



Canadian Association of  
Professional Immigration Consultants

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L'Association Canadienne des  
Conseillers Professionnels en Immigration

# CAPIC's Feedback on the Review of the ID Rules and IAD Rules

February 14, 2024

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## Consultation on ID and IAD Rules – Response Document

### Modernizing Divisional Rules of Practice at the Immigration and Refugee Board 2024-2025

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**Instructions:** Please provide any comments on the proposals listed in the consultation document. If applicable, please indicate to the Division the comments pertaining to and the corresponding number.

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#### **Issue 1: Updating the Rules to enable a digital tribunal, including addressing electronic means of communication and virtual hearings**

- Immigration Division: 1-6
- Immigration Appeal Division: 7

#### **Comments:**

**Questions:** Do you have other recommendations to facilitate a modern, user-centric approach? Are there other outdated aspects in the Rules that should be addressed?

#### **Comments:**

##### **1. About the virtual tribunal and virtual hearing**

CAPIC is aware that the IRB has assessed its virtual hearings, and the result is positive (the IRB Report).<sup>1</sup> However, in the IRB Report, Finding 3 states, “Although virtual hearings have proven to be useful and effective during the pandemic, more data is necessary to establish how they should be utilised in the long term.” We studied a report produced by the Office of the Commissioner for Federal Judicial Affairs Canada for the same effect concerning the courts (the Court Report).<sup>2</sup> It is more recent and comprehensive. Based on the findings of the IRB Report and the principles of the Court Report, CAPIC recommends considering the principles articulated in the Court Report for the virtual tribunal initiative.

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<sup>1</sup> Pr. Nicolas Vermeys and Valentin Callipel, “Report on the sense of access to justice associated with virtual hearings held before the IRB using MS Teams,” IRB, modified July 13, 2022, [online](#).

<sup>2</sup> Action Committee on Modernizing Court Operations, “Virtual Hearings: Orienting Principles,” Federal Judicial Affairs Canada, Office of the Commissioner for Federal Judicial Affairs Canada, modified Nov. 19, 2024, [online](#).

The use of electronic communication and the adoption of virtual hearings were accelerated by the COVID-19 pandemic.

Even though objections have been raised in the courts against virtual proceedings mainly based on concerns about procedural fairness, the jurisprudence<sup>3</sup> concludes that remote proceedings are not inherently unfair.

However, while the federal courts have modernized their justice system, forced by the unprecedented change brought by the pandemic, the approach adopted by the courts afterward is to continue the virtual hearings as a complement to in-person hearings instead of moving to virtual courts.<sup>4</sup>

The identified principles for court modernization include “no one-size-fits-all solution” and “[t]echnology is a tool, rather than an end in itself.” The Court Report recognizes the hasty transition to virtual hearings as a response to the pandemic and recommends finding the right balance between virtual and in-person hearings.

In short, the federal courts adopt virtual hearings as a complement to the in-person hearing and are not in the process of transitioning to virtual courts.<sup>5</sup>

## **2. About electronic means of communication**

CAPIC supports adopting electronic communication as the primary and preferred mode of communication; meanwhile, CAPIC also recommends retaining other document delivery methods as alternatives to facilitate communication. This can ensure full access to justice for marginalized participants in the proceedings who may not be electronically literate or have regular access to electronic communication, especially if they do not have a representative.

CAPIC would also like to raise two questions about the potential issues with electronic means of communication for consideration:

### **(1) What are the mechanisms to verify the authenticity of the documents and disclosures filed by parties?**

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<sup>3</sup> Julie G. Hopkins, “The Court’s Decisions Concerning Their Own Virtual Hearings: “What is Good for the Goose...” ADR Institute of Canada, published March 2, 2021, [online](#).

<sup>4</sup> Supra, note 2.

<sup>5</sup> Provincial courts seem a step ahead of the federal courts in this regard. Some studies show that marginalized groups seem to be left behind in this move. There may be some nuggets to draw from those studies for the IRB’s digital move. See CBA, “Who’s Getting Left Behind? The Impact of the Ongoing Digital Transformation of the Court System on Access to Justice in British Columbia,” posted July 19, 2021, [online](#).

Fraud is a legitimate concern in the immigration arena, and thus effective mechanisms to detect fraud are indispensable. Even though the operations of the Immigration, Refugees, and Citizenship Canada (IRCC) and the IRB are different from one another because of the inherent natures of the two institutions, immigration fraud that has transpired before IRCC may be a lesson for the IRB.

Documents sent to IRCC are mostly standardized and more easily verified, so it is easier for them to have something in place to detect fraudulent documents. However, fraudulent documents still pose an issue to its operations. For example, IRCC added a function for LOA verification in their system, which intercepted more than 10,000 potentially fraudulent LOAs in the 10 months after it was put into place.

Documents and disclosures filed at the IRB are diverse. A one-size-fits-all approach like IRCC's LOA verification mechanism, most likely, would not work for the IRB. When documents and disclosures are filed electronically, what is the mechanism in place to detect fraudulent documents, which could negatively impact the integrity of the IRB proceedings if admitted for decision-making?

**(2) What are the mechanisms to facilitate communications that need immediate attention?**

When IRCC announced the move to 100 percent online applications, CAPIC suggested delaying the move for several ongoing issues.<sup>6</sup> Some issues persist to date. In addition to technical difficulties, the most common issue is a lack of responsiveness to inquiries, including urgent ones that need immediate attention.

Communication gaps can cause inefficiencies. Timely human support behind virtual communication is key to addressing online communication failures. CAPIC recommends having human support in place to facilitate communications that need immediate attention to achieve the objectives of modernization.

**Issue 2: Requiring earlier disclosure of information and introducing time limits for specific applications or actions**

- Immigration Division: 8-19

**Comments:**

<sup>6</sup> CAPIC, "Request to Delay Moving to 100 Percent Online Applications," posted September 21, 2021, [online](#).

**Questions:** Would the proposed updated time limits for disclosure provide an adequate amount of time for parties to submit evidence and information to the Board? Would these changes increase efficiencies in the proceedings?

**Comments:**

**On #10**

CAPIC supports requiring the Minister to provide information promptly and including the detainee's counsel as a recipient.

CAPIC has concerns about revising "3 days" to "as soon as possible" for 7-day reviews or an admissibility hearing held at the same time.

"As soon as possible" for 48-hour reviews is built on the premise that the time for providing information is, at least, before the reviews. Nevertheless, it does not exclude the possibility of during the reviews. In the case of the latter, it is acceptable given the time constraint. However, in the 7-day review context, "as soon as possible" may be ambiguous and could invite unintended consequences for persons concerned, and their counsels only being served on the day of the proceeding. Three (3) days is sufficient and fair.

CAPIC recommends leaving the 3-day time limit for 7-day detention reviews or adding "no later than 3 days before the proceeding date" to prevent late and unfair disclosure.

**On #13**

CAPIC supports adding this new rule, as it can better maintain consistency among Members when considering the admission of late disclosures.

CAPIC recommends further considering two aspects:

**(1) For the list of factors to consider**

CAPIC suggests that one factor that could be added to the list is the time the Division and the other party and his/her counsel receive the late disclosures: Whether it is before the proceedings or at the proceedings. Taking this factor into consideration is to add a layer to detect bad-faith late disclosures.

**(2) For the late disclosures by the Minister**

CAPIC believes that rules for admission of late disclosures by the Minister should be stricter.

Both detentions and referrals for admissibility hearings are, generally, actions taken by the Minister based on reasonable grounds to believe, which means the Minister should have reliable information to get to the conclusions reached; for certain grounds of inadmissibility conclusion, a higher standard of proof is required: balance of probabilities. Therefore, while the person concerned may have difficulties meeting the deadline for document disclosure, especially if he/she is self-represented, this would be the case on the Minister's end only in exceptional circumstances.

#### **On #14**

For consistency, CAPIC recommends the Board consider including counsel as a recipient.

#### **On #15**

CAPIC understands that, normally, it is the person concerned to call witnesses. However, the *Immigration Division Rules, SOR/2002-229 (ID Rules)* do not exclude the Minister, being a party, from calling witnesses. Therefore, CAPIC suggests that rules for the Minister's failure to provide witness information should be stricter.

Some factors in the new rules for considering late disclosure of documents may be considered in the Minister's failure in this respect. For example, whether the Minister, with reasonable effort, could have met the rules of providing the witness information; whether the Minister requested to allow the proposed testimony in a timely manner, and whether it is justifiable.

### **Issue 3: Other measures to increase efficiency, procedural fairness and strengthen program integrity**

- Immigration Division: 20-52
- Immigration Appeal Division: 53

#### **Comments:**

**Question:** Would the proposed measures improve efficiencies, procedural fairness, and program integrity? Are there other aspects of the Rules that should be addressed?

#### **Comments:**

CAPIC believes that the proposed measures should, in general, improve efficiencies. We have some input for the ID items below.

### **On #35**

CAPIC recognizes that allowing a detained person to orally notify the Division and CBSA about the removal of their counsel of record is intended for the detainee's convenience.

CAPIC seeks reassurance that the rights of detained individuals are preserved and that, if a detainee provides oral notification of the removal of counsel, they fully understand the implications of this decision. Furthermore, CAPIC emphasizes the need for formal written acknowledgment from the detainee confirming this understanding.

### **On #41**

CAPIC has two questions for the Board to consider:

#### **(1) Factors to be considered for a cancellation request**

The current applicable ID Rule does not specify the factors to be considered for a cancellation request.<sup>7</sup> For transparency, we suggest the Board specify factors to be considered when deciding a cancellation request.

#### **(2) An optional cancellation request by the requesting party**

Change of circumstances may cause the testimony of a witness to be no longer relevant or required. The current version of the ID Rule<sup>8</sup> provides that the cancellation request be made by the summoned witnesses only. CAPIC suggests also allowing the requesting party to request cancellation.

### **On #44**

ID deals with detention reviews<sup>9</sup> and admissibility hearings<sup>10</sup>. For detention reviews, the IRPA incorporates subsequent reviews if continued detention is ordered<sup>11</sup> and early review requests<sup>12</sup>. For admissibility hearings, the Minister and some groups of persons concerned, namely, protected persons, permanent resident visa holders, and permanent residents, have the right to appeal to the Immigration Appeal Division (IAD).<sup>13</sup> Therefore, detention reviews may not

<sup>7</sup> [S. 34](#) of the ID Rules.

<sup>8</sup> Ibid.

<sup>9</sup> [S. 54](#) of IRPA.

<sup>10</sup> [S. 45](#) of IRPA.

<sup>11</sup> Ss. [57](#) and [57.1](#) of IRPA.

<sup>12</sup> S. [9\(1\)](#) of the ID Rules.

<sup>13</sup> Ss. [63\(2\)](#), (3), and (5) of IRPA.



require reopening; admissibility hearing reopening may be redundant for persons concerned who have the right to appeal decisions made by ID at admissibility hearings as well as for the Minister.

It is unclear to CAPIC whether this proposed new rule is to provide persons concerned who do not have access to the IAD an avenue for remedies or out of other considerations. It is also unclear to CAPIC why this mechanism is needed given the analysis above and the fact that foreign nationals only obtain rights to enter and remain in Canada upon authorization.

CAPIC would like to see the text of the proposed new rule to provide comments on it.

## About CAPIC

The Canadian Association of Professional Immigration Consultants (CAPIC) is the professional organization representing the interests of Canadian Immigration Consultants. The organization advocates for competency, ethical conduct, and consumer protection in the immigration consulting industry. CAPIC's mission is to lead, connect, protect, and develop the profession, serving the best interests of its nearly 5000 members. It is the only association recognized by the Government of Canada as the voice of Canadian immigration and citizenship consultants. CAPIC is a major stakeholder consulting with federal and provincial governments and their respective departments on legislation, policy, and program improvements and changes.

## Contact Us

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