parliament as a necessary safety valve to ensure the fair and correct decisions are made in the adjudication of refugee claims. This was understood as particularly important given IRPA's imposition of a once-in-a-lifetime refugee claim restriction and the reduction from two member panels to single member panels.

- Inconsistent quality of decision makers at the RPD. Notwithstanding the establishment of an arm's length advisory body and screening process for prospective RPD members, GIC appointments continue to be plagued by ideological considerations and by patronage, to the very great detriment of refugees and the credibility of the tribunal itself.

- Delays in hearing refugee claims. As a result of the current Government's failure to make appointments to the IRB, for almost two years the RPD was operating at far less than its full complement of decision makers. This caused an escalating backlog of claims at the RPD, with claimants from some countries having to wait upwards of three years to have their claims heard. These delays have grave consequences for the mental health of some traumatized claimants and often place children and family members of claimants at risk as they wait overseas, sometimes in the country of persecution or in a refugee camp, for an opportunity to join their family member in Canada. Just prior to introducing Bill C-11, the Minister was able to claim he had appointed the full complement of members to the RPD, but then he introduced an entirely new refugee system, so that there was no opportunity to see how much better the RPD would function as intended when fully staffed. Given the political and ideological considerations that have been introduced into the new refugee regime, it is easy to believe that the "crisis" the Minister has said he seeks to address was deliberately generated, and the process is being fast-tracked so that Parliamentarians and the public will not understand the Bill's full implications.

- Extensive delays in processing humanitarian and compassionate (H&C) applications by Citizenship and Immigration Canada (CIC). In the Greater Toronto Area (GTA) applicants generally have to wait three or more years to have their requests put before an officer for decision. Even once approval-in-principle has been granted there are frequently delays of a further 12 months or more for the status to actually be granted. These delays cause serious hardship for many applicants, especially those with a spouse or children overseas.

- The Pre-Removal Risk Assessment (PRRA) program is largely an illusory remedy. PRRAs are refused at a rate of around 97%. While a high refusal rate is to some extent understandable given that many have already had a claim refused by the RPD, the quality of many PRRA decisions is shockingly poor and numerous deserving cases are refused for the flimsiest of reasons. Many (not all) PRRA officers appear to know little or nothing about the country to which applicants face removal, and in most cases do cursory research. PRRA reasons for refusal frequently leave one with the impression that the officer responsible gave no actual consideration to the basic merits of the claim before her or him, and suggest a serious lack of understanding of refugee law.

- The problem of both regulated and unregulated consultants providing inadequate representation to claimants continues to plague the refugee determination system, often with disastrous results. There are also instances of incompetent representation by members of the bar. The inadequacy of Legal Aid coverage for refugees nationwide forces many refugees into the arms of unethical and incompetent representatives.

Given these and other serious problems in the current system, the fact that Parliament is in the process of considering amendments purportedly designed to improve the speed and fairness of the system would be a positive development were all of the proposed amendments themselves fair and just. Some of the proposals in the bill do in fact meet the test of fairness, and the announcement of increased resources for refugee determination should enable the IRB to process cases significantly faster than they do now. However, many of the provisions in the bill go far beyond the stated goal of ensuring a fast and fair system and instead impose unconstitutional and unfair limitations on access to protection and recognition of fundamental human rights for the most vulnerable refugee claimants.

There are restrictive proposals contained in the bill, many of which violate a refugee claimant's rights under international law and the Canadian Charter of Rights and Freedoms. They reflect the extremely negative and misleading rhetoric and political posturing of the Minister who brought in the reforms. As many have recognized, this government is responsible for creating an artificial crisis at the IRB by starving it of resources and decision makers and thus allowing a large backlog of claims to build. At the same time, the Minister has made a habit in recent years of attacking the refugee determination system. Indeed he has gone so far as to publicly denounce whole swaths of refugee claimants as being "bogus" and frauds, thus encouraging public hostility to refugee claimants.

In this way, it appears that the Conservative government has succeeded in fostering a political climate that is receptive of the rights-eroding reforms proposed in Bill C-11. Certainly it would appear that many editorial boards have been won over by Minister Kenney's negative rhetoric. However, given the profound vulnerability of refugees and the special responsibility of the opposition in a minority Parliament to ensure that any laws it passes meet the fundamental goals and commitments of Canadians, we call for a thorough review of every provision of the Conservative refugee bill. While we had hoped that the bill would be referred to committee for study prior to second reading, that

has not happened. Indeed, the bill appears poised to be rushed through committee and to third reading before the House rises for the summer.

While the RLA is grateful for the opportunity to appear before the committee to present our concerns, we are dismayed by the timelines for consideration at committee. There are elements of this bill that require very careful examination before they can responsibly be passed in any form: it would have been good, for example, to hear from a range of advocates and academics with detailed and direct knowledge of how safe country lists have worked in other jurisdictions. Yet the timelines at committee prevent it from subjecting this bill to the detailed analysis required for a bill with such far ranging and significant implications.

As set out in the pages that follow, while the RLA agrees with some of the provisions in the bill – notably the implementation at long last of the RAD with improvements to the evidence it can consider and the possibility of oral hearings - a number of the proposals in the bill are, in our submission, unacceptable – either because they would, if implemented as written, cause serious injustice to refugees and persons seeking Canada's protection, or because they are legally unsound and run afoul of the Charter, or they are administratively unworkable and destined to fail in implementation.

This brief will focus on:

- Safe country list
- Amendments to the humanitarian and compassionate regime
- Introduction of a new RPD interview
- Timelines
- RAD restrictions on evidence
- PRRA access
- Appointments process
- Coming into force and transitional provisions
- Related issue—Legal Aid funding

1. THE SAFE COUNTRY OF ORIGIN (SCO) AND "CLASSES OF NATIONALS" LIST

Section 12 of Bill C-11 adds s. 109.1(1-3) to the IRPA, allowing the Minister to designate a country, part of a country, or class of nationals of a country, if "in the Minister's opinion" they meet criteria set out in regulations (which have not yet been made public). Such Ministerial orders are not subject to Parliamentary oversight and give much power to the Minister. Claimants from the designated countries/groups on the list are barred from appealing RPD refusals to the RAD. Their only recourse is to apply to the Federal Court for judicial review, which is a limited form of appeal and does not go to the merits of the claim.

The desire to fast-track claims that appear obviously baseless is understandable. However, it is impossible to be sure without hearing a case that it is in fact baseless. As practitioners of refugee law, we are sometimes confronted with baseless claims by nationals of highly repressive states that have a high acceptance rate at the RPD; likewise we are sometimes confronted with very strong claims from nationals of countries we normally would think of as safe and with a low acceptance rate at the RPD. The only way to know is to hear the claim and test the evidence of the individual.

While Bill C-11 still allows nationals from designated countries and groups to have their claim considered at first instance, the denial of access to the appeal does a serious injustice. Claimants from Mexico, for example, are already facing a very serious disadvantage at the IRB in light of the pressure placed on decision makers by Minister Kenney's repeated assertions that Mexican refugee claimants are bogus and are queue jumping economic migrants. Minister Kenney's interference in the independence and impartiality of the tribunal has been widely condemned as effectively prejudging refugee claims, which when done by the Minister constitutes an improper interference in what is supposed to be an impartial tribunal. The Safe Country List will effectively formalize such prejudgments.

The RLA fundamentally and unequivocally rejects the notion of safe country lists and submits that the right to due process cannot legitimately be denied to groups based on arbitrary and/or discriminatory grounds of nationality or group membership. Denying equal access to due process and equal protection of the law to persons on the basis of their nationality violates the fundamental justice and equality guarantees s. 7 and 15 of the Canadian Charter of Rights and Freedoms. It also contravenes the fundamental principles of equality and non-discrimination, cornerstones of the entire international human rights and refugee law regime. Following are examples of international law and covenants that Canada has signed that relate to the rights of persons who seek Canada's protection.

Article 3 of the 1951 Convention relating to the Status of Refugees explicitly provides:

> 3. The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 2 of the International Covenant on Civil and Political Rights provides:

> 2(1). Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 5 of the Convention on the Elimination of Racial Discrimination provides:

> 5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> (a) The right to equal treatment before the tribunals and all other organs administering justice;
>
> (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution; …

These are just a few examples of many. These treaties were ratified by Canada and we are bound at international law to abide by them. Parliament recognized the crucial importance of ensuring that Canada's refugee system conforms to our international obligations when it passed the following provision in the Immigration and Refugee Protection Act:

> 3(3). This Act is to be construed and applied in a manner that
> …
> (f) complies with international human rights instruments to which Canada is signatory.

To deny some groups of refugee claimants access to an independent review of the merits of a refugee claim decision *because of their nationality* would be, in our view as human rights and refugee lawyers, a clear and unacceptable breach of the non-discrimination norm.

Related to this, it is our view that the SCO provision will import an undeniable and unacceptable institutional bias into the system. As noted, Minister Kenney has already come under fire for his interference in the independence of the refugee determination system when he public denounced certain groups as fraudulent claimants. While the Courts have yet to determine whether these comments create an institutional bias in the IRB or raise a reasonable apprehension that individual board members appointed by

the GIC would be biased against claimants from the named countries, the fact is that the SCO list provision will serve to formalize an institutional bias.

While some civil servants are undeniably more independent-minded than others, it is not unreasonable to believe that such decision-makers, when faced with a claim from a refugee from a nation or group on the Minister's list, will be affected by the Minister's designation. It is reasonable to expect that the decision-makers will start from the premise that the claim is baseless instead of with impartiality and an open mind, so that the claimant does not get a fair hearing. In our opinion, this provision will result in immediate, sustained, and vigorous litigation.

Furthermore, the RLA believes that the designation provision imports for the first time a clear channel for political and diplomatic interference in Canada's refugee determination process. Under the current regime, when countries complain to Canada about the negative impact on their reputation from the recognition of refugees from their countries, Canadian Ministers can point to the independence of the tribunal to stave off criticism and to avoid any pressure to stop recognizing refugees from such countries. With the establishment of a SCO regime, however, it must be recognized that listing as a safe country will become a political token to be used to placate or entice other countries with whom Canada wishes to have positive diplomatic or economic relations. How long will it take Turkey, for example, to demand it be placed on the list in exchange for improved trade relations? Likewise Colombia. It seems likely that China will want to be recognized as safe early on. How will Canadian Ministers refuse if China threatens restricted trade relations for failure to comply? In the RLA's submission, the listing proposal is poorly conceived and constitutionally and politically unacceptable.

It has been widely noted that the word "safe" is not currently to be found in the bill, nor are there any objective criteria for designation. Minister Kenney has stated that he is prepared to agree to the inclusion of criteria in the bill. While criteria would obviously be better than the current *carte blanche* given to the Minister, there is, in the RLA's submission, no way to maintain an SCO list while still abiding by the equality and non-discrimination norms of constitutional and international law.

Furthermore, as discussed below, while it might be possible to mitigate some of the worst and most blatant kinds of political interference and to limit the number of countries that could be listed, no set of criteria will be able to effectively insulate the refugee determination system from political or ideological manipulation once the SCO provision has been introduced into the law. The litigation relating the US-Canada Safe Third Country Agreement provides an important lesson:

S. 102 of IRPA provides as follows:

> **102.** (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

> (a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;
> (b) making a list of those countries and amending it as necessary; and
> (c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).
>
> (2) The following factors are to be considered in designating a country under paragraph (1)(a):
> (a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;
> (b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;
> (c) its human rights record; and
> (d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.
>
> (3) The Governor in Council must ensure the continuing review of factors set out in subsection (2) with respect to each designated country.

When Amnesty International, the Canadian Council of Churches, the Canadian Council for Refugees and an individual Colombian asylum seeker known as John Doe brought a challenge to the constitutionality of the Minister's decision to designate the US as a safe country, the Federal Court found unequivocally based on a detailed review of extensive expert evidence that the US did *not* comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture.

However, on appeal the Court of Appeal determined that notwithstanding the apparently clear language of the Act, the Courts in fact had no jurisdiction to evaluate the reasonableness or correctness of the Minister's decision to designate a country under this provision. Specifically, the Court of Appeal determined that whether or not the agreement exposed refugees to a real risk of being deported from the US to places where they would be persecuted or tortured was *irrelevant*, because "actual compliance" was not required. The Court of Appeal determined that all that was required was that the Minister *considered* whether the US is a party to the Refugee Convention and to the Convention Against Torture; its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture; and its human rights record, the Court had no business second guessing the Minister's conclusion that the US complies with its international obligations. As the Court of Appeal put it:

> **78** Subsection [102(1)] does not refer to "actual" compliance or compliance "in absolute terms" nor does it otherwise specify the type and extent of compliance contemplated. However, Parliament has specified the four factors to be considered in determining whether a country can be designated. These factors are general in nature and are indicative of Parliament's intent that the

> matter of compliance be assessed on the basis of an appreciation by the GIC of the country's policies, practices and human rights record. Once it is accepted, as it must be in this case, that the GIC has given due consideration to these four factors, and formed the opinion that the candidate country is compliant with the relevant articles of the Conventions, there is nothing left to be reviewed judicially. I stress that there is no suggestion in this case that the GIC acted in bad faith or for an improper purpose.
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> ...
>
> **80** It follows that the fact that the respondents believe, and that the applications Judge agreed, that the U.S. does not "actually" comply is irrelevant since this was not the issue that the applications Judge was called upon to decide (compare *Telecommunications Workers Union v. Canadian Radio-television and Telecommunications Commission*, [2004] 2 F.C.R. 3 (F.C.A.), at paragraphs 39 to 43). What is relevant is that the GIC considered the subsection 102(2) factors and, acting in good faith, designated the U.S. as a country that complies with the relevant articles of the Conventions and was respectful of human rights.

The Court's suggestions that if the parties had established bad faith or an improper purpose on the part of the Minister/Cabinet the Court would have been able to intervene gives no comfort, of course. The reality is that proving bad faith or an improper purpose by the GIC is well nigh impossible barring an extraordinary breach of cabinet privilege. As a result, the designation of a country on the list will be, practically speaking, immune from review.

This is particularly disturbing given the findings of the Federal Court that, at the time the case was before the Court, the US was violating the fundamental human rights of refugees. This finding was not overturned on appeal; it was just found to be irrelevant.

This conclusion of the Court of Appeal in the safe third country case is highly instructive for this committee and for Parliament. Parliamentarians must consider whether or not the inclusion of criteria for designation on the SCO list would make the Safe Country of Origin proposal acceptable from a human rights perspective and from a legislative and judicial oversight perspective.

Parliamentarians should reject the SCO provision because to allow it to pass would hand over extraordinary discretionary power to the Minister to designate countries and groups, without oversight or accountability. It is our submission that objective criteria set out in legislation are no guarantee either that countries designated as safe in fact are safe, or that the Courts or the legislature will be able to do anything about it if and when an unsafe country is designated, so long as we cannot prove that the Minister failed to even consider the criteria. We must never forget that human lives are affected by the Minister's decisions if the list is implemented.

Nor is it all clear what kinds of limits might be able to be placed on the Minister in respect of decisions to designate "classes" of nationals, since under the current draft the

Minister has carte blanche to name groups of nationals based on any criteria he sees fit. Were he so disposed, the Minister could under this bill decide unilaterally to deny access to due process to women from a given country, or to homosexuals, or leftists, or environmentalists. The issue, of course, is not that he would in fact do so now if he could; the issue is whether Parliament believes it appropriate to give any Minister such power. We submit, emphatically, that it is not appropriate.

Nor, in our submission, is the proposal to establish a committee to make SCO recommendations to the Minister any help except as a fig leaf. Certainly an internal government committee is no protection from arbitrary or politically driven decisions, where the final decision remains with the Minister. Nor is the involvement of the United Nations High Commission for Refugees (UNHCR) of any practical assistance since the decision would remain with the Minister, and the UNHCR, as a creature of states funded by states, is unlikely to take a stand against a significant funding partner like Canada. Nor should they be forced into that position.

The RLA therefore strongly opposes the provision establishing the power to designate safe countries of origin or classes of nationals, and urges MPs to reject them outright.

RECOMMENDATION: Strike out Section 12 of Bill C-11

2. AMENDMENTS TO THE HUMANITARIAN AND COMPASSIONATE REGIME

IRPA, s. 25 allows for discretionary exemptions for foreign nationals who are inadmissible or do not meet the requirements of the Act, taking into account humanitarian and compassionate factors, including the best interests of any child directly affected or by public policy considerations.

Section 4 of Bill C-11 makes a number of far-reaching changes to the regime for the consideration of humanitarian and compassionate factors and the best interests of children. The RLA strongly opposes some of these proposed amendments.

a. Prohibition on consideration of humanitarian and compassionate applications for one year following a final decision by RPD or RAD

The proposed new s. 25(1.2)(b) & (c) denies consideration of humanitarian and compassionate requests from the date that a refugee claim is initiated until 12 months after it has been finally refused or abandoned or withdrawn.

The humanitarian and compassionate(H&C) provision in IRPA is rooted in the ancient common law principle of equity, where the decision maker can exercise discretion to do what is right and equitable in all the circumstances of a case even of a strict interpretation of law would direct otherwise. It has been a part of Canada's immigration law for many years, and has ensured the safety and protection from harm or arbitrariness for many tens of thousand of people who are now Canadian citizens as well as their children and grandchildren.

Because it is a discretionary provision, immigration officers currently have a great deal of leeway to decide who may and who may not benefit from a positive decision. While there are no strict criteria or legislated requirements, the guidelines set up by the department state that only those who can establish that requiring them to return to their country of origin would cause them "unusual, underserved or disproportionate hardship" will be granted the opportunity to stay in Canada under this program. The Supreme Court of Canada and Parliament have both required that in making decisions on humanitarian and compassionate applications, the Minister and his officers are required to give careful consideration to the best interests of any children affected by their decision.

As legal practitioners, RLA members have seen numerous cases where those who have been denied refugee protection are subsequently granted status on humanitarian and compassionate grounds. There are numerous reasons for this. One common issue is that while a claimant may arrive in Canada with a very real fear of ill treatment, severe discrimination, even persecution in their country of origin, they are unable to establish that this ill treatment meets the Convention definition of persecution, or that the ill-treatment or persecution is based on one of the five grounds in the Refugee Convention. As a result, the IRB is bound to reject the case even if they believe that the person faces severe ill treatment or serious discrimination or persecution. Yet with H&C consideration, the Minister can look beyond the the legal threshold for "persecution" and

“persons in need of protection” and allow the person to remain and live a secure and safe life in Canada on equitable grounds.

Similarly, the H&C provision has been used on numerous occasions to ensure that parents are not separated from their children who have the right to remain in Canada, either as Canadian citizens or permanent residents.

For instance, there are cases where a claim for persecution in one country is made out, so children who are citizens of that country are accepted as refugees but the parent’s claim is rejected because she has the right to claim citizenship in a third country, even if she has never lived there. A successful application for H&C consideration allows for the parent to remain in Canada where their children have protection from being returned to the country of persecution and keeps the family together.

Another type of case is that of a woman who has lived in Canada for several years, having fled her home country because of domestic violence. Not knowing she could have applied for refugee status at the time she arrived in Canada, she files a claim several years later but by the time the claim is heard, the circumstances in the home country are different and the claim is rejected because laws have been passed to provide protection to victims of domestic violence. But the woman has lived and worked in Canada for years, engaged in volunteer work, so that she has become established and in some cases, may have Canadian-born children. H&C consideration can be applied to allow her to remain in Canada.

Bill C-11’s H&C provisions have been framed as an attempt to eliminate an abusive layer of appeal of refugee claims that frustrates removal of refused claimants. But this is misleading, since filing an application for H&C consideration does not in and of itself prevent an applicant from being removed. There is no prohibition on removal while an application is in process and applicants are frequently removed before a decision is rendered. CIC’s policy is that if a positive decision is made after an applicant is removed, the applicant will be permitted to return to Canada, although in practice this is rare.

While we do not dispute that ill-founded H&C applications have been submitted by persons seeking to remain in Canada who have no substantial reason to stay, it is in our submission fundamentally unjust to arbitrarily deny access to the H&C remedy as proposed in this bill. Where cases involve children, the denial of access to H&C consideration is also contrary to international law (the Convention on the Rights of the Child, to which Canada is party) as well as basic Canadian values of fairness and equitable treatment.

In the vast majority of cases, restricting access to H&C consideration would not block removal within one year of a refugee claim being dismissed. The applicant who faces removal before getting a decision on the H&C application can ask the removals officer

to defer removal until the decision is made, and, if refused, has the option of applying to the Federal Court for a stay of removal. Only where an individual can convince a judge of the Federal Court that a CBSA officer erred in refusing to defer removal and that removal would cause irreparable harm will a stay be granted, and even then only for a limited period of time and not necessarily until the H&C is decided. This is by no means an easy route to stop removal and most such applications are refused.

The provision may also have the unintended effect of encouraging people whose refugee claims have been refused to go underground until the point at which they can make an H&C application.

In addition to preventing post-claim H&C applications, this provision bars concurrent applications for H&C consideration and refugee protection. This forces a choice between the two processes from the beginning, but if the client chooses to file an H&C application, will the Minister guarantee a decision on the H&C before removal? There is nothing in the bill that says so and currently there is no such policy or provision.

Moreover, there is an injustice to the claimant who makes a claim to refugee status and then obtains legal advice that the claim is likely to fail but is grounds for an application for H&C consideration. The claimant is prevented from making an H&C application for one year even if she recognizes the mistake and wants to withdraw the claim. Removal could take place without the individual having an opportunity to put forward an application for H&C consideration.

It also happens that a refugee claim is made that may not meet the criteria for acceptance as a refugee or person in need of protection but is put forward in good faith. RPD decision-makers have many times mentioned that a claim has H&C factors but such consideration is outside their jurisdiction. Yet the one-year bar against H&C applications would prevent such a case from being considered in the proper forum.

> **Recommendation:** Strike the provision. Invest resources to speed up H&C decision-making by CIC.
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> ***Alternative Recommendation:*** *Give concurrent jurisdiction to the RPD and RAD to grant approval- in- principle for permanent residence on humanitarian and compassionate grounds. The advantage is that the person is already before the decision maker, this is far more efficient than requiring people to make an entirely separate application.*
>
> *To limit the numbers of people making claims to get access to H&C consideration it might make sense to limit the jurisdiction to human rights that do not qualify for protection under s. 96 and 97 of IRPA. However if limits are placed on the H&C jurisdiction, there would need to be an opportunity to file a regular H&C with CIC to allow for consideration of other factors, such as establishment. In addition, there can be no arbitrary one-year bars on H&C applications to CIC even after refusal by the RPD or RAD with concurrent jurisdiction, unless there is a*

procedure for re-opening the H&C request at the RPD or RAD on the basis of a change in circumstances or new evidence.

b. Prohibition on consideration of s. 96/97 risk in an H&C application

The proposed new s. 25(1.3) would prohibit consideration of an applicant's risk of being persecuted, subjected to cruel and unusual treatment or punishment, tortured or killed as factors in support of a humanitarian and compassionate application for permanent residence.

This provision violates s.7 of the Charter as well as the Refugee Convention and Convention Against Torture (CAT) in those cases where an applicant is raising a s. 96/97 risk that has not been considered yet and where there is no access to consideration of their refugee claim. It also applies where a new risk issue has arisen after the refugee claim has been denied and the person is ineligible for a PRRA.

The line between persecution recognized under s. 96 or cruel and unusual treatment or punishment under s.97, and hardship as recognized under s. 25 of IRPA, is sometimes very blurry. Reasonable people might well disagree whether the mistreatment in a particular case rises to the threshold of persecution; similar reasonable disagreements might arise with respect to a claim under s. 97(1)(b)(ii) where there is little doubt that the claim would meet the hardship threshold for H&C consideration but could potentially also meet the s. 97(1)(b) threshold. There should be no bar to raising the same risk considerations if H&C consideration is sought.

Recommendation: Strike the provision

c. Fees requirement

The proposed new s. 25(1.1) prohibits the Minister from considering an H&C request unless and until fees have been paid. While this amendment merely codifies current practice, the RLA encourages Parliament to take this opportunity to address the obvious injustice caused to the poor by the strict requirement of fees for H&C consideration. Because of lack of funds, deserving applicants are prevented from applying for H&C consideration. It is in our submission fundamentally at odds with Canadian notions of fairness and equity to deny access to a compassionate remedy or to consideration of a child's best interests simply because of the inability to pay.

Recommendation: Amend to allow for fee exemption. We endorse the language proposed by the CCR: "The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1)."

d. Ministerial power to grant H&C exemption on own initiative

Section 5 of the bill adds s. 25.1 & 25.2 to give the Minister authority to grant exemptions on H&C and public policy grounds on the Minister's own initiative and without fees. The RLA supports this provision.

Recommendation: Maintain

e. Elimination of requests for Temporary Resident Permits (TRPs) for a year following refusal of a refugee claim

Section 3 amends IRPA s. 24 to prohibit TRP applications for 12 months after refugee claims are refused, withdrawn or abandoned.

No rationale has been provided for this restriction. It appears to be solely punitive, denying a necessary (albeit extraordinary) remedy to those who need it on humanitarian and compassionate grounds, including those for whom a TRP is the only available remedy to maintain family unity (for example, pending processing of an in-Canada spousal application), and therefore contrary to the family unity objective of IRPA.

Recommendation: Strike

3. INTRODUCTION OF A FIRST INTERVIEW AT RPD

S. 11(2) replaces IRPA s. 100(4), and adds (4.1) requiring a preliminary interview at the RPD; it provides that the same RPD official sets the hearing date. The Minister is on record saying the interview would take place 8 days after a claimant is found eligible by CBSA (a decision which itself must be made within 72 hours of initiation of the claim), and the hearing would happen 60 days later.

Comments from the Minister suggest that this will be an information gathering interview at which the substance of the claim will be set out in a simplified Personal Information Form, and the Minister has indicated that the interview will be recorded. However, the Minister has also stated in the House that the information gathered in the preliminary interview will be "without prejudice" to the hearing of the claim. The Minister has also made statements to suggest that there will be no right to counsel at this interview. Section 8 of the bill (amending s. 91) opens the possibility that the government will attempt to deny claimants the right to counsel at this first interview by stipulating this by regulation.

a. The "8-day" interview is actually a second interview:

Because Bill C-11 is limited to the amendments being put forward, the public and Members of Parliament are not being given clear explanation of where the "8-day" interview falls in the refugee determination process. What is not understood is that the new interview is actually a ***second*** *interview before the refugee claimant has a hearing.*

The RLA's position is that this second interview is undesirable for several reasons. First, if implemented as written, it will result in substantive unfairness for the most vulnerable refugees. Second, it creates a gratuitous new administrative hurdle before a refugee hearing. In practice, if its implementation has greater practical and legal implications than the government anticipates, it will bog down the refugee determination system. This will lead to refugees with valid claims being extensively delayed and would likewise delay claims that are ultimately rejected. Instead of making the refugee determination system fast and fair, the "8-day" interview promises to be fast and unfair, or unpredictably cumbersome.

a. Purpose and content of the interview and right to counsel

Under the IRPA a first interview is held by the CBSA to record that a person is claiming refugee status and to gather information to determine if the claimant would otherwise be inadmissible to Canada (i.e. for routine reasons such as being a non-resident seeking to remain permanently in Canada or for criminality), and that the claimant is not ineligible to have a refugee hearing (ie. for being deemed a danger to the public, a member of a proscribed group, or for already having status in another country).

The Supreme Court decided in Dehghani [1993] 1 SCR 1053 that a refugee does not have the right to a lawyer when questioned at an admissibility interview at a port of entry

when the purpose is routine information gathering related to admissibility. The Court distinguished this from an interview into the merits of a refugee claim (or an interview where the person is detained). For this reason people do not have a right to a lawyer in admissibility interviews, so long as the interviews are directed at admissibility, although the interview may touch on information that will arise in their refugee claim.

The admissibility interview is conducted by an officer with the Canada Border Services Agency (CBSA). Officers ask some questions related to the person's history and claim for protection. A form is also completed with biographical data. In cases where the the CBSA has information about the individual (ie. From its records or partner agencies), or the person's answers gives rise to security or identity concerns, the CBSA will conduct more in-depth interviews.

When the IRPA was introduced, a policy requirement that eligibility be determined within days of the person claiming was promised. In practice the time taken to conduct these first interviews varies. At the US-Canada border the CBSA it varies from an interview the day of arrival, to claimants being made to wait for weeks or months before an officer and/or an interpreter is available. The CBSA initially avoided recording such delays as administrative delay by treating the day of the interview as the day the person claimed. Eventually delay became routine. At inland offices claimants are usually told to return at a later date for their interview. A delay of several weeks inland is fairly routine. At airports there tends to be less delay than at the land border or inland offices.

The length of the interview, once it is held, varies from a brief interview where the officer sees no evident concerns, to interviews which take several sessions. If the person is detained, this converts the process into one where there is a right to counsel. If there are multiple interviews the person might also bring counsel to an interview, though the CBSA maintains that if the interview is solely to determine admissibility counsel is present as an observer.

In a minority of cases inadmissibility reports are referred for an Immigration Division hearing, which can lead to a delay of years before a refugee hearing if the claimant is ultimately found admissible.

Regardless of whether the eligibility determination is completed on the day of arrival, within weeks, months, or (unusually) longer, the CBSA interview has to be completed before referral to the Refugee Protection Division.

Bill C-11 now adds a second interview, which is designed to gather information specifically about the grounds for the refugee claim.

The apparent intent underlying the "8-day" interview is that an official will question the person about their claim and prepare a form or statement, replacing the "personal information form" currently prepared and presented by the refugee claimant (usually with the assistance of counsel). This would mean the claimant is never afforded a right to simply put forward her claim on her own terms but is left to what questions the officer asks. This is not an acceptable way to gather information about a claim, since the officer may not ask the right questions. If the claimant has just arrived in Canada she may

have no understanding of how to explain the basis for the claim and how much information to give if not asked, and may be traumatized by their experiences.

Where refugee claimants assert the right to a lawyer, the RPD will either have to proceed against their objection or accommodate some reasonable delay to secure a lawyer.

The bureaucratic appeal of requiring these interviews is precisely the idea that the Board's staff will control the interview and shape how the refugee's statement is written. This is most problematic for vulnerable claimants, who are often intimidated by official interviews. If the claimant's own written statement, prepared on her own terms, is eliminated this will mean that the claimant will at no point in the proceeding be able to put forward her own narrative, absent a government official being in charge of her, what she is asked, and how her statement is set out. An attempt at the subsequent hearing to correct mistakes or to add information innocently omitted, may work against her.

Currently, once the claimant is found eligible to make a claim, the claimant is given a personal information form (PIF) to complete and file with the RPD within 28 days. This allows the claimant to take time to give thought to the claim and the information to complete the PIF without the presence of a government official. This also gives the claimant time to seek legal assistance with preparing the PIF.

If it turns out that the information gathered at this "8-day" interview is used as the definitive statement that the claimant is forced to rely on, this will lead to litigation to ensure a right to counsel at the interview, based on the Charter. An "8-day" limit is unlikely to be realistic for the IRB's bureaucracy itself, but will become even less realistic where there is a right to a lawyer.

If there is no opportunity for the claimant to present a claim in her own terms, such as with the current PIF, this leads to further legal concern. In *Thamotharem* the Federal Court of Appeal accepted the IRB Chairperson's guideline that established the order of questioning so that the RPD began the questioning after many years of the claimant's counsel leading the questioning. This finding was predicated on the assumption that the "personal information form" could be treated as the person's statement in chief. If the "8-day" interview replaces a refugee's own statement, then arguably a lawyer who represents the claimant should be permitted to conduct the interview. That would lead to the unwieldy result of an interview where counsel is essentially preparing or helping set out what used to be the "personal information form" in an official's presence.

Some refugees will attend without a lawyer for various reasons (because they feel pressured to, because they can't find a lawyer who can attend in such a short time, etc.). If they subsequently retain a lawyer, the lawyer could challenge the admissibility of the interview notes under the Charter, pursuant to the decision in *Dehghani*. The foreign models the "8-day" interview was adapted from were not subject to Canadian jurisprudence or the Charter.

In practical terms, if the personal information form is eliminated and replaced with an official's interview, it is possible interview notes will be structured in a way that promotes

eventual rejection, particularly when there is no counsel present. Regardless of this assumption, the official interview replacing a claimant's ability to put forward her own statement in a non-threatening environment will have the worst impact on vulnerable claimants. This is not only common sense, from our experience working with refugees. It is also consistent with Human Rights Watch's recent study of the experience with such interviews in the United Kingdom.

Cutting both ways, in practical terms, is that contrary to the Minister's stated intentions, this introduction of an official's interview will create a new administrative delay and backlog.

We already know that admissibility interviews cannot uniformly be completed within the time originally predicted. An interview into the merits of a refugee claim is more involved, both as it goes into greater biographical information and because it often requires discussion of profoundly personal or traumatic experiences. It is improbable that the RPD will be able to schedule and complete such interviews without substantially delaying hearings.

Lawyers interviewing refugee claimants to prepare PIFs know from experience that interviews often take multiple sessions, because of the complexity of the person's life background, the amount of biographical information required, or because they are relating difficult experiences.

The Refugee Board will have to complete the interview in a scheduled and structured appointment. This will undoubtedly lead to a rush in getting the answers to the officer's questions which may work an injustice to the claimant as important facts may not be revealed if there is a time limit to how long the interview is to last.

In practical terms it is easy to foresee how these interviews will become more encumbered than the government expects. For example, a woman attends an interview without a lawyer. The interpreter arrives late or is not available. Another interview is scheduled for her. The official then begins questioning her. She feels uncomfortable and cries. The official has questions he wants to get through. He has to decide whether he is able to figure out why she is crying, or get the questions answered. If the officer is required to complete the interview quickly, he will simply make her answer his questions regardless. If the officer is concerned with figuring out her real history, it will take a long time.

Challenges in cross-cultural comprehension, narration and emotional problems complicate getting a complete narrative history from a person. The "8-day" interview will either be quick and arbitrary –in which case it does little to advance learning the refugee claimants' true case- or uncharted territory for administrative delay.

The risk of inventing a new administrative requirement is also borne out from our experience with the "credible basis" system introduced under the former Immigration Act. Under that system the government claimed refugees would have the credible basis hearing within a matter of days, then either permitted to have a refugee hearing before the IRB or the claim would be rejected and lead to deportation. Because these hearings

were on the merits of the claim, they were far more cumbersome than the government expected. In little time the system became bogged down. Eventually these screening hearings could take well over a year to schedule, and the system was abolished. With the system that replaced the scheme—the current system—the government of the day also claimed that hearings would be held within two months. But as time went on, that claim also was proved wrong.

b. Timelines:

Eight days after the eligibility determination is far too soon to expect claimants to be able to set out the basis of their claims. This is particularly true for claimants who have just arrived in the country and are traumatized and/or have not yet retained and met with counsel. Many claimants simply will not know what information is important to establish their claim and the officers who interview them may not take the time to encourage a full disclosure of what the claimant has experienced.

Claimants are at this stage in the process highly vulnerable, having newly arrived and possibly facing an entirely foreign culture and language. It is impractical to expect them to be able to face a government official, without counsel, and openly set out the details of their claim, which are sometimes highly intimate and personal and deeply emotional.

As practicing refugee lawyers, many of us spend many hours with clients building a relationship of trust before we are able to elicit all the relevant information from refugee claimants. It often requires multiple consultations over the course of the current 28 day timelines for PIFs, and sometimes the most significant details are not divulged until the last minute. And all of this is in the context of a solicitor client relationship. It is impractical to expect that the full story will be conveyed in the proposed setting and timeline.

If implemented as proposed we fully expect the system to quickly break down because not only is it unfair it is also administratively unworkable. There will be multiple adjournments by the RPD officers who discover they cannot get all the details in one sitting. There will be legal challenges on the issue of the right to counsel. There will be legal challenges against the reliance on evidence obtained at the 8-day interview.

Furthermore, there is no apparent justification to introduce this new step in the refugee system that has such potential to cause harm to claimants. The current 28 days to provide the PIF is strictly applied and is not the cause of any delay in the process.

Likewise we note that the proposed “average” timeline of 60 days for the hearing is equally impractical. To begin with, of course, there is no need for new legislation to speed up the hearing schedule; that could have been done years ago by ensuring a fully resourced tribunal with a full and perhaps expanded pool of qualified decision makers. However, the Minister chose not to do that and instead starved the tribunal of resources and members to such a point that there is now a large backlog and an artificial sense of crisis.

In our experience, for a large proportion of refugees, and perhaps the majority, 60 days will not be enough time to gather the necessary evidence to corroborate their claims. Most claimants do not think of what evidence they might need to present for their claim when they are fleeing their country and only after getting legal advice will they know what they should produce. This will mean trying to obtain evidence from their home country, and this in many cases, takes considerable time. Especially where refugees are from less developed countries or countries where the civil society has broken down, there are serious challenges to gathering even basic evidence such as birth certificates or hospital records; other kinds of evidence are even more difficult to obtain. In our estimation, 6 months may be workable, so long as there is a clear provision allowing for postponements to obtain relevant evidence.

Another consideration when it comes to delay of refugee hearings is that, at present, after a PIF is received, the RPD gives a copy of the PIF to CBSA so they may obtain a security clearance. This is in case the narrative gives information that raises any concerns. The CBSA is given up to one year to do this second security screening and the hearing is not scheduled until the clearance is obtained. While many cases are cleared in a couple of months, some drag on due to administrative delay or the clearance not being completed. The RPD would have to have the CBSA abandon the second screening to implement any mandatory scheduling practice.

Recommendation: Strike

4. RAD EVIDENCE RESTRICTIONS

S. 13 of Bill C-11 replaces section 110 of the IRPA. The new wording clarifies what materials are before the RAD and sets out the circumstances where an oral hearing may be held.

The proposed amendments to section 110 provide an important improvement on the language currently included in the IRPA as well as allowing for the RAD to hold an oral hearing, which would certainly be necessary in some cases. Despite these improvements, the proposed wording concerning what evidence may be admitted before the RAD raises a number of serious concerns.

Unfair Differential Treatment: Of great concern is the fact that the Minister, the Appellant and any involved third parties, such as the UNHCR, are treated *differently* under the proposed wording in section 13. The Minister is permitted to introduce any and all evidence, whereas the Appellant is restricted to "new" or previously unavailable evidence. Parties such as the UNHCR would be limited to providing only written submissions.

It is not reasonable and contrary to rules of procedural fairness to apply a restriction on evidence to the Appellant or the UNHCR but not to the Minister. Any restrictions on presenting evidence that apply to the Appellant must also apply to the Minister. This is especially so where the Minister has participated in the hearing before the RPD.

All parties before the RAD, to ensure adequate procedural fairness, should be treated equally under the law. There should be no restriction on the evidence that the Appellant can introduce in an appeal.

Unfair Technical Restrictions: Given the extremely short timeframe proposed for the initial decision by the RPD, restricting the evidence that an Appellant can present before the RAD to "new" evidence, or evidence that "was not reasonably available" at the time of the first decision is unfair and creates the potential for breaches of Canada's international obligations.

There are numerous reasons why a claimant may not have been able to present evidence at the time of their initial hearing that do not concern the *availability of* the evidence. For example, an issue or document may have been overlooked by previous counsel, or the claimant may not have had sufficient funds to translate or produce documentation.

This arbitrary restriction creates the possibility that evidence objectively demonstrating a serious risk to the Appellant will be excluded on a "technicality" regardless of whether it is credible evidence of risk. This could lead to individuals being removed to face torture, persecution or death when they had the evidence needed to prove their risk. This would be a breach of Canada's international obligations under international instruments such as the *Convention Against Torture*.

Costly and Time Consuming: The proposed language in section 13(4) restricting the evidence that appellants are permitted to produce at the RAD, essentially mirrors the language currently included at section 113(a) of the *IRPA* regarding what evidence is admissible by an applicant in a PRRA.

This same language in the current PRRA provisions has been the focus of considerable and costly litigation at the Federal Court. The interpretation of the wording is not immediately obvious (when is evidence "reasonably available"), and the provision was not being applied consistently by the Courts or PRRA Officers. This resulted in the Federal Court of Appeal in *Raza* setting out criteria for when evidence will meet the requirements of section 113(a). However, despite the guidance of the Federal Court of Appeal in *Raza*, PRRA officers still *routinely* interpret section 113(a) incorrectly, resulting in delays and costs associated with judicial review applications and PRRA application re-determinations. There is no benefit in terms of fairness, efficiency or cost by incorporating into the RAD the faulty evidence provisions presently applicable to the PRRA.

Procedures for ensuring the fair and efficient submission of evidence before the RAD should be left to RAD to determine through procedural rules and regulations created by the Division itself.

> **Recommendation**: Amend. Clarify that appeals ALWAYS include all the evidence and submissions that were before the RPD, and that (4) allows submissions of **any** additional evidence (i.e. eliminate the restriction on new evidence) for all parties before the Division.

5. ELIMINATION OF PRRA FOR FIRST YEAR FOLLOWING REFUSAL BY IRB

S. 15 of the bill amends s.112(2) of IRPA and effectively prohibits any individual from making a pre-removal risk assessment application (PRRA) if less than 12 months have passed since their refugee claim was rejected.

The PRRA program is a risk assessment mechanism that provides an opportunity before removal is effected for a person to demonstrate that she would face risk if returned to her home country. It allows for the applicant to provide evidence of risk that was not assessed by the RPD or where there is evidence to support the risk claim that was not available or capable of being produced at the RPD hearing. The purpose of the PRRA application is to ensure that the Government complies with its international and domestic legal obligation not to remove an individual to a country where they will face torture, a risk to their life, or a risk of cruel and unusual treatment or punishment, without their application being considered.

When IRPA was drafted, the PRRA program was created to ensure compliance with the principles set out by the Canadian courts.

In 2002 the Supreme Court of Canada released its decision in *Suresh v. Canada (Minister of Citizenship and Immigration)*. Mr. Suresh was a convention refugee from Sri Lanka who was being deported because the government was of the opinion that he was a member and fundraiser for the Liberation Tigers of Tamil Eela, an organisation alleged to be engaged in terrorist activity in Sri Lanka. He presented evidence that members of his organisation were being subject to torture in Sri Lanka and that it would be a violation of his s.7 Charter rights if he were removed to a place where he could face torture. The Supreme Court of Canada assessed Canadian jurisprudence and international law and determined that deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. This decision, along with others from lower courts made it unconstitutional for the government to remove an individual to a country where they could face a risk of torture and determined that individuals had to have an opportunity to have their case heard prior to removal.

The s.15 amendment appears to be designed to facilitate faster removals of individuals whose refugee claims have been deemed unsuccessful. But barring access to the PRRA process, and therefore not allowing for a second risk assessment when circumstances warrant such an assessment will lead to some claimants who are not successful in their refugee hearings being removed to persecution, torture, or other harm because their current circumstances have not been assessed.

A second chance to have a risk assessment is important because it serves as a safety net for the most vulnerable claimants. Often it is used to raise new risk grounds that the applicant could not raise at the hearing for a number of valid reasons. For example female claimants that live in situations of domestic abuse, often come to Canada with their abusive spouses who make claims on behalf of the entire family and these claims are rendered negative. Often, during the process, these women separate from their abusive spouses and seek their own legal advice because they fear serious retribution

or further abuse by their spouse if they return. Because these women have already made a refugee claim, the PRRA is the only application where she can have her claim heard.

Another situation that we see often is individuals of sexual minorities that do not disclose their sexual orientation at their refugee claim because they are not yet out of the closet, or they come from countries where they face such intense persecution that they do not tell anybody for fear of reprisal.

It is also true that circumstances in a country can change significantly over a short period of time. Situations such as the breakdown of peace accord, a major terrorist attack, a significant military offensive, an election, or a political coup are commonplace and can drastically alter situations for individuals being returned. Often the country conditions that were in place during the refugee hearing can be drastically different in a matter of days.

The Federal Court has clearly stated that s.7 of the *Charter* not only requires that a risk assessment be conducted, but that a *timely* risk assessment be conducted that considers the relevant circumstances that are present at the time of removal. In *Ragupathy v. Canada (Minister of Public Safety and Emergency Preparedness)* the Court ordered that a new risk assessment be conducted because of major changes that occurred in Sri Lanka, even though only 20 days had passed since the last assessment was done. In that decision Justice Kelen stated that, “an individual's rights under section 7 of the Charter would be rendered illusory, however, if the facts underlying the risk assessment did not correspond to the present reality in the country to which the individual is being deported.” Given that country conditions can change drastically any risk assessment that is not conducted just prior to removal would frustrate an individual’s s.7 right and is not likely to withstand legal scrutiny.

The existing PRRA process is severely flawed, and has gone from a decision-making process that initially took a few months to a process where it can take a year or more in many cases before a decision is made. It has imposed a separate bureaucratic structure that has resulted in a rejection of 97% of the claims.

It makes more sense to eliminate the PRRA and to transfer all responsibilities for risk assessments related to s. 96 and s. 97 of IRPA to the IRB. This would require allowing for claims to be reopened upon application, based on new evidence.

> **Recommendation***:* Strike out s. 15 of the Bill and insert a provision allowing a refugee claimant to reopen a hearing before the RPD or RAD where there has been a new risk development or new evidence that had not been considered by the RPD or where there is a significant change in circumstances since the RPD hearing, with an administrative stay of removal until a decision on the motion to reopen is made and the new risk claim is determined, including an appeal before the RAD.

In the alternative, strike out s. 15 of the bill and allow a claimant to apply for a PRRA, with an administrative stay of removal.

Currently, there is an administrative stay of removal when the PRRA application is filed within the stipulated 15 days, but it is not open to an individual to initiate the PRRA, as the first PRRA is offered at the time a person is considered “removal ready”. Subsequent PRRAs are permitted at the applicant’s initiative, but no administrative stay attaches and it is usually necessary for an applicant to apply to the Federal Court for a stay of removal.

6. APPOINTMENTS TO RAD

S. 18 amends IRPA s. 153 regarding IRB appointments, which are made by Governor – in-Council (GIC).

The Bill makes no change to the appointments process or criteria for making GIC appointments to the IRB. This is a lost opportunity. A fundamental weakness in Bill C-11 is that it does not come to terms with the problem of establishing the competence, independence and fairness of decision-makers. All these qualities can be summed up in one word, the quality of being authentically *judicious*.

Historically there has been a problem with the competence of members appointed to the IRB because of political patronage interfering in the appointments. Although the current government campaigned on a platform that included doing away with patronage appointments, in fact that has not occurred. When the new appointments process for the IRB was devised, it was heralded by the government as merit-based, because of the testing procedures it included. Yet they introduced a blatant political element to the appointment process when the requirement was added that an appointee by the Minister must be on the panel that makes the recommendations to the Minister after the assessment process. Thus, not only is the final decision left to the Minister, but his own appointee has influence over who is selected as qualified candidates for appointment.

Recently the GIC appointment system has delivered some highly ideological appointments, leaving the impression of a political intent to slant decision-making against refugees. The appointment of an Aristide-era official at a time when many Haitian refugees were arriving in Canada and the appointment of a policy commentator who has publicly advocated that Canada should deter any refugees from arriving here to claim refugee status are two high-profile examples of this trend. However there are many examples that have received less attention, where the professional or political background of the individual gives the impression he is more likely than not to rule against refugees.

It appears that Board Members appointed under the current system, hearing refugee claims at the RPD, will now be hearing cases on appeal, and giving their guidance to members who hear refugee claims at the reconstituted RPD. Yet nothing has been done to ensure they are more qualified than before and that political and ideological considerations do not affect the selection of candidates.

The Bill provides that the RPD decision-makers will be Public Service employees, which provides for a competition process. But we are concerned that those hired may well come from the ranks of PRRA officers and border agents, who will find the higher-level (and higher-paid) positions attractive and know how to deal with the competition process. For some, they will carry with them their enforcement-minded thinking that may

result in unfair and injudicious decisions. We are concerned as to who will be hired for these positions.

For example, the current PRRA officers are members of the Public Service, and they reject about 97% of applicants. We have already indicated above our concerns about problems with PRRA decision-makers. A public service hiring process could claim to treat PRRA officers as qualified as they have experience reviewing refugee cases, but our concern is that they will start out with a bias against refugees.

Bill C-11 establishes no arm's length and expert committee to select the public service appointments, and the public service process may allow little flexibility for that.

It also does nothing to address the tenure of decision-makers, which is a major factor in ensuring the freedom to be judicious. Public service contracts, just like GIC appointments, can be temporary.

Bill C-11 assists the Federal Court by assuring a much needed increase in the number of judges appointed, but this comes after the Prime Minister has brought into question whether appointments to the Federal Court are partisan. The Prime Minister's complaint that the Federal Court has too many "leftist" judges appointed under the Liberal Party, implies any new government should likewise make its own partisan appointments. This characterization of judicial appointments as partisan, whether based on party or ideology, devalues the importance of the justice system and demonstrates the willingness to favour partisanship over judiciousness.

Parliament has a unique opportunity with the presentation of Bill C-11 to rise above partisan politics, and sincerely come to terms with ensuring a non-partisan appointment process for the IRB and for the Federal Court

Members of Parliament should reject Bill C-11 and demand a new bill which makes a high standard of judiciousness the focal point of all appointments.

> **Recommendation**: Amend s. 153(a) and (c) to provide for new independent merit-based appointment system to RAD and to the RPD

7. Coming into force and transitional provisions

S. 31 of the Bill amends IRPA s. 275 with respect to the implementation of RAD.

S. 42 of the Bill provides that some sections of the would not come into force at the same time as the rest of the Bill, but without any stipulation as to when the particular sections will come into force. Given that the provisions of the Bill are touted as being "balanced", the provisions are interdependent and should come into force simultaneously.

Recommendation: Delete the words "except sections 3-6, 9, 13, 14, 28 and 31".

8. Related issues

Impact on provincial Legal Aid plans:

Bill C-11 clearly increases the amount of work which will be required to give competent legal representation to the average individual refugee claimant. There is not just the question of right to counsel at the "8-day" interview, but the Minister has indicated there will be more active enforcement and interventions into refugee claims by the Minister.

There is no national minimum standard for Legal Aid funding. In general, most of the Federal contribution to provincial Legal Aid funding is taken from the Canada Social Transfer. This leaves Legal Aid competing with all other services for funding, and typically underfunded. Legal Aid in Ontario lost significant funding from the time the Federal government shifted general funding from contributions dedicated to Legal Aid to the Canada Social Transfer. It has never regained the level of support it had before that shift.

Refugee law has become an exception to this general arrangement. The Federal government and the provinces have a cost-sharing agreement on Legal Aid for refugee law, which the RLA took part in lobbying for, and which was primarily negotiated between Ontario and the Federal government when Canada's current Minister of Finance, the Honourable Jim Flaherty, was Ontario's Attorney General. It has been renewed several times since then, and is currently in effect. Legal Aid Ontario states that the current agreement runs until March 31, 2011.

The cost-sharing agreement stipulates that the Federal government provides a contribution, and that individual provinces can take a share of that amount depending on a formula related to number of claimants in the province. Any province accepting the funding must match it.

Ontario receives at least half of all claimants, and has historically matched or exceeded the Federal contribution.

As Bill C-11 increases the cost of representation for claimants in response to actions by the state, it is clear the Federal contribution to the cost-sharing agreement should increase to offset this.

However current Federal levels of funding to the provinces for Legal Aid (both through the cost-sharing agreement and reliance on the Canada Social Transfer), have not resulted in adequate or reliable Legal Aid funding across Canada. When funding for Legal Aid infrastructure has been allowed to deteriorate, the support for all services diminishes. This is becoming an increasingly urgent problem.

> **Recommendation**: The RLA recommends, as an immediate measure, that the Federal contribution to the cost-sharing agreement for refugee representation be substantially increased. While the government is making a substantial new investment in refugee determination, enforcement and deportation, it should also increase its support for Legal Aid in this area. We also recommend that agreements be multi-year rather than annual, and retain the requirement of matching funds.

SUMMARY OF RECOMMENDATIONS RE BILL C-11 BY THE REFUGEE LAWYERS ASSOCIATION OF ONTARIO:

1. The **Safe Countries of Origin** (SCO) and "Classes of Nationals" List (S. 12):

   ➔ Recommendation: Strike.

2. Amendments to the **Humanitarian and Compassionate** (H&C) regime (S. 4)

   a. Prohibition on consideration of H&C applications for one year following a final decision by RPD or RAD (proposed new s. 25(1.2)(b) & (c)):

      ➔ Recommendation**:** Strike. Invest resources to speed up H&C decision-making by CIC.

      ➔ *Alternative Recommendation**:** Give concurrent jurisdiction to the RPD and RAD to grant approval-in-principle for permanent residence on humanitarian and compassionate grounds.*

   b. Prohibition on consideration of s. 96/97 risk in an H&C application (proposed new s. 25(1.3))

      ➔ Recommendation: Strike.

   c. Fees requirement (proposed new s. 25(1.1))

      ➔ Recommendation**:** Amend to allow for fee exemption. We endorse the language proposed by the CCR: "The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1)."

   d. Ministerial power to grant H&C exemption on own initiative (s.5)

      ➔ Recommendation: Maintain

   e. Elimination of requests for Temporary Resident Permits (TRPs) for a year following refusal of a refugee claim (s. 3)

      ➔ Recommendation: Strike

3. Introduction of a **First ("8-day") Interview** at RPD (s. 11(2))

   ➔ Recommendation**:** Strike

4. **RAD Evidence Restrictions** (s. 13)

   ➔ Recommendation**:** Amend. Clarify that appeals **always** include all the evidence and submissions that were before the RPD, and that (4) allows submissions of **any** additional evidence (i.e. eliminate the restriction on new evidence) for all parties before the Division.

5. **Elimination of PRRA** for 12 months following refusal by IRB (s. 15)

   ➔ Recommendation**:** Strike. Insert a new provision allowing a refugee claimant to reopen a hearing before the RPD or RAD where there has been a new risk development or new evidence that had not been considered by the RPD or where there is a significant change in circumstances since the RPD hearing, with an administrative stay of removal until a decision on the motion to reopen is made and the new risk claim is determined, including an appeal before the RAD.

6. **Appointments** to RAD (s. 18)

   ➔ Recommendation**:** Amend to provide for new independent merit-based appointment system to RAD and to the RPD

7. **Coming into force** and transitional provisions (s. 31, 42)

   ➔ Recommendation**:** Amend. Delete the words “except sections 3-6, 9, 13, 14, 28 and 31”.

8. Related issues: **legal aid for refugees**

   ➔ Recommendation: Substantially increase federal contribution to fed-prov cost-sharing agreement for refugee representation. Make agreements multi-year rather than annual, and retain the requirement of matching funds.