Canadian Association of
Professional Immigration Consultants

L'Association Canadienne des
Conseillers Professionnels en Immigration

Changes to IAD Rules

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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's mission is to lead, connect, protect, and develop the profession, serving the best interests of its members.

Overview

Overall, the proposed Rules change will enable the IAD to deal with the appeals filed in a more efficient manner. Until now, the IAD formal and final resolutions of an appeal have been by a formal hearing (full hearing), and there was an attempt to resolve the appeal without proceeding to a full hearing, i.e. the current Alternate Dispute Resolution Conference (ADR). However, backlog continued to build, and it took as much as two years for an appeal to go to a full hearing in the Central Region (Toronto), more than two in the Eastern Region (Montreal), and in the Western Region (Vancouver) that number is again creeping up past 12 months (we were at a more reasonable nine months prior to the resignation of ADC Kingma, when there were no current sitting members).

Time Limit Changes

Items 1 to 6 quantify the powers and provide the IAD with more flexibility to deal with the appeals filed. The major improvement, however, is in the time limit for a Record of Appeal to be provided by the minister (the CBSA), shortened from the current 120 days to a more reasonable 45 days, which is practical given the current electronic communication (as opposed to getting the file through diplomatic bags) for sponsorship appeals and residency obligation appeals, and shortened from 45 days to 30 days for a removal order made at examination (and 30 days for a removal order made at an admissibility hearing). A major change from an average of 4 months to 1.5 months is one worthy of applause.

Moreover, the proposed shortening of the deadline for the Record for Disclosure will only work if the wait time to a hearing or other proceeding is significantly shortened. If the hearing is still a year or more away, for example, then the 45 days from receipt of Record for Disclosure would be unrealistic. In other words, how can you disclose within 45 days and then wait one year for the hearing?

On the other hand, counsel for the appellant is put under time pressure when the appellant's disclosure is now due not more than 45 days of the Record being provided under the proposed Rules, and not the leisurely 20 days before the hearing (or 10 days before an ADR).

The new deadline for the appellant to make an application for ADR is now 45 days from the receipt of Record; previously there was no deadline. One can see that the purpose is to force the appellants (and counsel) as well as the minister to focus on the file and not sit idle until the last moment. Indeed, many counsels can attest to working on a file at a

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leisurely pace when the waiting time for a scheduled hearing (or even ADR) is far in the future.

Appeal Resolution

Interestingly, there is now a requirement to provide a statement if no disclosure is contemplated (item 113 (2)), and the IAD can declare an appeal abandoned if no document or statement is received (item 116). Also, the minister is required to notify the parties of the name and contact information of the CBSA hearings officer assigned to the file as minister's counsel and any change thereof (items 48 and 49).

These are useful to the appellant's counsel as the opportunity to resolve an appeal without going to a full hearing is increased, provided the counsel is diligent in his or her work on the file.

The introduction of an "informal resolution process" (item 73) in the Western Region has a precedent, since we already see a proactive approach taken by the Dispute Resolution Officer to try and resolve an appeal by having a telephone conference with the appellants. When nationally applied, this change will perhaps allow a conference between the appellant and the minister before even the ADR and the full hearing to attempt to resolve the appeal. The appellant and the minister must participate in the process "in good faith" (item 75). We note that there is no opt-out provision in the proposed Rules, which is a welcomed sign of progress.

Notes

Items 24

166(5)(a)

Special considerations have now been given to "vulnerable person."

Items 73-74

This codification of what is occurring now, when the Board asks us to present evidence and submissions early to see if the matter can be resolved quickly, should only be applicable to processes that do not contemplate examination of the Appellant, unlike the ADR. Counsel must be aware that whatever is used during the informal resolution process may be used later, whereas ADRs remain confidential. For clarity, we believe that discussions and materials used in ADR should stay confidential.

Item 77

We approve of the fact that the Persons Concerned can now formally request an ADR conference. We have made such requests in the past but making it formal gives it more weight.

Item 78

We strongly feel that the person assigned to hear the ADR should be a member.

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Item 88

We believe that "at least 30 days" is too short. IAD hearings need more time than this to be properly prepared and this rule can be abused; "at least 60 days" may be more reasonable.

Items 91 to 97

The proposed Rules codified the conduct of a hearing, which was established somewhat but not codified previously.

Item 92

We are greatly concerned by this. It is the Appellant's appeal to prove. Overzealous board members might use this rule to expedite the process — thereby not allowing the appellant to present his/her case properly.

We are particularly concerned about (2)(a) and 2 (d); these can fatally affect the appellant's right to appeal. 24 (b) and (c) are fine, as this already occurs.

Item 96

We are strongly opposed to this and recommend flexibility for members on the issue. Most hearings are better presented as written arguments. Stating that the preference is for oral representations at the end of the hearing puts pressure on the members not to accept written arguments, even if it is appropriate. Right now, the members are flexible on this issue.

Item 97

Time limits are necessary for written submissions. Overall, we are concerned that all this is taking the form of the RPD processes, which are not conducive to proper representation and limit the role of counsel due to the adversarial nature of an IAD hearing.

Items 107-109

The proposed Rules (items 107 to 109) removed the current requirements of one-side documents and a fixed size (letter sized, or 8.5 x 11 inches) and we welcome this standardization.

Item 115

30(4)(a)

We understand why the IAD is tying the disclosure of documents to the providing of the Appeal Record, but 45 days is too short. We recommend that a minimum of 60 days should be allowed for cases originating in Canada and 90 days for those originating overseas.

30(4)(b)

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Again, 20 days is too short if there is a need to translate or obtain documents. 30 days is a reasonable compromise and up to 45 days for medical records where necessary.

Item 117

Timelines for providing documents have been tightened to within 45 days of receipt of the Record and 20 days for rebuttal documents. Note: Medical documents previously had specific time requirements but are now treated as other disclosures under the proposed changes. We recommend that when medical records are necessary, an extension of up to 45 days be given.

Item 123

Barring "registered mail" and "by courier or priority post" from providing a document.

Items 126, 141, 166, and 190

We recommend the following factors for the IAD to consider when an application is tightened: "may" to "must not" (item 126), "may issue" to "must not issue" (item 141), "must not allow" (item 166), "must allow" to "must not allow" (item 190).

Item 130

36(1)(b)

The Notice of Witness now requires a "will-say" statement previously not required, and the 45 days from Record, or the 20 days for rebuttal is applied.

Item 132

Same concern as with Item 115.

Also, for both, if hearings are not scheduled expeditiously, this rule makes no sense.

Item 144

Applications now have a deadline of ten days before a proceeding, when previously there was none, and we welcome this change.

Item 145

We are fine with the language of the Rules stating that the "oral application should not be allowed unless the party, with reasonable effort, could not have made a written application before the proceeding." We are not comfortable, however, with the word "must" nor with not being allowed to make the application. This can lead to grave problems.

Item 159

44 (3) is incongruous with the rule stating that a proceeding must be scheduled at least 30 days after notice is given. It would not be incongruous if that time limit is increased.

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Items 167-168

Application to change date now requires medical certificate and specified contents of the certificate.

Item 173

We have the same concerns as with Item 145.

Item 196

4(b) What is the relevance of not making an application for judicial review? We require clarification as to why this was included.

Item 202

We have the same question for 5 (b).

Item 209

Again, we understand that they want to lessen the burden on board members from writing, but we are not sure how salutary this is.

Item 211

All decisions should take effect when notice in writing is given to the appellant.

Area of Concern

Under item 50 and Schedule (Rule 12) (item 213), the proposed Rules provide for "counsel not representing or advising for consideration." It is not clear which counsel the drafter of the proposed Rules has in mind, and whether this counsel will be competent to represent or advise appellants in an IAD appeal.

While we understand that the Board may see this as a way to control the appearance of unregulated/unauthorized counsel at the Board, we submit that the best way to do it is to simply make it clear that there will be no person appearing before the board other than those persons "referred to in any of paragraphs 91(2)(a) to (c) of the Act". Allowing persons appearing by forcing them to sign a declaration will not dissuade unscrupulous persons and will encourage persons such as settlement workers and clergy, to act as counsel despite not having the necessary knowledge, skill, and experience. This does not seem to be in the interest of any party. If someone appears before the board as counsel, they should be required to be regulated as an "Authorized Representative." Authorized representative "counsel" can choose to do so pro-bono, or NGOs/Churches may choose to fund counsel or have paid counsel on staff. Ultimately, having unqualified persons appearing is counterproductive.

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