



August 14, 2018

The Honourable Ahmed Hussen, P.C., M.P.
Minister of Immigration, Refugees and Citizenship
House of Commons
Ottawa, Ontario
Canada K1A 0A6

RE: CAPIC Response to the Report of the Independent Review of the Immigration and Refugee Board

Dear Minister Hussen,

Please find attached CAPIC's detailed response to the Report of the Independent Review of the Immigration and Refugee Board

Our meeting on July 25 yielded several interesting talking points related to this review, namely facilitating collaboration between IRCC, the CBSA, and the IRB, optimizing the asylum-seeking process, and ensuring that claimants receive a fair hearing.

We were glad to be invited and thank you and your department for giving us the opportunity to provide input on how the RPD can be made more efficient and responsive while ensuring fairness.

Regarding the Report, we generally view Mr. Yeates' recommendations favourably. However, CAPIC supports the alternative model proposed by the Canadian Council for Refugees, since it preserves the integrity of the existing structure and can be achieved quickly and affordably. In the attached submission, we answer the questions you posed regarding the Report and offer solutions as part of a multifaceted approach that necessarily precludes the dismantling of the current structure.

We look forward to holding further discussions on similar industry issues soon.

Thank you for your time and consideration.

Yours sincerely,

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President, CAPIC-ACCPI



Canadian Association of
Professional Immigration Consultants
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CAPIC Submission on the Review of the IRB



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About CAPIC

The Canadian Association of Professional Immigration Consultants (CAPIC) is the professional organization founded for Regulated Canadian Immigration Consultants (RCICs) on four guiding principles: Education, Information, Lobbying, and Recognition. CAPIC leads, connects, protects, and develops the profession, serving the best interests of its members.

CAPIC's Position on the IRB Review

CAPIC generally views the recommendations contained in Mr. Yeates' report favourably. However, CAPIC believes that they should be implemented through the current structure of the Immigration and Refugee Board. CAPIC is largely supportive of the alternative model proposed by the Canadian Council for Refugees and views it as a viable model that can be achieved within a reasonable timeframe and cost.

Minister Hussen's Questions

1. The report identified several challenges related to governance, accountability and results in delivery of the asylum system, including the challenges with co-ordination between IRCC, the Canada Border Services Agency and the IRB. What are your views on the best ways to address these challenges?

Regarding **recommendations 10, 25, 32, 35, 42, 52, 58, and 59**, CAPIC supports the establishment of an "External Advisory Committee," as proposed by the CCR, as this safeguard would help ensure that the interests of claimants are protected. As per the CCR:

The CCR proposes a new accountability body for all federal tribunals, including the IRB. To support the proposed model, we recommend that a body be created to provide expert services to all federal tribunals, with expertise in fairness and efficiency. The body could conduct quality assurance reviews, review and report on tribunals' functioning, and facilitate exchanges between federal tribunals on ways to promote efficiency within the context of fair and independent decision-making. This body would be well-positioned to support and hold the IRB accountable for achieving efficiencies while respecting principles of independence. The body could also be responsible for making appointments to tribunals and for hearing complaints against members.

While referencing persuasive decisions by members, vigilance should be maintained to ensure members' decision-making independence and against the fettering of their discretion, and to ensure that each case is adjudicated on its specific facts and merits. Template decisions infringe on such assurances.

Additional CCR recommendations include:

- Interventions by IRCC should be discontinued (as recommended in the Yeates report). CBSA should review their processes to ensure interventions are useful and that they rigorously respect the timelines.

- The PRRA should be discontinued and replaced with a provision allowing people to apply to the RPD to present new evidence or changed circumstances, with a stay while the application is being considered. Similar to the provisions for second claims, the RPD would review the application on paper and decide whether there is new evidence or changed circumstances that merit a new hearing. Having a provision with leave at the RPD for a new or renewed claim would be a fairer and more efficient way of dealing with issues arising immediately prior to removal, or second claims. Currently, people who make a second claim, or whose claim has been rejected but who have new evidence that they are at risk, are not heard by the RPD, but rather apply for a Pre-Removal Risks Assessment (PRRA), conducted by officials at IRCC (although a provision in the legislation, never implemented, actually transfers this decision-making to the RPD). Having a whole parallel structure at IRCC to make refugee determination is very expensive. PRRAs are frequently very slow.
- All refused claimants should have access to the RAD (eliminate bars for STCA claimants, manifestly unfounded/ no credible basis). The jurisdiction of the RAD should be modified so that it can hold more hearings, hear any relevant evidence and finalize more cases (as opposed to sending them back to the RPD, as happens currently in many cases overturned by the RAD).

While ensuring that members deal with proceedings before them “informally and quickly,” it is imperative to ensure this is done only to the extent that “the considerations of fairness and natural justice permit,” and that the claimants are always given “a reasonable opportunity to present evidence, question witnesses and make representations.” These concerns relate specifically to **recommendations 9, 36, 53, 56, and 57**. It is submitted that, in practice, the Division, as an institution, often fails to maintain the proper balance when it pressures members to deal with matters as “quickly” as possible and in such instances “considerations of fairness and natural justice” may be compromised.

CAPIC also recommends eliminating current restrictions on RAD jurisdiction for better time management. The RAD should be allowed to hear cases orally and make decisions on cases instead of returning them back to RPD, which in turn contributes to a larger backlog. This relates to **recommendations 37-39** as they suggest finetuning the RAD’s role in relation to the RPD.

Concerning **recommendations 20-23**, CAPIC is not against the proposed triaging body/system that is being implemented by the IRB/CBSA/IRCC, as it seems to be a step in the right direction and in keeping with the Report’s recommendations. However, CAPIC is wary of too much integration between the decision-making, processing, and enforcement arms of the system, as such integration would be susceptible to the creation of institutional biases similar to those that have been created by the excessive collaboration of the CBSA with the Immigration Division, as observed in a separate audit report commissioned by IRB. Participation of counsel at the triage stage, particularly when there are concerns regarding credibility, is of utmost importance to ensure the process remains in compliance with the rules of natural justice and procedural fairness.

2. In what ways could the asylum process be made easier for claimants at the initial stage? During the decision-making stage?

In view of **recommendation 12**, the establishment of a new board/infrastructure is both unnecessary and inefficient as the recommendations can be implemented within the existing framework of the Immigration Refugee Board, and, specifically, the Refugee Protection Division and Refugee Appeal Division. As per the CCR:

All claims would be referred immediately to the RPD (eligibility provisions are eliminated). The RPD would be responsible for making a determination of the need for protection, in accordance with Canada's obligations:

- The RPD would determine whether the claimant has refugee status in other countries to which the person can be safely returned.
- In the case of people who have made a previous refugee claim, their new claim would take the form of an application for a new or renewed claim. The RPD would allow a hearing on the merits if there is new evidence or changed circumstances meriting a new hearing. If not, the person would not be entitled to a hearing at the RPD.
- In the cases of allegations of criminality or security, the issues would be considered within the refugee hearing, as relevant to the Refugee Convention exclusion clauses. In the tiny number of cases where the person is found to be in need of protection, but the federal government has criminality or security concerns, the proceedings for inadmissibility could be pursued after the RPD decision, or in parallel.

Regarding **recommendations 34 and 35**, CAPIC recommends that oral decisions be rendered in all positive cases, which would save time wasted on written decisions.

Additional CAPIC points:

- An "expert committee" should be established, as proposed in **recommendation 13**.
- The requirement for an FESS timeframe should not be left open-ended. A reasonable timeline should be established within which screening ought to be completed. This pertains to **recommendation 18**, which suggests that cases should not be scheduled for hearing until FESS screening is complete.
- Regarding **recommendation 31**, the current NDP system, while not perfect, is a proven and efficient system. Therefore, CAPIC is against this recommendation.

3. From your perspective, what steps in the asylum system can be streamlined or eliminated while ensuring that asylum claimants have a fair hearing of their claims, including effective recourse for negative decisions?

Considering **recommendation 11**, careful analysis of the viability of a chosen date vis-à-vis “considerations of fairness and natural justice” should be undertaken prior to the establishment of a target date as the selection of an unreasonably optimistic target date may result in a failure to appropriately weigh these considerations. As the CCR states:

Hearings would be scheduled by the RPD only after the BOC is received. Once the BOC is received, the RPD would triage the case and schedule a hearing date, taking into account the specifics of the case (e.g. whether it is appropriate for expedited processing, or more time is needed to gather evidence, and whether there is a Ministerial intervention). The RPD should be required to provide a hearing date within a reasonable time, given the difficulty for claimants to wait very long periods with no idea of when they will be heard.

The RPD has recently shown that it can dramatically increase its efficiency, particularly when not constrained by hearing dates scheduled by IRCC and the CBSA. Under the proposed model, the RPD would have an opportunity to find even more efficiencies in processing by having greater control over the whole claim process.

Under the individualized determination model, all claimants would be subject to the same rules: provisions treating some groups of claimants differently (Designated Countries of Origin, Designated Foreign Nationals) would be eliminated. Processing before the RPD may however vary depending on the needs and realities of the individual claim: e.g. expedited processing for clearly documented claims meeting the refugee definition, or procedural accommodations for claimants with particular vulnerabilities.

By centralizing decision-making at the RPD, the model would have the same advantages of the Refugee Protection Agency in the Yeates report’s “Integrated Refugee System”: all the processes would be “under a single independent lead.” The need for coordination between government bodies is minimized by having the RPD fully responsible for all aspects of refugee determination.

CAPIC supports expedites when and where determined by the RPD and hearings to assess credibility and other factors in cases that do not meet the criteria for expedites prior to protection being granted. This is applicable to the changes to the triage process proposed in **recommendation 26**.

Further, it is submitted that it is the experience of most stakeholders that establishing the credibility of a claim is the starting point of most claims. It is recommended, at a minimum, that any case in which the decision-maker leans toward not granting protection, it would be in keeping with procedural fairness and natural justice that the claimant, through counsel, be given an opportunity to respond to all the decision-maker’s concerns (including non-credibility findings) before a final decision is rendered. This is underscored by the CCR’s statement below:

The proposed model is designed to give enough time for claimants to present their case properly. This is important, as on first arrival claimants often cannot fully articulate the relevant parts of their experience. This is particularly the case for people who have been

highly traumatized and people fleeing gender persecution, or LGBT claimants. It is fairer and, in the end, more efficient to make sure the basis of the claim is properly presented before making decisions on scheduling.

CAPIC is primarily concerned that institutional biases may arise from administrative pressure to deal with backlogs. Thus, eliminating backlogs as much and as quickly as possible would help reduce the occurrence of institutional biases. This is applicable to the subjects addressed in **recommendations 1 to 5 and 37**.

Regarding **recommendation 37**, CAPIC suggests that the current legislative bars imposed on the submission of applications for permanent residence pursuant to s. 25 of the Act be removed, as the ability to file such applications concurrently with a refugee claim could help reduce the backlog in cases in which the s. 25 application is reviewed prior to the hearing of a claim. As per the CCR:

A mechanism should be in place to ensure the IRB quickly receives additional resources when claim numbers go up, to avoid backlogs emerging.

The current legislation has a complicated system to deny access to the RPD to people who are inadmissible on security or criminality grounds. Often this turns out to be very inefficient: there may be long delays in determining inadmissibility when in fact the person could quickly have been determined not to need protection. Under the current system people found inadmissible still need to have an assessment of their risk: this is done as an extra step through the PRRA, after the inadmissibility has been determined. The current statutory scheme is conceptually and legally problematic because the eligibility grounds are broader than the Convention exclusion grounds. The current process leads to protracted parallel litigation (at a minimum there is an ID hearing, followed by a PRRA application; in some cases, there can be an RPD hearing, interrupted or followed by an ID hearing and a PRRA application, or an exclusion decision followed by a PRRA application). The current process is also often delayed further by protracted Ministerial Relief applications. The proposed model would focus on making the determination on refugee protection for everyone and without delay, by the same body that has the relevant expertise. This is more in line with Canada's international obligations. Inadmissibility matters can be dealt with afterwards, if necessary, or in parallel.

CAPIC highlights the support and need for the IRB's transition to technology-based processing system for greater efficiency and productivity, which is relevant to both **recommendations 1 and 60**.

Additionally, CAPIC strongly favours removing processing timelines from the regulations, regarding **recommendation 24**. CAPIC also supports the propositions to accelerate application processing made in **recommendations 14, 28, 43, and 45**.



Conclusion

Mr. Yeates' report is ultimately a tool that offers insight into the many challenges faced by the IRB, particularly in terms of the RPD. These challenges require a paradigm shift that, through a multifaceted approach involving human, technological, and fiscal solutions, can achieve the reasonable goals of the report. However, this shift should not require the dismantling of the current structure nor curtailment of its independence, a crucial quality which ensures that claims are decided fairly and efficiently.