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Refugee lawyer practice manual

Representing claimants before the Refugee Protection Division



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For more information

For more information please contact the Refugee Law Office (RLO) at 416-977-8111 or refugee@lao.on.ca

Refugee lawyer practice manual

1. Statutory mandate

The Ontario government introduced legislation in late 1998 that created an independent agency called Legal Aid Ontario (LAO). The purpose of LAO is to promote access to justice throughout Ontario for low-income individuals through the provision of high-quality legal services.

The *Legal Aid Services Act, 1998 (LASA)* establishes the following mandate for LAO:

- To promote access to justice throughout Ontario for low-income individuals by providing high quality legal aid services
- To encourage and facilitate flexibility and innovation in the provision of legal aid services
- To recognize the diverse legal needs of low-income individuals and disadvantaged communities
- To operate within a framework of accountability for the expenditure of public funds.

As part of its mandate, LAO is committed to identifying, assessing and recognizing the diverse legal needs of low-income individuals and disadvantaged communities. LAO provides legal aid services by any method it considers appropriate, including certificates, staff offices, duty counsel, community legal clinics, public legal education, summary assistance, alternative dispute resolution and self-help materials.

2. Vision

Legal Aid Ontario will pursue its legislative mandate with the goal of achieving:

- excellence in accessibility and quality of client service
- effective relationships with service providers, and
- efficient, accountable and innovative use of resources.

3. About this practice manual

This manual is intended to be a guide to best practices for lawyers and supervised paralegals representing refugee claimants before the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB).

The focus of the manual is on effective preparation of the Basis of Claim (BOC) form, which is crucial to the success of a claim.

This manual also offers an introduction to filing an appeal at the newly formed (operational and in force as of December 15, 2012) Refugee Appeal Division (RAD).

This is not intended to be a legislative guide.

Counsel should be familiar with the following:

- The *Immigration and Refugee Protection Act (IRPA)* (<http://laws-lois.justice.gc.ca/eng/acts/I-2.5/index.html>)
- The *Immigration and Refugee Protection Regulations* (<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-227/index.html>)
- The *Federal Courts Act*
- The *Federal Courts Rules*
- The *Federal Courts Immigration and Refugee Protection Rules* (<http://laws-lois.justice.gc.ca/eng/regulations/SOR-93-22/index.html>)
- The *RPD Rules* (<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-256/index.html>)
- Commentary to the *RPD* rules
- The *RAD Rules* (<http://laws-lois.justice.gc.ca/eng/regulations/SOR-2012-257/index.html>)
- Commentary to the *RAD* rules
- Chairperson's guidelines (IRB) (<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/pol/GuiDir/Pages/index.aspx>)

This manual is *not* a guide to jurisprudence. Links to resources on interpretation of the definitions are given at the end of the following section.

For comprehensive resources dealing with substantive areas of refugee law, review LAO LAW's research memoranda: <http://www.legalaid.on.ca/en/info/laolaw.asp>

3.1 For more information on Legal Aid Ontario

- [Legal Aid Services Act \(LASA\)](#)
- [LASA Regulation 106/99](#)
- [LASA Regulation 107/99](#)

Also go to:

- [Refugee and Immigration resources](#)
- [Tariff and Billing Handbook](#)
- [Interpreter Services](#)
- [LAO Panel standards for refugee law practitioners](#)

3.3 For more information about this manual

Please contact:

Address: Refugee Law Office
 20 Dundas Street W, Suite 201
 Toronto ON M5G 2H1

Telephone: 416-977-8111

Fax: 416-977-5567

Email: refugee@lao.on.ca

4. Resources for lawyers

4.1 LAO LAW (legal research department of LAO)

Lawyers acting on legal aid certificates have access to research assistance through

LAO LAW. Standard memoranda of law are provided free of charge for specific legal aid cases and can be ordered by email or phone.

In addition, LAO LAW:

- publishes [The Bottom Line](#), a weekly digest of important immigration and refugee cases.
- publishes memoranda, which it updates, on substantive areas of refugee and immigration law
- has a website which includes a link to introductory training modules on refugee and immigration law; [these recorded sessions, PowerPoint presentations and resources from 2014/15 can be accessed online.](#)

NOTE: These sessions have CPD accreditation with the Law Society of Upper Canada.

To contact LAO LAW:

Telephone: 416-979-1321 or toll free at 1-800-265-1392

Fax: 416-979-8946

Email: laolaw@lao.on.ca

Web site: www.research.legalaid.on.ca

4.2 Legal Aid Online

Legal Aid Online is a secure website that allows lawyers to:

- acknowledge certificates online
- submit criminal and civil certificate accounts
- submit duty counsel statements
- update contact information
- look up their annual billing limits

- review the status of submitted accounts and statements.

If you want to become a registered user of *Legal Aid Online*, contact the [Lawyer Service Centre](#) at (416) 979-9934 or toll free at 1-866 979-9934.

For more information, visit: <http://www.legalaid.on.ca/en/info/legalaidonline.asp>

4.3 LAOiFax

[LAOiFax](#) is an electronic cover sheet for your fax that is populated using information such as the type of document and certificate number. Based on these fields, iFax generates a reference number which will appear at the top of the cover sheet. LAO's fax system uses this number to route your document to the appropriate department.

4.4 LAO's second chair program

The [second chair mentoring program](#) is available to promote mentorship and enhance the quality of service to LAO clients. Approved experienced members of the bar can receive remuneration for acting as mentors to new or junior members of the bar. The work must be pursuant to a Legal Aid certificate and the mentor cannot work at the same firm or in association with the mentee. New lawyers can seek mentors to assist with and consult about complex cases. Experienced lawyers can also mentor junior lawyers to fulfil conditions of their empanelment through the panel standards program. Finally, experienced counsel can ask for a junior to assist with a complex case, which can also be funded through the second chair program.

4.5 Orientation for newly empaneled LAO refugee lawyers

Legal Aid Ontario is committed to supporting new members of the profession dedicated to offering legal services to Ontario's most vulnerable communities. In order to assist new counsel, several times a year LAO offers a full-day orientation on the many facets of running a successful practice. The training includes an explanation of all of the LAO resources available and detailed discussion of billing and tariff manual do's and don'ts. There is also an opportunity to hear tips for working with LAO and doing refugee work from experienced members of the bar. For more information about the next date for this orientation, contact: General-TrainingComments@lao.on.ca.

5. Definitions

5.1 Refugee protection

Under the *Immigration and Refugee Protection Act (IRPA)*, refugee protection is given to someone who is found to be a Convention Refugee or a Person in need of Protection. These terms are defined under Sections 96 and 97 of IRPA. Together they are known as the “consolidated grounds,” and once a person is found to meet either definition, they are often called simply a “protected person.”

The Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) has the authority not only to determine whether someone is a Convention Refugee, but also to make a determination as to whether a person is a Person in need of Protection. There is a single hearing at which all of these grounds will be considered.

IRPA provides the following definitions for Convention refugee and person in need of protection:

Convention Refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
- a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
 - b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

- 97.(1)A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally:
- c) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

- d) to a risk to their life or to a risk of cruel and unusual treatment or punishment if:
 - a. the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - b. the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,
 - c. the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and
 - d. the risk is not caused by the inability of that country to provide adequate health or medical care.

A protected person does not include someone who is excluded from the definition. The grounds for exclusion are set out in Articles 1E and 1F of the 1951 *United Nations Convention Relating to the Status of Refugees* (herein "*Refugee Convention*")¹.

Exclusion—Refugee Convention

98. A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

Articles 1(E) and 1(F) of the Refugee Convention are as follows:

- e) This Convention shall not apply to a person who is recognized by the competent authorities of the country in which that person has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.
- f) The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

¹ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137

- a. the person has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
- b. the person has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee
- c. the person has been guilty of acts contrary to the purposes and principles of the United Nations

If someone is excluded from the definition of Convention refugee on the grounds enumerated in Article 1(F) of the Convention, they must still have access to a risk assessment in order to protect their Charter rights. This is done through a specialized Pre-Removal Risk Assessment, which is restricted to consider only those grounds laid out in s. 97 of the *IRPA*. Other factors, such as any danger the person may pose to the public in Canada, may also be considered. This is a complicated area of law set out in s. 112(3) and s. 113(d) and (e) of *IRPA*.

Counsel encountering this type of case for the first time is advised to seek research support from LAO LAW. As well, junior counsel can seek to work with an experienced mentor through [LAO's second chair program](#).

Useful resources for learning about the interpretation of the definition of **Convention refugee (s. 96)** in Canadian law include the following:

- [Immigration and Refugee Board](#)
- [LAO LAW](#)
- [Canadian Association of Refugee Lawyers](#)

LAO LAW has a number of relevant memoranda on the consolidated grounds, exclusion, and the assessment of risk. Counsel is strongly advised to check LAO LAW before representing someone who may be excluded from the definitions under the Convention. This is an evolving and complex area of law which has been before the Supreme Court of Canada.

5.2 Designated Countries of Origin (DCOs)

Pursuant to legislative changes made in 2012, the Minister of Citizenship and Immigration has been given the power to deem certain countries, or specified areas of certain countries, as “safe” countries for refugees, and list them as Designated Countries of Origin (DCOs). Refugee claimants from these countries are subject to shorter

timelines for RPD hearings, and were intended to be denied access to remedies and procedural protections afforded to other refugee claimants.

The DCO list is subject to change by the Minister. An updated list of DCOs is available on the [Citizenship and Immigration Canada \(CIC\) website](#).

As indicated above, claimants from DCOs are subject to shorter timelines for RPD hearings. This has raised the potential for concern regarding procedural fairness:

- for Port of Entry (POE) claims from DCO countries, hearings will be held within 45 days of referral to the IRB
- for Inland DCO claims, hearings will be held within 30 days of referral to the IRB.

Before July 2015, Claimants from DCOs were **not** eligible to appeal rejected RPD claims to the Refugee Appeal Division (RAD) and they were only able to apply for leave and judicial review at the Federal Court. Unlike refugee claimants from other countries, they did not benefit from a statutory stay of removal while their appeal rights were exhausted.

On July 23, 2015, in ***YZ v Canada 2015 FC 892***, the Federal Court ruled that the Designated Country of Origin (DCO) scheme discriminates against refugee claimants who come from DCO countries by denying them access to the Refugee Appeal Division. Go to the full decision: <http://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/110850/index.do?r=AAAAAQACWVoB>

Justice Boswell struck down s. 110(2)(d.1) of IRPA because it violates equality rights under section 15 of the Charter. He refused to suspend the declaration of invalidity, despite the Department of Justice asking for a 12-month suspension, because DCO claimants should not spend one more day subject to inequality.

It is anticipated that this case will be argued at the Federal Court of Appeal, so stay tuned for developments.

As a result of this decision, claimants from DCOs now have access to appeal to the RAD, and now do benefit from a statutory stay pending their appeal to the RAD. This applies if they seek leave to judicial review a negative RAD decision as well.

DCO claimants are not eligible to apply for a Pre-Removal Risk Assessment (PRRA) for 36 months after their claim is rejected. The timeline is 12 months for all other claimants.

Claimants from DCOs also face other barriers in Canada, such as more limited health care coverage under the Interim Federal Health Plan (IFHP). Persons from DCOs are not eligible for a work permit in Canada while their refugee claim is in process or until their claim has been in the system for more than 180 days and no decision has been made.

If an individual has dual nationality (one country being a DCO and the other not a DCO), their claim will be considered in the DCO stream.

5.3 Designated foreign national (DFN)

A foreign national may be assigned this designation by the Minister of Public Safety if they are believed to have arrived in Canada illegally with a group, for example if they were smuggled for profit. Being designated has serious implications for their refugee claims and other rights in Canada.

Also known as “irregular arrivals,” DFNs are subject to mandatory immigration detention. There will be a review of their detention after 14 days, and if they are not released, their detention will be reviewed again every six months, excepting only minors aged 16 years and under. Mandatory conditions will be imposed by the CBSA if they are released.

Moreover, persons found to be DFNs are prohibited from applying for permanent residence for themselves and their family members for five years after a positive determination of their refugee claim, instead of becoming eligible immediately following a successful claim for refugee protection. If their claim is rejected, there is a five-year bar on applying for permanent residence on humanitarian and compassionate grounds. DFNs are subject to reporting requirements during this period.

For detailed information on DFNs and permanent residence, [go to the CIC’s Operational Bulletin 440-D](#).

6. First steps

6.1 The initial client interview

At the initial interview, counsel should explain to the claimant their role. Counsel should explain that everything the claimant says is confidential.

It is important to obtain all of the documents the claimant was given from Citizenship and Immigration Canada (CIC), the Canada Border Services Agency (CBSA), or from the Immigration and Refugee Board (IRB) right away.

6.1.1 Deadlines

Claimants who initiated their refugee claims at a Port of Entry (POE) are provided with a claimant “eligibility” document with their photograph. It is important to note the date stamp and date of signature on this eligibility document, as this is the date their claim was “referred” to the IRB. This date should correspond with the date the claimant was given a blank Basis of Claim (BOC) form to complete.

The BOC must be submitted to the Refugee Protection Division (RPD) of the IRB **within 15 days** of the date of referral for claimants who made their claims at port of entry (POE). POE claimants will also know their hearing dates. Counsel can confirm this date by contacting the IRB.

For other claimants who enter Canada and then decide to claim refugee protection afterwards, a completed BOC and other CIC forms must be presented at an inland CIC office. This is called an “inland claim.”

After these documents are accepted by CIC at an inland office, the claimant will be given a hearing date at the IRB—within 60 days for claimants from a non-DCO country or 30 days for claimants from a DCO country. In either case, claimants are given a *Notice to Appear for a Hearing* document, which sets out timelines and also dates for abandonment proceedings if deadlines are missed.

Counsel or the claimant can change the hearing date, if necessary, under s. 54(2) of the *RPD Rules*, so long as the request for a change of hearing date is made **within three working days** of the referral to the IRB. If more than three days have passed since the referral, a change of date *may* be possible, but is not guaranteed. (See s. 54 of the *Refugee Protection Division Rules*.)

Note

Because of the tight deadlines (i.e., documents to support a refugee claim must be submitted **10 days** before the hearing, at the latest), it is **critically important** that the claimant begin collecting documents to support their claim immediately.

After your initial meeting, follow up with the claimant to report the disclosure deadlines and outline, in a reporting letter, some of the evidence you discussed at that meeting.

6.2 Becoming counsel of record and seeking disclosure

It is advisable to write to the IRB advising that you are counsel of record. In your letter, request copies of the information the Board has received from CIC and the Canada Border Services Agency (CBSA) (See Appendix A—Sample letters). This will include forms the claimant has filled out as well as the port-of-entry or inland interview notes prepared by CIC or CBSA.

It is important to obtain these as early in the process as possible, preferably before the completion of the BOC form, in order to discuss and address any possible inaccuracies or errors in CIC or CBSA forms/ notes with the claimant during BOC preparation.

It is advisable to explain any exceptional circumstances when the BOC was drafted (client in detention, client or counsel ill, or short time to prepare) in the cover letter when the BOC is disclosed. It is preferable to include, in the BOC, only details which are certain as well as flexible, general statements upon which a client can elaborate either in a further affidavit filed as evidence or in oral testimony at the hearing. Where time is tight, one can allude to some details at this stage, such as efforts to seek state protection or attempts to move within the country, and elaborate on these details later. This is a strategy to use sparingly, however, and ought to be well-explained and, if possible, well-documented.

6.2.1 Extensions of time to prepare and file the BOC

If it is not possible to complete the BOC for a POE claim within the 15-day deadline, a request for an extension of time must be made to the Immigration and Refugee Board **three days** before the due date, where possible.

If the claimant has contacted you after this point, you must make an extension request immediately, providing detailed reasons why the claimant has not been able to prepare their BOC and file it on time, or meet the extension request deadline. It is essential to mention any difficulties or other factors which have delayed the claimant from retaining counsel, such as language barriers and the need for a qualified interpreter, being in

detention, physical or mental health problems that have made it difficult to retain and meet with counsel, etc. If there were any social services agencies involved with the claimant upon arrival, consider asking them for a letter to support the claimant's intention to pursue their claim. In addition, efforts should be made to obtain medical documentation if health is at issue for the claimant (go to: *RPD Rules 8(3)-(5)*).

The reason it is important to show due diligence and an intention to pursue the claim is that the Board will take steps to abandon the claim if the BOC is not filed on time. An intention to pursue the claim is an important consideration at an abandonment hearing.

Furthermore, any difficulties faced by counsel in trying to complete the BOC in time should be described in detail and supported with medical evidence, where possible. For instance, explain any problems getting a competent interpreter despite serious efforts, or issues with claims that are particularly complicated, or physical or psychological issues which make completing the BOC within the 15 days impossible.

6.3 Address changes

Tell the claimant about the importance of notifying counsel, the IRB, CBSA, and CIC of any change to their address (most will not understand that the IRB, CBSA and CIC are different bodies) and advise them to keep a copy of correspondence concerning change of address.

In all refugee claims, CIC and the IRB need to be advised of their address change, while certain claimants will also have to keep CBSA informed of their address change. For instance:

- if the claimant signed Terms and Conditions with the CBSA, they are required to inform the CBSA of any address change, in writing, **before** they move.
- if the claimant was detained and then released from immigration detention with a release order, they may be subject to conditions about where they must live or if they are permitted to move as well as how and when to inform the CBSA of their address change.

It is advisable to ask to see claimants' release orders, if applicable. However, counsel should be cautious about undertaking to notify CIC or CBSA of address changes, because the client's relationship with CIC or CBSA will continue after the refugee claim is complete.

If the claim is not successful, CIC will send the client's address to the Canada Border Services Agency (CBSA), who will be in contact with the claimant about removal arrangements once timelines for appealing to the RAD, if applicable, have passed (if notice of a RAD appeal is filed on time, enforcement of the conditional removal order will only take place once a RAD decision is rendered). An unenforceable or conditional

removal order is issued to all refugee claimants. It becomes enforceable if the claim is rejected and the deadlines for appeal rights have passed.

Keep copies of all correspondence concerning change of address, But if you undertake to advise the IRB, CBSA and /or CIC of any changes of address, be clear as to the limit of the undertaking and set it out in writing for the claimant.

7. The Basis of Claim (BOC) form

7.1 Interviewing the claimant to complete the BOC

– Adapted from a presentation given by Barbara Jackman, Barrister & Solicitor

The Basis of Claim (BOC) form is the most important form in the refugee process. In preparing the BOC, counsel needs to keep in mind the definitions of Convention refugee and persons in need of protection as well as both the inclusionary and exclusionary aspects of the claim.

The BOC includes questions about “personal data,” and questions concerning a claimant’s fear of return to a particular country (or countries, if the claimant has more than one country of citizenship or permanent residence). The personal data questions include questions about the claimant’s birth date, citizenship, family members, refugee claims made elsewhere, identity and travel documents, and how the claimant came to Canada.

The questions pertaining to the persecution and serious risk to a claimant’s life require him or her to answer questions about:

- past persecution or serious risks to life—harm, mistreatment or threats that have occurred against them or their family by any person(s) or group, and whether other similarly-situated persons experienced such harm or threats
- questions about future persecution or serious risks to life—what could happen to the claimant and his or her family in a forward-looking assessment
- efforts to seek state protection—the claimant’s ability or not to relocate safely and reasonably within their country
- the reason why they left their country at the time they did
- any attempts to seek refugee protection in other countries.

Prior to implementation of the legislative changes in December 2012, claimants were required to submit a Personal Information Form (PIF). It included a longer “narrative” after the personal data, setting out the incidents which caused the claimant to seek protection in Canada, and any attempts they made to obtain protection from the state.

It remains acceptable for a longer “narrative” to be appended to the end of the BOC. Many counsel prefer this practice, as it permits a claimant to explain their history and background using their own chronology and details pertaining to their culture, background and history that assist the reader in understanding their actions and fears. If this format is preferable to counsel, each question on the BOC form should still be

answered with at least one sentence, along with: “Please see paragraph XXX or line XXX in my enclosed narrative for more information.” Numbering the paragraphs or lines provides ease of reference.

The information in the BOC is **critically important** to the success of a refugee claim. It is the foundational, and usually the first, document used by the decision-maker to understand and ultimately test the claim. Discrepancies or omissions between the BOC, POE or interview notes, CIC/CBSA forms, any other applications or interactions with immigration authorities, claimant’s testimony and documentary evidence will be used to find the claimant not credible at the refugee hearing.

It is also **critically important** to use a skilled interpreter and to scrutinize *all* evidence prior to submission of the BOC, including the forms filled upon arrival, POE notes, personal evidence that the client will submit and rely upon, and a person’s immigration history with Canada or other countries.

The BOC is used by CIC and CBSA in screening for potential ministerial interventions, and will be used in the future if an application for cessation or vacation is brought back to the IRB.

When contacting the claimant to arrange the first interview to prepare the BOC, or at the first interview, suggest that they complete a draft copy of the BOC. Given the tight deadlines involved, having the claimant do a first draft of their story may save you the time you would otherwise need to allocate to starting from scratch in a series of interviews.

Reassure the claimant that:

- counsel will be working with them to complete the BOC—this is just a starting point, and you will work with them to make sure all of the facts are included
- they can leave blank anything about which they are uncertain
- it would be helpful if they outline in chronological order the things that happened that caused them to be afraid to go back to their country.

This may not be possible or the right approach for all clients—you will need to assess your client’s ability to conduct this task during your first interview. The risks are that:

- a claimant, especially a claimant lacking in education, may feel this assignment is a requirement that has to be done even if they are not capable of doing so
- the client might seek out a friend to help him or her, or even a consultant; the draft you get back might not be the client’s own story

- clients may lack the necessary language skills or ability to fill out the BOC or provide a written narrative in their own language
- asking many claimants to just “write their story” will *not* elucidate the necessary elements of the refugee claim.

Whether or not you are working from a first draft prepared by the claimant or that you are developing for the claimant, it is important that you question the claimant about anything that appears “odd” or “implausible” in their account, so as to best explain the claimant’s history in the BOC, and to root out possible misapprehensions or inaccuracies in the claimant’s description of events. It is your job to protect your client’s interests by advising the client what you think the perception of the Board might be and identifying weaknesses or implausibilities in the claim in the preparatory stages.

You also need to inquire about the claimant’s situation and explain the Convention definition and consolidated grounds in clear terms. Although the Board has jurisdiction to grant refugee protection on the basis of the consolidated grounds as well as on the Convention refugee definition, most claims are still related to the Convention refugee definition.

Starting from that premise, explore the claimant’s connection to any of the grounds in the Convention refugee definition. Then ascertain if the claimant has ever been a member of a political party, religious organization or social group. If so, get the name and other details about the party or group. In the case of a political party, ask about the party’s political line, ideology or platform and whether the claimant has any documentation to prove this involvement.

It is very important to canvass the evidence that the claimant has to support their claim at the first opportunity. As stated above, this discussion of evidence as well as what the claimant has, hopes to obtain and will try to obtain should be reflected in the reporting letter with the disclosure deadlines after the first meeting.

Constructing a BOC narrative that touches upon all of the requisite elements takes skill and a knowledge of refugee law. For this reason, we highly recommend watching the videos identified below, which include LSUC accreditation.

Online training video

For more information on this topic, please refer to these training modules, all available on the [LAO LAW website](#):

- [Overview of Immigration and Refugee System - Basis of Claim forms \(part 1\)](#), and
- [Developing a Theory of the Case and Plan for Obtaining Supporting Evidence \(part 2\)](#)

If your client is making an inland claim, i.e., they did not make a refugee claim at the airport or in detention, they will need to fill out all of the background forms *as well as* the BOC. The number of forms necessary depends on how many family members your client has, and whether or not they have children with them or a spouse.

Go to fillable electronic copies of the forms, as well as a useful guide to their interpretation on [CIC's website](#).

7.2 Amending the BOC (adding or changing information)

If substantive details in the BOC are wrong, or important details are missing, counsel can prepare a BOC amendment that provides the correct information. It is important that counsel provide even substantial revisions to the BOC in an amendment, particularly if they learn from their client that the entire basis for the risk is changing, or that they need to add an additional basis for the risk.

Since the claimant must swear under oath at the beginning of their refugee hearing as to the truthfulness of the BOC, these must be changed or added prior to their testimony.

It is very important, however, to make all changes before the disclosure deadline—**10 days prior to the hearing**, according to BOC Appendix instructions.

This is because amendments after the 10-day disclosure deadline may become subject to adversarial examination by the Board and result in negative credibility findings, particularly where the changes relate to important, rather than elaborative aspects, of the claim.

Changes/additions to the BOC after it is filed should be made by bolding and underlining the additions, and striking through the words or dates that are inaccurate. The claimant should initial and date the place in the form where the amendments are made, and also sign the “Declaration” at the end of the BOC. If the claimant requires an interpreter, the

interpreter must interpret the BOC and BOC amendments to the claimant, and sign the Interpreter's Declaration at the end of the BOC.

In all cases where a BOC amendment is filed, an explanation must be given for why the amendment is being made. An explanation may include a claimant's mental or physical illness, shame or discomfort discussing an event, or other explanation that mitigates adverse inferences. Or it may be as simple as "in reviewing my BOC before the hearing, I realized that I had made an error," or "since I filed my BOC, I have found out more important information that I am adding now."

If the amendment cannot be made by the 10-day disclosure deadline, it should be made as soon as possible thereafter, and a reason provided at the hearing for the lateness.

7.3 Questions to ask the claimant in preparing their BOC

7.3.1 Membership in a political (or perceived to be political) group

Membership in a group or an organization may be established by documentary evidence, witness evidence, through the evidence of the claimant or through a combination of these.

You can ask, "When did you first become involved in the group?" This may not be the same date as when the person became a member. You can also ask why—"Why did you first become involved? What was your motivation? Your reasons for becoming involved in the group?"

Other suggestions:

- Find out if the claimant attended meetings or demonstrations.
- Note if the claimant had a role in organizing or assisting at meetings or demonstrations.
- Get as much detail as possible about what the claimant actually did, and be careful to characterize the role properly.

If the claimant is described as an organizer, and it turns out he or she was one of many who gave out pamphlets, the Board might see this as the claimant trying to exaggerate his or her importance.

On the other hand, if the claimant actually was an organizer, but details about what the claimant did are not described in the BOC, the Board might accuse the claimant of trying to bolster his or her claim when this role is described at the hearing.

Where possible, get the exact dates of the demonstrations attended by the claimant, but only when they are very sure about them. Check the country research to see if these dates were noted in human rights reports or news articles. If differences are noted, put them to the claimant to be able to explain it, and if the events are not documented it is also acceptable to give an approximation or timeframe, depending on the nature of the event.

- Meetings' frequency, location, and the number of attendees should be noted.

7.3.1.1 How the authorities viewed the group

The claimant should be asked how the authorities or other groups viewed the group. It is important to note any problems that the claimant had because of his or her membership.

7.3.1.2 Problems arising from other family members' membership in a group

Sometimes a claimant has problems because of a family member's involvement in an organization, rather than their own involvement. Ask whether any members of the claimant's family have been involved. If so, explore when the family members were involved, the degree of involvement, and whether or not that person or persons had problems relating to their involvement.

If there was involvement, find out where the family members are now. If the family members are still in the country, seek to obtain evidence of the family member's involvement, and find out if the claimant knows whether they have had any problems since the claimant left and whether they are still involved. Ask what has happened to others in the same situation.

7.3.1.3 Problems faced by the claimant

The narrative should indicate when the claimant's problems began, the nature of the problems, and where possible, the dates when events occurred.

A note of caution concerning dates: do not write an exact date unless the claimant is completely certain of it, particularly if the claimant is experiencing problems remembering specific dates.

Approximate dates are much better to use if the claimant is not certain as to specific dates for events. If the claimant knows that it was "around" or "approximately on" a particular date, use that language. If the claimant knows the month and the year, but is not sure of the date, then state the month in the BOC.

You can also provide a brief explanation. Dates are of less importance in many non-Western cultures. It can be difficult to convert or estimate Gregorian calendar dates when events occurred in countries that do not use the Gregorian calendar.

7.3.1.4 Similarly-situated persons

The experiences of persons similarly situated to the claimant can help establish the objective basis of the claimant's fears. While the documentary evidence may be a source for this information, the claimant may have knowledge of specific incidents involving friends, neighbours or other members of his or her organization. Again, it is necessary to describe when the problems occurred, the nature of the problems, and the results of the problems, particularly any state involvement.

It is important to include all matters that relate back to the claimant's fears, such as threats to family members, friends or associates of the claimant in the country of reference since the claimant fled that country. An update of circumstances that have occurred since the filing of the BOC, or of information that was not known at the time the BOC was submitted often form the basis of a BOC amendment.

7.3.2 Detention

Was the claimant detained?

7.3.2.1 Details of arrest and detention

When a claimant has been detained, it is important to elicit information about that detention to the extent that the claimant can remember.

At the same time, remember that memories of traumatic incidents are not always clear and easy to recall. Consider obtaining a psychological report if the claimant seems traumatized and also consider reading and sharing the excellent paper by Hilary Evans Cameron, "Refugee status determinations and the limits of memory," available in the *International Journal of Refugee Law* (2010) 22 (4): 469-511.

Try and find out:

- the date or approximate dates when they were in detention
- who detained them
- the circumstances of their arrest and detention
- whether the person(s) were uniformed
- where the claimant was arrested
- where they were taken
- how long they were detained

- what was said to the claimant by the person(s) who arrested and detained the claimant
- if they were arrested, whether they were charged with any offence, and whether anything was written down by the authorities who detained them. The claimant may be able to obtain a copy of an arrest warrant, bail paper, or other type of document that would be helpful corroborating evidence for their refugee claim.

A detailed description of the prison or other place of detention is also important. Ask about any interrogation, including details about the treatment received and the questions asked. The conditions in the detention facility and the treatment the claimant received are relevant, especially where the claim could be based on the ground of cruel and unusual treatment for extremely poor conditions.

7.3.2.2 Release or escape

Questions also need to be asked about how the claimant got out of detention. Was he or she released, or was there an escape? A paid bribe or other influence needs to be explained. In the case of a release, did that end the claimant's contact with the authorities or did they have to report to the police or other authorities? Were there any conditions attached to the release? Did someone have to post bail?

7.3.2.3 Reporting to police or authorities

Even where the claimant was not detained, the claimant should be asked if they were required to report to the police or other authorities. If so, find out if there any were documents to that effect that the claimant had to sign. It is unlikely that they would have a copy of such a document, but you can ask to be certain.

7.3.2.4 Torture and other mistreatment

Cases where the claimant has been tortured raise special difficulties. The claimant may have been psychologically as well as physically harmed or scarred. While it is important to get a complete description of what occurred, it is equally important to be sensitive to the client's wellbeing. It is usually a good idea not to go into too much detail in your very first client meeting.

Ask if they have scars or other physical injuries. Find out if the claimant received any medical or psychological treatment afterwards. If they did, if possible try and obtain a report of that treatment, as soon as possible. Additionally, take steps to obtain a medical and/or psychological report to verify the claimant's injuries or psychological trauma and related issues, as well as to ensure that they obtain the medical or psychological treatment that could help them to begin to recover from their experiences.

7.3.3 State protection

The issue of state protection needs to be addressed in the BOC if the claimant fears non-state actors or authorities that are not national in scope. Ask the claimant questions like these, and include their answers, in detail, on their BOC

- Did you make efforts to try to get state protection? If so, what was the result? If not, why not?
- Did you not seek state protection because you had tried in the past and it was ineffective: Do you know other people who tried but were unsuccessful? Please provide as much detail as possible of your attempts or knowledge of others who didn't receive protection.
- Were you treated poorly or disregarded when approaching the state for protection? Please provide details of this experience.

7.3.4 Internal flight alternative (IFA)

If the claim is based on the Convention refugee definition, or on the Convention against torture, the claimant will need to show there is no place in their country where they would be free from risk, and where it would be reasonable to go and to stay based on their previous experience and documentary evidence.

This means the claimant is going to have to show that he or she has no internal flight alternative (IFA).

To document this, you should ask the claimant if he or she tried to go to another part of their country to be safe. If the claimant did try moving to another place:

- find out why they did not stay there; note whether the authorities or anyone else the claimant fears came looking for them, or if they received any threats there
- ask about the journey there
- ask whether the claimant was able to work or study there.
- ask whether their spouse and/or children were able to come with them and work or study
- Did they face incidents of discrimination or have other problems in the area? If the claimant was in hiding, or could not live a normal life there, set this out in detail.

If there are other reasons why the claimant could not go to or remain in another part of his or her country, add them. In some cases, reaching the possible "safe" area of the country would be too dangerous a trip for the claimant, depending on

country conditions and on their personal circumstances (e.g. gender, family composition, disability). All of these reasons and the claimant's thought process should be reflected in the BOC.

Note

The fact of an IFA is not inherent to the definition of a refugee, but must be raised by the decision-maker to become relevant. For this reason, the Board must give notice at the beginning of a hearing if IFA is an issue and must also specify a particular proposed IFA. This notice is required because the right to be heard and know the case against you are foundational principles of natural justice.

Some Federal Courts have found that notice *at the hearing itself* is not sufficient time to prepare. If this is raised at a hearing and more evidence is required, request the opportunity to submit post-hearing evidence, to take a break to speak with your client, or, in limited circumstances, to request an adjournment. If these requests are denied, you have laid the grounds for an appeal based on procedural fairness.

Nevertheless, preparation is key. Despite notice being required, it is important to include details relevant to the issue of IFA in the BOC, and to include research that shows no other locations are reasonable, *before* the hearing. If you find, in doing case law research, that one or two locations are commonly proposed as IFAs in claims from a given country, it is wise to prepare for this issue.

Your client may not have tried to go elsewhere in their country, so you will have to do some of your own research. When you gather evidence to support the claim, look for any evidence that indicates that the harm feared by your client exists throughout the country, to rebut the suggestion that an IFA exists.

7.3.5 Departure from country of persecution

Another area which needs to be canvassed is the timing of when the claimant decided to leave their country. If there was a passage of time from the last persecutory incident, some explanation as to why there were no further persecutory acts in that time will need to be given. State whether the claimant changed his or her place of residence. If such a change provided a temporary solution, it will be necessary to try to explain why this could not be a permanent solution.

If during this time, the claimant encountered problems that might be considered to be less than persecution, these should be canvassed and included. Cumulative acts of

discrimination, for example, can be considered persecution. Smaller incidents may also provide reasonable explanations for why a claimant left at a given time.

Some of the questions in the personal data section of the BOC may need to be explained in the narrative. For instance, if the claimant was able to leave their country using their own passport, they should be asked if there were any problems obtaining the passport.

Similarly, clearly explain in the BOC if the claimant had to pay a bribe to leave, or if there were some other unusual aspects to their leaving the country. The narrative should also set out if the claimant had to leave on a false passport, or by using someone else's passport.

Mention whether the claimant had problems leaving his or her country in the BOC. Describe how they were not able to leave at an earlier time or if they felt a fear of harm at that point because there were problems arranging their departure.

7.3.6 Travel outside their country

Claimants should be cautioned, at the outset – before the BOC is filed for POE claims, or before the BOC and all the other CIC forms are filed for inland refugee claims – that **full disclosure of all their travel and immigration history, including previous applications for visas** to the CBSA and CIC is the only way to avoid negative credibility findings or ministerial interventions.

It is now regular practice for CIC and CBSA to send the fingerprints of all refugee claimants to many other countries, looking for a positive “match.” There are reciprocal agreements in place with many countries for this information sharing, including (but not limited to) the United States, the United Kingdom, South Korea, and many European Union countries.

Positive “matches” will come back for matters such as entry and exit into those countries, immigration applications made in these countries, refugee claims or visa applications made to/in those countries, immigration status obtained, as well as any criminal charges or convictions in those countries.

The minister will often still intervene if a claimant has fully disclosed something that may raise issues of exclusion, i.e. that the claimant may have a form of permanent residence or citizenship in another third, “safe” country or a criminal conviction in a third country for something the minister will try and maintain is “serious” enough for exclusion. Nonetheless, it is much better for the claimant to have fully disclosed their history at the outset, to demonstrate that they are not hiding anything, and to preserve their credibility.

It is important to tell your client this information at the outset. In the past, the CBSA and CIC did not routinely do fingerprint matching as extensively or for the breadth of

countries that they do now, and the claimant may receive inaccurate information from members of their community telling them not to disclose past travel or immigration history. This is an important point, generally. Counsel should always ask clients what they have heard about the refugee process at one of the first meetings. Often, claimants have received misinformation that can have an impact on their actions and process. Work on establishing trust with your client so that you can dispel any inaccurate information.

7.3.7 Failure to claim elsewhere

If the claimant passed through other countries on their way to Canada, they should explain in the narrative why they did not make a refugee claim in those countries. Were they told not to by someone who assisted them in getting out of their country? Did they want to join family or community members in Canada? These questions are relevant and will most likely come up at the hearing.

7.3.8 Re-availment

If the claimant previously travelled outside of his or her country, and then returned to that country, a detailed explanation should be given, particularly if the claimant faced incidents of persecution before leaving.

7.3.9 Delay in claiming in Canada

If the claimant did not claim at the port-of-entry, find out in detail the reasons why. Ask how they learned about making a refugee claim, and what prompted them to do so and when. Find out what barriers or impediments (if any) the claimant faced in learning about the refugee process in Canada, and what they understood about how their fears could meet the definition for refugee protection.

7.3.10 Recent information from country

Ask the claimant about any information he or she has received since leaving their country. The claimant may have received information that people are still looking for or asking about them. Also, the claimant may have some information about what has happened to family members or persons similarly situated to them. This type of updated information should be included in the BOC. If controversial or central to the claim, such information might also be added to the BOC through an amendment, prior to the hearing.

7.4 Finalizing the BOC

Once the draft of the BOC has been completed, it is best to finalize it on another day, if possible. This will give the claimant a chance to think about any information that may have been left out, and for the lawyer to consider whether there are any areas which need to be explored further.

It is prudent to do brief country research at this stage, to see if elements of the claim can be independently verified. If inconsistencies between objective sources and the client's account arise, be sure to discuss these with your client at your next meeting, and be prepared to explain them at the hearing.

It bears repeating that in finalizing the BOC, counsel should be especially alert to any discrepancies in dates between the narrative and other parts of the form, as well as any discrepancies between the BOC and the other CIC forms completed by the claimant. The claimant should offer an explanation in the BOC for any inaccuracy in the claimant's identity document(s).

It is important to clarify any inconsistencies, and where there is a discrepancy with a CIC form, it is advisable to provide the claimant's explanation for it in the narrative. For example, there may be many factors that contributed to any inaccuracies: interpretation over the telephone, exhaustion due to lengthy travel, a feeling of being rushed or a fear of officials. Where there are significant discrepancies, the context of the POE interview should be described in the BOC and possibly cover letter.

7.5 Filing the BOC

Once the BOC has been translated to the claimant through an interpreter, the claimant has to sign in the spaces provided. Three copies of the BOC must be made.

For port of entry claims, it is important to deliver the BOCs to the Immigration and Refugee Board (IRB) in a reliable manner, such as by courier, to ensure proof of service.

The courier must deliver the original and three copies of the BOC to the reception at the IRB. The receptionist at the IRB will date-stamp the copies and give two back to the courier to bring back to the office. One should go into the file, and the other should be given to the claimant, by mail, or by asking them to pick it up.

For inland claims, the claimant must bring the completed BOC and the five CIC forms to an inland office of CIC when making their refugee claim, plus one copy of all of the forms. Include a signed CIC Use of Representative Form. Make a copy of all the completed forms for the file.

Often inland claimants will be given an appointment date to return to CIC with their completed forms. Inland claimants have been sent away without CIC accepting their forms because they were deemed incomplete. In these situations, it will be important to keep track of the dates the claimant approached the CIC, in case the issue of delay in making a claim (and the claimant's subjective fear) becomes an issue at the hearing. Another excellent paper by Hilary Evans Cameron, "[Risk Theory and 'Subjective Fear': The Role of Risk Perception, Assessment, and Management in Refugee Status Determinations](#)" is available online.

If you have been retained, provide the claimant with a cover letter setting out dates when you will be available to attend the hearing. The suggested dates must be within the timeline for hearings mandated by IRPA: within 30 days from submission of the BOC and other forms for DCO claimants, and within 60 days for non-DCO claimants.

Once the BOC and other CIC forms are accepted by the inland CIC office, the claimant will be given a hearing date and other documents (ex. Refugee Eligibility document,)

7.6 Reporting back to the claimant

With a copy of the IRB-stamped BOC to the claimant, write the claimant a letter advising that he or she can now apply for an employment authorization and/or a student authorization (unless they are a DFN or from a DCO). [Applications may be completed online on the CIC Web site.](#)

7.7 Claimant gathering documents to support the claim

Tell the claimant that they need to try to get personal identity and other supporting documents well before the disclosure deadline (10 days before the hearing).

If a port of entry claim, the claimant's passport or other identity document(s) will likely have been seized by the CBSA. The claimant should have been given a copy of any document that was seized. For inland claims, a claimant must produce some kind of identity document, and the original will be seized by CIC at the inland CIC office. A photocopy will be given to the claimant. (Counsel should keep a copy on file).

Documents will often need to be translated and reviewed by counsel before they are submitted, hence the claimant must provide supporting documentation to counsel as soon as it becomes available.

At the time of finalizing the BOC, or even prior to that point, it is **recommended practice for counsel** to set out in a letter to the claimant the specific types of documents they should be attempting to gather. It is important to tell the claimant to keep all envelopes in which letters and other documents are received, and to keep track of all their efforts to try and obtain documents.

See Appendix A for a sample letter to the client detailing the supporting documents that the claimant should try and obtain.

The Board will want to see all the claimant's original documents, and will question the claimant about what they did to try and obtain personal supporting documents. The circumstances of how they sought the documents may be questioned, and how they obtained them. The circumstances of their efforts to try and obtain documents when no documents could be obtained can often be a major issue in the refugee claim, and a claimant should be informed of this as early as possible.

Counsel should emphasize the importance of the BOC again. If the claimant discovers any mistakes after the BOC has been filed, or the claimant receives new information, he or she should contact counsel at once. Prior to the hearing, the BOC should be read back to the claimant with an interpreter as part of hearing preparation.

7.8 Counsel gathering evidence to support the claim

7.8.1 Obtaining medical/ psychological assessments

In many cases, after interviewing the claimant, it will be apparent that a medical or psychological report will assist the case.

Refer the claimant to a doctor who has experience dealing with refugee claimants or people who have experienced torture. Physical assessments can corroborate injuries the claimant has suffered or medical procedures they have had. Psychiatric expertise can be helpful in identifying Post-Traumatic Stress Disorder and other symptoms claimants suffer from as a direct result of what they experienced in their country before they fled.

The names of experienced doctors and psychiatrists can be obtained from the Canadian Centre for Victims of Torture (CCVT) at (416) 363-1066. The Refugee Lawyers Association (RLA) list-serve also is a useful source for finding professional referrals for doctors and specialists who can provide reports for the claimant. More information about the RLA can be found at <https://rlaontario.wordpress.com/about-2/>

- The initial contact with the doctor to request a physical or a psychological assessment can be made by phone. Confirm the appointment in writing.
- Where the claimant is covered by a legal aid certificate, the certificate number must be included in the letter. This means that the doctor must charge a fixed rate for the medical report, in accordance with Legal Aid Ontario's tariffs.
- If there is a deadline for the report to be submitted, (i.e. the 10-day disclosure deadline or hearing date), this should also be brought to the attention of the doctor immediately both verbally and in writing. It is good practice to provide the doctor with a deadline that will permit you to review it with the claimant, and then contact the doctor if any errors are noted in the report, or follow up questions arise. Never disclose a report to the IRB without reviewing it yourself and also with your client.
- Send the doctor a copy of the BOC narrative before the appointment; it can be attached to the confirmation letter.

- The claimant should be advised of the purpose of the appointment, the importance of attending, as well as the time and date of the assessment. Tell the claimant that the doctor will already have a copy of the BOC narrative.

If an interpreter is required, work with your client to make sure that one is available.

- Once the assessment has been completed, request that the doctor forward a draft for review. When booking the appointment, find out how long it will take to obtain the report.
- Review the draft report to ensure accuracy with respect to the BOC narrative and other personal information. If upon review, counsel feels that there are mistakes, or that some matters have been overlooked, contact the doctor immediately.
 - Depending on the doctor’s diagnosis and the symptoms/problems noted in the report, counsel should consider whether an application to designate the claimant as a vulnerable person should be made to the Board and which accommodations should be requested. [Go to Chairperson’s Guideline 8 – Procedures With Respect to Vulnerable Persons Appearing Before the IRB.](#)
- Once the complete report has been received, counsel should notify the claimant where a doctor has recommended follow-up treatment or therapy. If treatment is not been pursued, counsel should prepare the claimant to answer this question at the hearing. Also, if counsel anticipates that any aspect of the doctor’s report will give rise to credibility concerns at the hearing, counsel should review and discuss the report with the claimant.
- The report, like all other evidence, has to be filed with the Board at least **10 days** before the hearing date. If the report is received after this point, submit it as soon as possible. If it is not available until the date of the hearing, be prepared to argue why it is important and relevant to the claim, how it adds new information to the claim and the reason why it could not have been submitted by the 10 day disclosure deadline. It will be important to document correspondence with the doctor concerning the referral and the date the report was completed, within the new short timelines.

7.9 Supporting the objective basis of the claim

7.9.1 Country conditions research

Note: This section was originally based on *Country conditions research and documentation for refugee claims*, written by Matya Kotlier for the Refugee Law Office

After interviewing the claimant for preparation of the BOC, counsel should have answers to the following questions:

- What is the basis of the claim?
- Who is the claimant and why do they fear returning to their country?
- What are the identifying characteristics which put her at risk?
- Who is the claimant afraid of and why?
- Why did, didn't and/or can't the claimant approach the state for adequate protection?
- IFA considerations – for example, is there evidence of the agent of persecution activity throughout the country? Did the claimant try to go to another location? What happened? etc.

The next step is for counsel to strategize about what evidence to present to support the objective basis for the claim. In order to show there is an objective basis to the claim it is necessary to provide evidence of the country conditions in the country or countries where the claimant fears persecution. Evidence of country conditions can be introduced in three ways:

- Documentary evidence (human rights reports, newspaper or magazine articles, books, letters from friends or relatives, personal documentation: membership or medical documentation)
- Expert evidence (this can be by the expert testifying at the hearing, or by way of affidavit or report)
- Oral evidence. This is from the claimant and also other witnesses who have knowledge of the country (or claimant) but who may not be qualified as experts.

Where witnesses are being called, use Rule 44 of the *Refugee Protection Division Rules*.

Rule 44 requires notice to be given to the Board and to any other parties of the witness' contact information, the purpose and substance of the witness's testimony, the time needed for the witness's testimony, and whether counsel wishes the witness to testify by videoconference or telephone.

In the case of expert witnesses, the rule is more onerous; counsel must provide a signed summary of the witness's evidence, as well as a description of the witness's qualifications and/or a copy of their CV.

The type of documentary evidence that is necessary depends on who the agent of persecution is.

If the agent of persecution is part of the government authorities, counsel should:

- document human rights abuses by the authorities in general, and of human rights abuses by the authorities against persons with a similar risk profile to the claimant
- document abuses by the particular branch of the authorities that the claimant fears, and evidence that they operate throughout the country (IFA)
- document any impunity the government authorities have, and/or the lack of adequate prosecution of human rights violators.

In a federal state or in any situation where the claimant fears local authorities, it may be necessary to research the reach of the authority's power.

Sometimes the agents of persecution, while not governmental agents themselves, are linked to governmental authorities. Examples include paramilitary groups, death squads, and some religious communities (for example communities in a theocracy). In such situations, it is important to:

- document the abuses by the group
- document the group's ties to the government authorities
- document ways in which the group operates with impunity, or the lack of adequate prosecution of its members for human rights violations by the state, and again, the breadth of their operation throughout the country for IFA purposes.

For either section 96 or 97 claims, it is not necessary for the agent of persecution to be connected to the state. Examples of such non-state agents are rebel groups, drug cartels, religious communities, families, spouses (in cases of domestic abuse), and community members at large (where discrimination and violence against someone with the claimant's profile is widespread).

In such cases, one should try to:

- document the human rights abuses by the group or individual
- document any influence or ties which the group (or individual) may have with the authorities; although a connection to the state is not necessary, it may be relevant in showing that the state may not provide protection
- document any impunity the specific group has and/or the lack of adequate prosecution or state response to the human rights violations of the individual or group, generally.

In cases involving repeated and persistent acts of discrimination, or harm perpetrated by certain members of society against a group of persons, human rights abuses and systemic discrimination in workplaces, schooling, housing, and the provision of medical care or other social or government services, should be documented.

7.9.2 Claimant-specific evidence concerning lack of protection

Desirable documentation would include evidence showing the inability or unwillingness to provide protection to:

- the claimant—Copies of police reports or declarations or denunciations made against or by the claimant are particularly useful, or
- to persons who are similarly situated to the claimant—human rights reports or affidavits by such individuals are examples of probative documentary evidence.

Carefully scrutinize all documents and compare them with dates and statements in the BOC. Make sure that the translation is accurate and that they are not inconsistent or raise credibility concerns.

There often Response to Information Requests (RIRs) on the IRB’s National Documentation Package (NDP) for each country. These describe problems in the creation of fraudulent documents, or describe what such documents “should look like”.

While the Board holds these RIRs in high regard, they can be outdated and flawed. To ensure that the claimant is not caught off guard by questions about why their document differs from the description in a RIR, you should go through the information in a RIR with the claimant if his/her supporting document does not contain the security features described in the RIR, or has a description that varies from the RIR. There may be a valid explanation. . Moreover, in such a situation, counsel should consider obtaining evidence from others in the claimant’s ethnic community in Canada, in their own country, or members of the RLA who have represented similar clients, where appropriate. Such an inquiry must be done in a way which will not put the claimant or their relatives at risk.

7.9.3 Where to find country documentation

[The National Documentation Package](#) (NDP) includes a selection of documents on issues that are relevant to the determination of refugee protection claims for each country. The NDP is considered to be part of the record in every claim before the Board. It serves as a starting point to research and needs to be supplemented with additional claimant-specific research.

The NDP normally consists of some human rights reports such as:

- the Amnesty International annual report

- response to Information Requests (RIRs)—responses to requests for information from the IRB in previous cases, which are, sometimes, helpful in establishing that a state cannot offer adequate protection, or that similarly-situated persons to the claimant face risk in a particular country.
- the U.S. Department of State Country Report on Human Rights Practices (DOS reports) and reports from other countries

Be cautious about relying on RIRs at face value because:

- a RIR may not tell the whole story or it may be overly optimistic about human rights improvements in a country.
- large portions of RIRs are often based on things such as excerpts from a telephone call with a particular official at one point in time, or selected quotes from an interview with an expert, which can mean that the information set out in the RIR may not be a full and accurate description of the human rights situation
- information supportive of claimants' risks may not be included, even if the particular expert or official had indeed provided such information.

It is possible to contact the experts cited in RIRs and verify whether their comments were fully represented, if they are particularly damaging to a claim. You can also review the full news article if a portion was cited that is detrimental to the claim, to make sure it has not been distorted or is misleading through use of selective quotations.

Likewise, while the sources in the NDP are held in high esteem by most Board members, other country documents in the NDPs should not be relied on exclusively and must also be looked at critically. For example, the U.S. DOS reports may be overly optimistic about human rights improvements by American allies. The U.K. Home Office reports constitute a series of citations of other documents, and can make sweeping judgments about whole classes of refugees.

To counter assertions in those documents, it is necessary to find and submit different, persuasive documentary evidence concerning the human rights situation in the claimant's country and the risks specifically related to the claimant. Also, the NDPs, and especially particular RIRs, can become stale well before they are revised, which is usually once a year. Counsel should ensure that more recent documentation is submitted as evidence.

Where a particular citation is damaging to a case, for instance, read the primary source being cited. It often provides helpful information or a more balanced picture. In this cases, include the primary source in your disclosure to the Board.

In some cases, it may be necessary to look for expert witnesses or the actual source quoted to counter information in these documents and yield a more fulsome and more accurate description of the human rights situation in the claimant's country.

It is, of course, not necessary to duplicate information in the NDP when submitting your own documentary evidence since the NDP is considered to be part of the record before the RPD.

There is an abundance of human rights reports and other sources of information on the Internet. You can go to:

- [Refugee Lawyers Association](#)
- [Amnesty International](#)
- [BBC World News](#)
- [European Country of Origin Information Network](#)
- [Freedom House](#)
- [Human Rights Watch](#)
- [IRIN News](#)
- [RefWorld](#)
- [United Kingdom Country of Origin Reports](#)
- [UN News Centre](#)
- [United States Department of State Human Rights Reports](#)

Online training video available

The training module on Research Skills on the [LAO LAW](#) website reviews additional sources of information through the Toronto Public Library as well as tips about contacting an expert to ask for claimant-specific information.

7.9.4 Disclosure of documents

Rule 34 of the *RPD Rules* requires that documents are disclosed **10 days** before the hearing. An exception is made for documentary evidence introduced in a reply to disclosure from the minister or from the Refugee Protection Division itself; such documents may be introduced **five days** before the hearing.

In order to get an exemption from these time limits, counsel should be aware of Rule 36, and will need to address the following factors:

- the relevance and probative value of the documents
- whether they bring “new” evidence to the hearing and
- whether, with reasonable effort, counsel could have submitted them earlier.

The form in which documents must be submitted to the Board, as set out in Rule 31 of the *RPD Rules*, is that documents can be on single or double-sided, letter-sized (8 ½” x 11”) paper. If there is more than one document, the package must be page numbered and have an index.

In addition, in accordance with Rule 32 of the *RPD Rules*, all documents must be translated into English or French.

According to Rule 42 of the *RPD Rules*, the original personal supporting documents must be given to the Board at the beginning of the hearing, unless the Board directs a party to do so at another point in time (i.e. before the hearing), and, in this situation, must be submitted to the Board “without delay” following that request.

In situations where late disclosure is contentious, it is also helpful to have regard to RPD Rule 70, which allows the Board wide discretion in ensuring the fairness of proceedings before it, set out as follows:

70. The Division may, after giving the parties notice and an opportunity to object,

- (a) act on its own initiative, without a party having to make an application or request to the Division
- (b) change a requirement of a rule
- (c) excuse a person from a requirement of a rule and
- (d) extend a time limit, before or after the time limit has expired, or shorten it if the time limit has not expired.

8. The refugee hearing

Hearings before the RPD are generally before a single member of the Board.

According to the Board's policy [Designation of Three- Member Panels – Refugee Protection Division approach](#), three-member panels will be assigned solely for training purposes, decided on a case by case basis, at the Minister's initiative, with notice to the parties.

The decision of the three-member panel may be unanimous, or each member may issue their own concurring or dissenting reasons. If there are dissenting reasons, the majority decision will determine the outcome of the claim or application.

Except in situations where the minister is a party, hearings are supposed to be non-adversarial. However, the reality is often quite different. The Board is usually the first one to ask questions, (unless a Vulnerable Person application is made and a request to reverse the order of questioning has been granted), and often vigorously questions the claimant. The Board's questioning can resemble a cross-examination of varying intensity and aggressiveness, depending on the individual Board member.

The limits to which the Board can go in the manner and content of his or her questioning are not precisely defined by the Federal Court.

Some cases have found no reasonable apprehension of bias even where the member's "energetic and extensive questioning" was at times "insensitive" and not relevant. On other occasions, the Federal Court has held that the microscopic and insensitive examination of a claimant by the Board to be a breach of procedural fairness, or an indicator that a reasonable apprehension of bias did exist:

If you think that the Board no longer appears impartial, object to the manner of the questioning or consider raising the question of reasonable apprehension of bias. If the Board's questioning is repetitive, aggressive, not relevant, misleading, confusing or unfairly puts assumptions or misstatements of the evidence to the claimant, it is important to object in a clear manner so that it is on the record. If there is no objection, on judicial review the court may interpret this as acceptance of the hearing as fair and a waiver to any objection.

Not all hearings are overtly adversarial. Much will depend on the personalities at play, but be prepared to vigorously protect your client. You need to have a grasp of all the documentary evidence before the tribunal, and be attentive to situations where the Board asks the claimant about excerpts from that evidence. Ensure that the claimant understands what is being asked and that the Board's characterization of the evidence is accurate and fair. If the Board has mischaracterized the evidence, object and instruct the claimant not to answer until what the Board is asking is clarified, and where in the evidence the proposition can be found. Where there is evidence that says something

different from what the Board is asking, counsel should request that evidence also be put to the claimant, or counsel should be prepared to raise it in re-examination of the claimant or in submissions.

Refugee hearings are held in private. Members of the public, or “observers” are not permitted unless the claimant gives their express permission. Some institutional observers may be present, such as interpreters in training or UNHCR staff. Observers are cautioned by the Board not to interrupt and that the refugee hearing is confidential. Do not hesitate to object to their participation if you believe that it will adversely affect your client or if your client expresses discomfort about it.

Refugee hearings are recorded. A CD of the hearing can be requested by the claimant or their counsel. If there is more than one sitting of a refugee hearing, in some circumstances, requesting the CD can help review evidence prior to the next sitting, though most often CDs are ordered where a negative decision has been rendered.

If the CBSA or CIC has indicated that they will be intervening (ministerial intervention), and provided the grounds on which they seek to intervene, a representative may or may not be present at the hearing as a party. If they are present, they have the right to question the claimant and any other witnesses and make submissions. Occasionally, the minister’s counsel participates by providing written submissions only and does not appear.

The hearing will usually last two to four hours. However, hearings can go on for a full day, or may require more than one sitting. Hearing dates can be days, weeks or months apart.

8.1 Issues before the hearing

8.1.1 Vulnerable person applications

If the claimant demonstrates a vulnerability that you think would benefit from a procedural accommodation, make an application for “vulnerable person” status, setting out the claimant’s issues and the procedural accommodations requested. This should be done as soon as possible—in writing, prior to the refugee hearing—once you can obtain documentation to substantiate the concern.

The IRB’s [Chairperson Guideline 8, Procedures with Respect to Vulnerable Persons Appearing before the IRB](#), describes this process.

If the claimant’s vulnerability only becomes known or better understood by counsel very close to the hearing or even during the hearing, an application for vulnerable person status and the procedural accommodation requested can be made at the hearing. Supporting medical evidence should be filed and included with this application. Be

prepared to offer an explanation for why the application was not filed in writing and 10 days before the hearing.

Vulnerabilities can include (but are not limited to) the following:

- Mental health issues, such as PTSD, depression, anxiety, schizophrenia
- Cognitive issues
- Physical health conditions or issues, such as difficulty breathing or sitting for long period of time, migraines
- Being detained
- Serious, past trauma (e.g. torture or physical or sexual abuse)
- Illiteracy
- Claimant is a minor
- Physical or mental disability
- Having several children to care for as a single parent
- A combination of any of these or other factors.

Often, but not always, the claimant's vulnerability may require a request for the appointment of a designated representative (more information on designated representatives is in Section 10.1).

Procedural accommodations can include (but are not limited to) the following:

- Extension of time to file the BOC
- Request for counsel to question the claimant first
- Adjournment of the hearing
- Request for a female board member and/or female interpreter
- Request for multiple breaks in the hearing process
- Request for part of, or all, of the claimant's testimony to be provided via sworn affidavit and
- Appointment of a designated representative.

Be careful when requesting to vary the order of questioning. This can help put the claimant at ease, but it may also lead to unnecessary or long questioning on issues about which the Board is not concerned. If such a request is made and granted, be prepared to elicit the evidence necessary to support the case, but remain closely attuned to the Board's questions throughout the hearing.

8.1.2 Ministerial interventions

The Minister of Public Safety and Emergency Preparedness, through the Canada Border Services Agency (CBSA) can intervene at any stage in a refugee claim. [CIC Operational Bulletin 440-G](#), dated April 17, 2013 sets out the directive for ministerial interventions.

As stated in this operational bulletin:

The Ministerial Intervention program has the following objectives:

Ensuring that persons such as serious criminals and security threats do not benefit from Canada's protection;

Maintaining the integrity of the refugee determination system;

Ensuring that the Refugee Protection Division has comprehensive information for its refugee hearings.

Refugee hearings are normally non-adversarial in nature. The decision to intervene in a hearing is made by Hearings Officers (CBSA) or Senior Immigration Officers (CIC) who review the refugee claim file. If CIC or CBSA has relevant information that the IRB is not aware of, or questions or concerns are raised with respect to criminality, security, fraud, credibility or program integrity, the officer will file an intervention on the Minister's behalf and will disclose that evidence.

Once the minister's representative files notice of their intention to intervene, they are considered a "party" to the claim for refugee protection. All disclosure filed with the Board by counsel for the claimant, or any applications made by counsel for the claimant, must also be served on the minister's representative.

CBSA handles possible exclusion of a refugee claimant from having the substantive aspects of their claim considered, that is on the grounds of Article 1F(a)—(c). CBSA could intervene where the following issues are raised:

- Criminality issues
- Security issues

- Possible war crimes issue
- Possible organized crimes issue
- Irregular arrival (i.e., claimant is a designated foreign national)
- Detained individual.

The test of exclusion based on Article 1F(a) has recently been considered by the Supreme Court of Canada in: *Ezokola v. Canada* (MCI), 2013 SCC 40.

The applicability and test for exclusion from refugee protection based on Article 1F(b), that is where a person has been convicted of a “serious non-political crime” was appealed to the Supreme Court of Canada. See: *Febles v. Canada*, 2014 SCC 68, where the court affirmed that Article 1F(b) of the Refugee Convention applies to anyone who has ever committed a serious non-political crime outside the country of refuge prior to his/her admission to that country as a refugee. The court further found that such an interpretation did not offend s.7 of the *Charter* because the *Charter* has essentially no role to play in the interpretation of s.98 of the IRPA (the provision that incorporates the exclusion clauses into Canadian law).

More information on CBSA Interventions can be found in Chapter 24 of the Enforcement Manual, available online: [ENF 24: Ministerial intervention](#).

CIC handles exclusions based on Article 1E (permanent residence and right of return to a third, safe country).

The Minister of Citizenship and Immigration, through representatives at the agency under his control, Citizenship and Immigration Canada, can intervene at any stage in a refugee claim.

CIC could intervene where the following issues are raised (this is not an exhaustive list):

- Possible status in third country
- Multiple nationalities
- Possible multiple identities
- High profile case (with no criminality or security issue)
- Previous Canadian immigration history (e.g., visa-related information, previous misrepresentation)
- Claim initiated more than six months after entry to Canada
- Major discrepancy in claimant’s allegations or documents

- Claimant appears to be making a claim in order to access benefits, e.g., urgent IFH coverage requested during or before the eligibility interview.

Where cases involve a criminality or security issue, as well as a “program integrity” issue, CBSA will be the department to handle intervention. Ministerial interventions have increased dramatically under the new refugee determination process.

The minister’s representative is supposed to provide at least 10 days’ notice of their intention to intervene and the documents they rely on in that intervention: Rule 29(4) *RPD Rules*.

During the intervention (according to Rule 29 *RPD Rules*) the minister sets out:

- the purpose of their intervention
- whether exclusion is sought pursuant to Articles 1E or 1F
- and the facts and law that pertain to the exclusion and
- whether the minister intends to intervene in writing alone, or in writing and in person.

A minister’s representative is not prohibited from attending, even if they indicated that they will only be participating in writing.

Usually, the minister’s representative provides some amount of notice in writing. Pursuant to Rule 29(4) of the *RPD Rules*, documents related to an intervention must be provided at least 10 days prior to hearing. In practice, however, counsel is often notified of ministerial interventions very close to, or on the eve of, the refugee hearing. In this case, an adjournment can be sought based on natural justice and the opportunity to respond to and prepare for the hearing based on this new evidence.

Pursuant to Rule 26 of the *RPD Rules*:

- if the Board believes that exclusion on the grounds of Articles 1E or 1F is “a possibility”, they **must** contact the minister and give them a chance to intervene
- even if the possibility of exclusion on Articles 1E or 1F only arises at the hearing, pursuant to the *Rules*, the Board “**must**” adjourn and give notice to the minister of the possible exclusion and a chance for the minister to intervene

Pursuant to *Rule 27 of the RPD Rules*:

- if the possibility of “program integrity” issues arise before the Board, but does not involve exclusion, the Board **must** notify the minister if the Board believes

that the “minister’s participation in the hearing ***may help*** in the **full and proper hearing** of the claim”

- “program integrity” issues include:
 - information that the claim may have been made under a false identity in whole or in part
 - a substantial change to the basis of the claim from that indicated in the Basis of Claim Form first provided to the Division
 - information that, in support of the claim, the claimant submitted documents that may be fraudulent or
 - other information that the claimant may be directly or indirectly misrepresenting or withholding material facts relating to a relevant matter.

In all cases, the Board must provide the claimant with a copy of their notice to the minister seeking the minister’s intervention.

The RPD Rules oblige the Board to notify the minister of “any relevant information” if:

- the Board believes that a claimant “may” be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality
- there is an outstanding charge against the claimant for an offence in Canada that is punishable by a maximum term of imprisonment of at least 10 years, or
- the claim may be ineligible to be referred under section 101 or paragraph 104(1)(c) or (d) of the IRPA: *Rule 28 RPD Rules*.

The Board must also provide the claimant a copy of such notice.

Ministerial interventions often raise the adversarial nature of the refugee hearing. Depending on their complexity, counsel without experience in this area should seek out mentorship from other counsel who have handled similar interventions (or exclusion issues) before the Board for guidance in their advocacy. For information about how to seek an experienced refugee lawyer to work with, go to LAO’s second chair mentorship initiative: http://www.legalaid.on.ca/en/info/second_chair.asp

8.2 Procedure at the hearing

8.2.1 Preliminary matters

It is important to prepare the claimant to expect what will happen in the hearing room, while acknowledging that not everything can be anticipated. It is helpful to make a diagram of what the hearing room looks like and where all of the participants sit, and the order in which they ask questions. The IRB's [Ready Tours](#) are also a good resource for photos of hearing rooms and tours that claimants can take to ready themselves for the hearing itself.

An interpreter, if used, is sworn in and given an opportunity to talk with the claimant to see if they understand one another.

The claimant is then asked to swear on a holy book (claimants can bring their own, if they intend to use one), or to affirm, to tell the truth.

It is advisable to explain this choice to the claimant before the hearing, so that they can decide their choice in advance and is not caught off guard at the beginning of the hearing, when they are already nervous. This may sound trite, but a few awkward moments around the commitment to tell the truth can set a negative tone for the hearing.

Another good reason to discuss the oath before the hearing is where the claim is based on religious grounds, and swearing on a holy book may have particular significance.

8.2.2 Introduction of the BOC into evidence

After taking an oath to tell the truth, the claimant will be asked to look at their signature on their BOC to confirm they signed it, that it was translated to them and that they understood it.

The panel will ask the claimant if the BOC (with any amendments) is true and accurate to the best of their knowledge.

If any changes have been made to the BOC which have not been disclosed to the Board, indicate this before the claimant swears to the contents. Minor changes will not usually be a concern but if the Board thinks the change is significant, there could be an issue as to whether the amendment will be accepted because of the ten-day disclosure rule. If, for example, the claimant just learned of the arrest or harm of one of their relatives, you can argue that it was not possible to provide this information ten days before.

Ultimately, if relevant information is inaccurate in the BOC, it must be changed before the claimant testifies, and a copy of the amended and signed BOC provided to the Board. The claimant will need to be prepared to answer questions about why the

amendments are only being made at the hearing. Once this is done, the BOC is entered as an exhibit.

8.2.3 Introduction of documentary evidence at the hearing

The Board will go through and identify and enter as exhibits and part of the record:

- disclosure already submitted by counsel
- any Port of Entry (POE) notes and other documents received from CBSA or CIC
- the most recent RPD National Documentation Package
- any documents and disclosure made by the minister's counsel for either CBSA or CIC in the case of an intervention.

Counsel should have a preliminary submission ready as to why any late disclosure should be accepted, addressing the factors set out in Rule 36 of the RPD Rules:

- the relevance and probative value of the document
- any new evidence it brings to the hearing
- whether the claimant (and depending on the type of evidence at issue, counsel), with reasonable effort could have provided the document pursuant to the regular 10-day disclosure deadline
- if the minister is a party to the proceeding, the lack of prejudice to the party in having time to review the document

The length and the complexity of the document should also be addressed. The short timeframes should also be referenced, particularly as they impact obtaining documents from overseas or arranging professional assessments and reports. If disclosure is not accepted, counsel should indicate on the record that they object to this and that this will prejudice the client in presenting their case. This will then become a likely issue to take forward on judicial review or at the RAD, depending on the claimant's eligibility for either process, and the type of evidence and its relevance and probative value to the decision.

If the late disclosure is accepted, the Board will enter it as an exhibit.

Submit any additional evidence received after the disclosure deadline to the Board and other parties as soon as possible, in order to give them some time to review it to minimize any prejudice. If it is within 48 hours of the hearing, it is a good idea to notify the IRB case officer that an additional document is being submitted and to fax or courier it as soon as possible. For all late disclosure, even disclosure that has been submitted a

few days in advance, bring extra copies to the hearing, in case the evidence is not on file.

Original documents should be available should the Board request to see them at the hearing.

8.3 Discussion of the issues

Some Board members like to have a pre-hearing conference before any evidence is heard. Most often it will take place in front of the claimant and interpreter before the hearing begins, though accommodations can be made if the claimant is particularly vulnerable or is a minor.

Once discussion of the case begins, counsel should remind the panel that the discussion of the issues should be “on the record,” i.e., the Board should begin recording the hearing.

The Board will set out the issues in the claim. If the Board does not offer this information or has done so imprecisely, counsel should ask the Board to identify the issues. The issues can always expand or be taken off the table as the hearing unfolds. Credibility is an issue in every claim.

Listening carefully to the Board’s language, tone and cues when discussing the issues is critically important. Sometimes the Board will be very clear that it accepts certain things already in the claim based on the evidence that has been filed. If the Board says it is satisfied that state protection would not exist for the claimant, accept that and do not delve into it in your questions to the claimant. Likewise, if the Board states that it accepts that a claimant suffered the domestic violence detailed in the BOC and confirmed by doctor’s reports, you may not need to ask many questions about it. Other possibilities are that the Board will want to hear about many issues, or it will not give you a clear indication of which issues are critical to it. For these times, you must ensure you establish all aspects of the claim pursuant to section 96 and 97.

Remember, however, that a claimant must still demonstrate that they are a credible witness, and bears the onus of demonstrating that there is a serious possibility that they face a well-founded fear of persecution. Sometimes the only way to establish a claimant’s credibility is to ask, sensitively, a few questions about an area of trauma they have experienced. Certainly the type of questions, and the amount of questioning on areas for which the Board states it is satisfied, must be done carefully and sensitively.

It is at this point in the hearing that the Board will identify whether IFA is an issue, and which locations are being raised. Make note of the cities or regions indicated so that you can ask the claimant specific questions about each of them. A negative decision and an area not specifically raised by the Board at the outset of the hearing indicated as an IFA is grounds for review by either the Federal Court or RAD as a matter of procedural

fairness. More evidence required to respond to a proposed IFA is an opportunity to ask for post-hearing submissions and evidence. As above, notice of an IFA is required in advance of the hearing to ensure a fair process. Make sure to preserve any objections about the notice given on the record.

8.4 Order of questioning

The usual hearing procedure involves the Board questioning the claimant first, followed by counsel asking questions. If any questions arise out of counsel's questions, the panel will ask more, or they may interrupt counsel's questions for clarification. Finally, counsel has the right of reply to clarify any issues arising from a member's questions.

Unless counsel makes an application to change the order of questioning in a vulnerable person application requesting "reverse order questioning", wherein counsel questions the claimant first, the Board will generally always be permitted to question first. The RPD Rules state that the order of questioning must not be varied unless there are "exceptional circumstances" to do so. Accommodating a vulnerable person is listed as one example of permitting the variation in the order of questioning: *Rule 10(5)*.

If the minister is a party to the claim, and has intervened on an exclusion issue, the claimant (and any other witness) will be questioned first by the minister's counsel, then by the Board and then by their counsel. Other interventions of the minister where the minister appears in person will involve the Board questioning the claimant and any other witnesses first, followed by minister's counsel, and then by claimant's counsel. (Rules 10(2)-(3) of the *RPD Rules*)

During the Board's questions, counsel must listen actively and take careful notes. It is good practice to split the notes to put questions on one side and answers on the other. If it is clear the claimant has misunderstood a question, or is not grasping what is being asked, you can interject to ask for clarification of the question. Certainly, if you do not understand the question, or it is confusing or misleading, ask the Board to rephrase the question. It is also important to pay attention to the interpretation at the hearing. See section 8.5 of this manual.

8.4.1 Before counsel's questions

After the Board has finished their questions, it is helpful to ask if they are satisfied about the issues identified at the outset of the hearing and which issues are still on the table. Sometimes the Board will not narrow the issues further, and simply say, "it's your case, counsel," but it is always worth asking.

It is good practice to ask for a brief break after the Board's questions to focus your questions. In determining whether you need to ask the claimant any questions, and on what areas, go through the things you need to prove the refugee claim:

- Has the claimant established their identity? Does the Board appear satisfied as to their identity, as being the person they say they are from country X?
- Has the claimant credibly described the elements of their risk profile, for example, shown their affiliation to a political group, religion, or particular social group, or their evasion of mandatory military service, or the prison centre conditions they endured or could endure in country?
- Were there any inconsistencies between the BOC and testimony, the POE notes and testimony, or the BOC and other CIC forms that have not been reasonably explained by the claimant?
- Has the claimant credibly explained who the agent of persecution is?
- Has the claimant credibly described why they fear returning to their country, including why they would fear this in the future?
- Has the claimant credibly explained their attempts to seek state protection (if the agent of persecution is a non-state actor)?
- Have the issues identified by the Board at the outset of the hearing been reasonably addressed by the claimant, has a particular IFA been identified?
- Has the claimant provided reasonable and clear answers to questions related to the subjective component of the claim: delay in departure, delay in claiming refugee protection in Canada, re-availment to the country of persecution, failure to claim refugee protection in other countries?
- Are there any explanations the claimant can provide for any differences between the country conditions documentation and their own description of their personal experiences (possible implausibility findings)?
- Are all of the elements in evidence to make your case? The claimant's personal profile in terms of education, sophistication, trauma, psychological state, past work experience, gender, age, and more is relevant to all issues of the claim, including credibility as well as IFA, state protection, delay, etc.

Remember, if the Board indicated that a particular matter, was not an issue or a concern, **do not ask** the claimant about that area. If the Board finds against the claimant on an area that they instructed was not an issue, this is a very solid ground for appeal or judicial review (depending on claimant eligibility) on the grounds of procedural fairness.

When preparing your submissions, it is good practice to make a list of all the facts and evidence that you will need elicited in testimony in order to be able to make your case. Some evidence will be readily available in the documentary or supporting

documentation filed. Other evidence can only be entered or elaborated through the claimant. Asking yourself what you need to establish your case is an effective hearing preparation tool that will assist you in identifying what questions you will ask when it comes time for you to question your client. You need not revisit facts to which the claimant has already testified, but you can refer to a list, which you have kept, of outstanding evidence to be called, crossing things out if they are touched upon by the Board's questions.

Counsel's questions may also help a claimant clarify testimony that may have damaged their credibility. This is a judgment call, informed by how well you know your client, their ability to understand or answer favourably, and the existence of a good explanation for a previous answer. Do not dwell on an area your client cannot explain, but be sure to give them an opportunity to rehabilitate bad testimony where possible. Also, do not ask questions to which you do not know the answer, as this can be more harm than help. Much of this work hinges on effective hearing preparation, so that the claimant is ready for your questions and understands the motive behind them.

Remember that the more care counsel takes in asking fair, non-leading, and open questions, the greater the probative value of a claimant's answers.

8.5 Interpretation at the hearing

Another area that often raises serious problems at the hearing is interpretation. The claimant has a right to good interpretation. That is, interpretation which is "continuous, precise, competent, impartial, contemporaneous."

It cannot be emphasized enough that any problems with the interpreter during the hearing should be mentioned immediately to the Board. The Federal Court has held that an objection to bad interpretation must be made as soon as it is reasonable to do so. As already indicated, a failure to object in a timely way can be taken as a waiver to object upon appeal.

Check with the claimant (or observers who speak the claimant's language) at breaks to make sure that he or she is confident of the interpretation. Often, however, the claimant is not sufficiently conversant in English (or French, if that is the language of the hearing) to know whether the translation is satisfactory. Counsel needs to be alert to possible problems.

Some indications of problems with interpretation are as follows:

- A long answer by the claimant followed by a few words in English from the interpreter
- An answer very different from answers during hearing preparation

- A lengthy exchange between the claimant and the interpreter before the interpreter gives his translation; in this case, the interpreter may be honestly striving to get the most exact interpretation, especially where there are technical terms involved, but a good interpreter will advise the Board and parties what he or she is trying to do.

Before the hearing, counsel should advise their client to signal them if there are issues with interpretation, and ask for a break. This is easier if the claimant speaks some English, or a trusted friend, support worker or family member who speaks English as well as the claimant's language attends the hearing and can indicate to counsel that there is a problem.

Sometimes there is a problem with the dialect. It is important to ask the claimant to really engage with the interpreter prior to the hearing to see if they understand each other.

Once a problem with interpretation is identified, raise it with the Board. Depending on the circumstances, a request that a new interpreter be found, or that the hearing be adjourned may cure the procedural fairness issue. A de novo hearing before a new Board may cure the procedural fairness issue, depending on how much testimony has been given and the nature of the problem.

Many Federal Court decisions have addressed the issue of competent interpretation having an impact on the fairness of the refugee hearing.

Go to [LAO LAW](#) for more detailed discussion, references and a toolkit for refugee representation.

8.6 Counsel's submissions

After the claimant's testimony, the Board may render a decision or request submissions from counsel. The Board can make a positive decision without submissions, but can only render a negative decision after hearing submissions.

The Board will often indicate which issues or concerns they would like addressed. If the Board does not state this, counsel should ask them to identify the remaining issues prior to giving their submissions.

Counsel should always be prepared to make submissions at a hearing, regardless of how straightforward or complex a claim may seem. Prepare draft submissions that include the issues, the evidence supporting each one, the relevant case law and analysis. If the claim raises a particularly novel issue, or hangs on one crucial area of jurisprudence, counsel should bring a copy of the relevant cases for the Board.

To begin the submissions, counsel should outline the basis of the claim. For example, state which of the Convention refugee grounds or consolidated grounds the claim is based.

A general summary of the facts of the claim should follow. The issues of the case should then be outlined and dealt with in turn.

Under the *IRPA*, identity must be addressed in all cases before the Board, so it makes sense to start with it, unless the Board has indicated that it is satisfied as to the claimant's identity.

Note, however, that being satisfied as to a claimant's nationality and personal identity is not synonymous with the Board's acceptance of their identity as a member of a particular social group, or risk profile. This will still need to be outlined in submissions.

Identity is usually established by a combination of documentary evidence and oral testimony. At this point, any affidavit evidence that was submitted to support identity should be highlighted, and the following reviewed:

- formal identity documents—documents that have been entered at the hearing to establish identity, such as a birth certificate, passport, national identity card, or other identification from the claimant's country
- proof of residence in a country and city such as corroboration from friends or family, or even a claimant's testimony and knowledge of a place, group, or process
- oral evidence that supports identity, including the ability to speak a particular language or dialect if ethnicity is an issue, as well as geographical knowledge of the region and country. .

One of the main issues in all cases is credibility. Under s. 106 of *IRPA*, the possession of acceptable identity documents, or a reasonable explanation for their absence, is relevant to credibility.

Where identity is being established only through affidavit or witness testimony, submissions should focus on the claimant's credibility and the reasons that formal identification is not available. In these cases, identity and credibility are particularly linked.

It is good practice to take careful notes on areas of concern with credibility. In addition to your notes of the testimony, record questions that you can pose to the claimant that can allay the Board's concerns or explain evidence that was confusing. The notes about credibility will be helpful when it is time to make submissions on the issue.

Credibility issues usually involve alleged inconsistencies or implausibilities. Inconsistencies in the claimant's evidence usually arise in the following areas:

- Between the BOC and/or the oral evidence and the CBSA or CIC interview/ Port of Entry notes or forms
- Between the BOC and the oral testimony
- Between the BOC and personal documentation submitted by the claimant
- Between the testimony and known country conditions or events that have been reported in objective country conditions evidence
- Between testimony given earlier in the hearing and testimony given later (or at a separate sitting).

In examining a credibility concern a number of questions must be asked:

- Is it in fact an inconsistency?
- Has the inconsistency been resolved through the claimant's explanation?
- If not, does it go to the core of the claim?
- If it does, and that portion of the evidence is removed, is there enough evidence for the Board to make a determination that the claimant is a Convention refugee or a protected person?

In addressing plausibility, counsel should consider the guidance that the Federal Court has provided. Plausibility findings are only to be made against the claimant in the clearest of cases. In considering whether something is implausible, decision makers must take into account cultural, religious, and educational differences or characteristics of a claimant.

The Board's legal reference provides a comprehensive summary of the principles applicable to credibility determinations. Go to: <http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/Credib.aspx>

Counsel should have all the relevant case law on credibility in order to guide the Board as to what must be considered when analyzing this particular claim. Go to the LAO LAW website for more resources and a toolkit for refugee representation.

Submissions are the opportunity to highlight those aspects of the documentary evidence that support the claim. Reference should be made to:

- specific documentary evidence, if any, such as police or medical reports concerning the claimant and
- general documentary evidence concerning country conditions, such as human rights reports and news articles.

Refer to specific page numbers. Sometimes the Board may discourage counsel from reading lengthy passages, but compelling citations are important and should be read or effectively paraphrased in order to make the best possible impact and support the claim.

Counsel needs to assess how knowledgeable the Board is about the country documentation in a particular hearing. If in doubt, counsel should be very persistent about leading the Board to the specific references. It is, of course, important to link that evidence to the claimant's specific situation.

Once oral submissions are given, the Board may render a decision, which can be either positive or negative. Often, the Board will reserve the decision and render it in writing at a later time. Both claimant and counsel will receive the decision and the reasons in writing.

8.6.1 Written submissions

Counsel may request to do written submissions where something unanticipated has occurred at the hearing, and the short break usually given before oral submissions commence would not be sufficient for counsel to review all the evidence and present persuasive submissions.

Written submissions may be requested by the Board or by counsel, if the hearing was lengthy, the issues complex, or counsel wants an opportunity to review the CD and/or seek additional evidence on a certain issue raised at the hearing. The Board must agree to receive written submissions, as the Rules indicate that oral submissions are the norm. With written submissions, a timeframe is set by the Board, usually two weeks from the date of the hearing.

The main difference between oral and written submissions is that written submissions allow counsel the opportunity to do a more detailed analysis of the issues and to provide more extensive case law research. With credibility concerns, where the notes taken during the hearing are unclear, counsel can request the hearing CD in order to confirm the testimony. Counsel must make this request in writing, as soon as possible given the time frame for getting the submissions completed.

An affidavit from a colleague or assistant should be prepared with a full or partial transcript of the testimony in question attached, or a summary of testimony with specific reference to the time of the testimony on the audio recording of the hearing.

If a hearing has not proceeded as expected, or you anticipate the Board will make a negative decision and you wish to set the record for review, asking for written submissions can afford you time to conduct extra case-law research, consult with more senior counsel, or synthesize lengthy or complicated testimony (especially if a hearing was lasted for more than one sitting).

Nevertheless, do not depend on being permitted to make written submissions. Always be prepared to make your submissions at the end of the hearing.

As with oral submissions, counsel will set out the basis for the claim, the issues and then an examination of the issues that sets out the evidence, the case law and an analysis.

It is incumbent on you to get the submissions in on the date requested by the Board. Failure to do so may mean that the Board will render a decision without them. If they are not ready for the due date, make a request for an extension in writing, citing the reason, with a new date that the submissions will be completed.

It is possible to submit evidence or further submissions on a claim before a decision has been rendered, however, the reasons for the post-hearing evidence and further submission should be detailed in writing and set out in an application pursuant to RPD Rule 43 and Rule 50. If a decision has been reserved for a while and the circumstances in the claimant's country change, an updated country documentation package can be very helpful.

9. The decision

9.1 A positive decision

If the decision is positive, counsel should advise the claimant that they can submit their application for permanent residence and that it is good to do so as soon as possible.

Since the changes implemented by the IRB on December 15, 2012, all decisions, positive and negative, contain written reasons. If the positive decision was rendered orally by the Board at the hearing, then the reasons will consist of the transcript of the oral reasons.

Claimants who received a positive oral decision must wait until the transcript of the positive decision is sent to them before they can apply for permanent resident status. It usually arrives within 2-4 weeks.

There is no longer a 180-day deadline to apply for permanent residence for accepted refugee claimants. This applies retroactively to all persons found to be Convention refugees or persons in need of protection, regardless of when the positive decision was issued.

9.2 A negative decision

If the decision is negative:

- the RPD will indicate that it will send a copy of the hearing CD along with the negative reasons and decision to the claimant or claimant's counsel in the mail
- counsel should discuss the alternatives with the claimant. In some circumstances, a claimant will have the right of appeal to the Refugee Appeal Division (RAD). Claimants who do not have a right of appeal to the RAD have the option to seek leave to judicially review the RPD decision at the Federal Court. Some claimants have a statutory stay against their removal as they pursue a remedy, while others do not.

9.3 Effect of a negative decision

RAD	Federal Court	
	Eligible to apply for leave/JR?	Statutory stay of removal?
<p>An eligible refused claimant (<i>IRPA</i> s.110(1))</p> <p>As of July 2015 and the YZ decision, claimants from DCO countries are now eligible refused claimants</p>	<p>Yes if refused at Refugee <u>Appeal</u> Division</p>	<p>Yes if filed application within prescribed time limits (Regs s. 231(1) with the exception of DFNs designated post-RPD decision)</p> <p>No if missed deadline(s) for RAD—see <i>IRPA</i> s.49(1)</p> <p>No if applied for extension of time to file/perfect the application (s. 231(4) <i>IRPR</i>)</p>
<p>Claimants excluded from RAD:</p> <ul style="list-style-type: none"> • Designated Foreign Nationals (<i>IRPA</i> s.110(2)(a)) • Withdrawn or Abandoned claims (<i>IRPA</i> s.110(2)(b)) • Claims found Manifestly Unfounded or No Credible Basis (<i>IRPA</i> s. 110(2)(c)) • Arrived to Canada through the United States and made a refugee claim at the border (<i>IRPA</i> s.110(2)(d)) • Decisions that caused the cessation or vacation of refugee status (<i>IRPA</i> s.110(2)(e)and(f)) • Claims deemed rejected because of an order of surrender under the <i>Extradition Act</i> (<i>IRPA</i> s.105) 	<p>Yes if refused at Refugee <u>Protection</u> Division</p>	<p>No, must apply for interim order for a stay of removal at Federal Court while seeking leave and judicial review</p>

RAD	Federal Court	
Claimants excluded from RAD: Legacy claims, i.e., referred to RPD prior to Dec 15, 2012 (applies to re-determination of Legacy claims if ordered by Fed crt)	Yes , if refused at RPD	Yes , if non-DCO, would have had access to RAD and statutory stay <i>if</i> claim made after Dec 2012

9.4 Appellate timelines

The RAD can consider “new evidence” that arose after the RPD’s rejection of the claim, or which was not reasonably available, known or foreseeable as necessary to prove the claim at the time of the RPD denial.

In contrast, a judicial review usually proceeds based solely on the record that was before the RPD, except in exceptional circumstances where new evidence is required to demonstrate a breach of procedural fairness, bias of the decision maker, or to demonstrate extremely flawed plausibility findings.

There are statutory limitation periods for filing notice in both procedures. The Federal Court limitation period starts when the claimant receives the written negative decision and reasons. An application for leave and judicial review must be filed with the Federal Court and served on the Department of Justice within 15 days of this date

Similarly, the RAD limitation period begins from the date the claimant receives a copy of the negative decision and reasons in writing. The claimant has 15 days to file their notice of appeal with the RAD registry of the IRB. RAD Rule 35(2) provides a seven-day deemed mailing receipt timeframe, from the date listed on the notice of decision (not the date listed on the actual reasons for decision). The RAD practice has been to use this deemed receipt date as the date from which the perfection deadline of 30 days is calculated.

RAD	Federal Court
Deadlines to appeal the decision:	
<p>After written reasons for the decision received:</p> <ul style="list-style-type: none"> • 15 days to file an appeal (Regs s.159.91(1)(a)) • 30 days to perfect an appeal (Regs s.159.91(1)(b)) <p>Total: 30 days to perfect</p>	<ul style="list-style-type: none"> • 15 days to file a notice of the application (<i>IRPA</i> s.72(2)(b)) • 30 days to perfect the application (SOR/93-22 Immigration Rule 10) <p>Total: 45 days to perfect</p>
Extension of time to file/perfect the application	
<p>If an appeal cannot be filed within prescribed time limits, RAD may, for reasons of fairness and natural justice, extend each of those time limits by the number of days that is necessary in the circumstances (Regs s.159.91(2))</p>	<p>May request extension of time (<i>IRPA</i> 72(2)(c)) and provide evidence and arguments justifying your request</p>
<p>Motion for extension of time MUST be accompanied by Appellant's record</p>	<p>Application record NOT required with motion for extension of time</p>

Unlike the Federal Court, where an applicant's record is due 30 days from the date of the application notice for judicial review, perfecting the RAD record runs **from the date the negative reasons for decision were deemed to be received**. An appellant's RAD record is due 30 days from the date they are deemed to have received the negative reasons.

With the changes initiated to the refugee protection system that came into force on December 15, 2012, a refused refugee claimant will not have a right to a Pre-Removal Risk Assessment (PRRA) until one year has passed since the final determination of their refugee claim or refugee appeal. Claimants from DCO countries are barred from submitting a PRRA for **three years** from the date of their negative refugee determination.

This “PRRA bar” raises serious concerns that persons could be removed to countries without the chance to have a timely risk assessment done on the basis of new evidence or new risks that have arisen, or on evidence that has only reasonably become available since their refugee hearing. The constitutionality of the PRRA bar provisions are presently being challenged in Federal Court of Appeal. Go to the [*Peter v. Canada \(Minister PSEP\)*, 2014 FC 1073](#) case concerning the constitutional challenge to the one-year PRRA bar:

10. Other matters

10.1 Designated representatives

[The IRB appoints a designated representative \(DR\)](#) as soon as possible to look after the interests of any claimant under 18 years of age or a claimant who is unable to appreciate the nature of the proceedings due to mental illness or cognitive issues.

For minors, the designated representative is:

- their parent, if available
- a relative, appointed by the Board, if no parents are in Canada and a relative is available
- someone from the claimant's ethnic community
- If unaccompanied, counsel from the McCarthy Tétrault program that provides pro bono designated representatives

If you become aware of a conflict with the designated representative, advise the Board and request that a new designated representative should be appointed.

Pay attention to conflicts that can arise with a relative or parent acting as a DR for a minor. Particularly where the DR is also a party to the claim, a co-claimant may be in a conflict position. For example, if a mother has, in the past, counselled her children to conceal physical abuse at their parents' hands, a separate DR may need to be appointed or, in extreme cases, that the claims must be severed and new counsel retained.

If you are of the opinion that your claimant is unable to appreciate the nature of the proceedings, notify the Board of the need for a DR right away. You may accompany the request with a psychological assessment, if you have one. If counsel is aware of a suitable DR, provide their contact information in the notice.

The role of the DR is to act in the claimant's best interests, to assist them to make and attend appointments, instruct counsel, and gather evidence. This role is more flexible than that of a "litigation guardian" in the sense that someone who is "unable to appreciate the nature of the proceedings" does not have to be legally incompetent to make decisions for themselves. In some cases, they may have some level of understanding of the proceedings. The DR process is meant to allow them to have input into the decisions in their case insofar as possible.

A DR may assist in gathering the evidence to support a claim, and may also testify on behalf of a claimant where necessary. A very young child, or someone unable to testify at all may rely heavily on evidence entered through a DR's testimony. The process is

flexible, however, and in some cases it may be appropriate to have testimony from the claimant and the DR, or from the claimant with the DR as an alternate in case the claimant is unable to testify on the day of the hearing.

In cases of unaccompanied and/or traumatized children, or claimants with trauma or mental illnesses that prevent them from appreciating the nature of the proceedings, consider whether a pre-hearing conference with the panel and the DR is appropriate to determine what evidence will be elicited from the claimant, as opposed to the DR. It may be appropriate to have a vulnerable claimant wait outside of the hearing room. It may also be appropriate to have particularly difficult or traumatizing evidence called with the only the DR present, rather than a vulnerable client.

10.2 Witnesses (Rule 44 of the RPD rules)

In some cases, a witness may be helpful to establish a claimant's identity or another aspect of the claim, such as political involvement or sexual orientation. Expert witnesses with knowledge of specific country conditions or political parties can also be very helpful at a hearing, especially if their testimony covers areas that are not well-documented.

It is necessary to provide the IRB, at least 10 days before the hearing:

- a letter telling them that witnesses will be called to give evidence (along with their name, contact information), how the evidence will be provided (orally, via telephone, or through a statutory declaration or affidavit are all accepted), the relevance of their evidence, and what these witnesses are expected to say about the claim
- if they are expert witness, a resume setting out their qualifications and expertise in the subject matter

Appendix A includes a sample of such a letter to the Board.

Witnesses are excluded from the hearing room until they are about to give evidence. Where an expert witness is outside of Canada and it would be prohibitive to bring them to a hearing, the evidence can be provided in report or affidavit form.

If witnesses are to testify via telephone, including from international locations, advise the Board as early as possible so that the proper equipment can be available on the day of the hearing. If making international calls, arrive with a calling card to cover the cost of the telephone call.

The Board seems to prefer evidence from either permanent residents or Canadian citizens, but

if another claimant is the only one who can give evidence, that person should be approached for help. Tell the witness' counsel of what you are doing.

The RPD also has the power to issue a summons. *RPD Rules 45-47* explain the procedure for requesting the issuance and enforcement of a summons for witnesses. Cases where a summons should be used because a witness is unwilling to testify are rare, and likely only to occur in complicated cases. Ask for a summons with caution, and consider seeking the advice of experienced counsel before doing so.

10.3 Abandonment of a claim

The statutory authority for abandoning claims is set out in s.169 of IRPA:

Abandonment of proceeding

168.(1)A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

The two most common situations in which the Board takes steps to abandon a claim are when the claimant has not filed a BOC within the prescribed 15 days (or within the time period allowed by an extension of time) or when the claimant has not appeared for a hearing.

Before abandoning a case, the Board must provide the claimant with a chance to explain why the claim should not be abandoned. If a claimant is present at a hearing, the Board can ask the claimant to do so on the spot if the Board thinks it is fair to do so. The Board has also chosen to notify the claimant in writing of a “special hearing” (Rule 65 of the *RPD Rules*). This special hearing is more often known as an “abandonment hearing” or a “show cause hearing.”

The single exception to the notice provision is where there is no counsel on record, and the Board has no address for the claimant. This lack of contact information could arise where the claimant has no address to give to the immigration officer when the claimant makes his or her claim, and the claimant fails to notify the IRB when he or she gets an address.

The Federal Court has ruled that a key element in deciding whether a claim should be abandoned is whether the claimant has shown an intention to pursue their claim. As a result, consider the following:

- If the show cause hearing is because of a late BOC, the claimant will need to explain what steps they took to file it on time

- If the request for an extension of time is filed after the BOC due date, the Board will consider that request at the show cause hearing only.
- If there has been no extension of time granted and it has not been possible to submit the BOC within the 15 days, file it as soon as possible to indicate the claimant's intention to pursue the claim. It is ill-advised to wait until the show cause hearing because the Board could take the view that the claimant is in default of the proceedings or is not demonstrating an intention to pursue their claim.
- If the show cause hearing is because of a failure to attend a hearing, the claimant needs to explain why they did not attend.
- If a claimant cannot attend the show cause hearing for a medical reason, a medical note must be provided to address how the physical or psychological condition impeded the claimant from providing the BOC, appearing at the hearing, or otherwise pursuing their claim. If no medical evidence is presented, efforts to provide it and why it is not available must be presented, as per *Rule 65(5)-(7)*.
- If the failure to attend is because the claimant did not receive notice of the hearing, evidence showing that the claimant kept the Board informed of their address, or made efforts to do so, is important. When notifying the Board of a change of address, keep a copy of the correspondence, or better yet, a fax receipt.

10.4 Remedies if case is declared abandoned

If the Board declares a refugee claim to be abandoned, the claimant can apply to the RPD to re-open the claim, keeping in mind the two key rules concerning written applications—Rule 50 and Rule 62. (The claimant could also apply for leave to commence judicial review proceedings at the Federal Court—see Section 10.5 below).

Re-opening at the RPD is limited to situations where the claimant was denied natural justice. Other relevant factors must be considered by the RPD, including whether any delay in bringing the application to re-open is justified, and the reasons why the applicant did not appeal to the RAD (if there was a right of appeal) or apply for leave to judicially review the decision: Rule 62(7). The most frequent example is where the claimant was not given notice of the “show cause” hearing.

To establish a breach of natural justice in these situations, the claimant must put forward clear and convincing evidence that they were diligent in complying with the address notification requirement.

Usually, an access to information and privacy (ATIP) request to the Board will be needed to determine what address the claimant provided to the Board, and to determine if the Board properly served the claimant with the notice(s) to appear at the correct addresses.

In some instances, the claimant may not have been aware that CIC and the IRB are distinct, and notified only CIC of the change of address. In this situation, proof that the claimant has provided CIC with the correct address can be helpful. Documents or envelopes from CIC with the correct address are examples of evidence which can be useful in showing that the claimant had the intention of pursuing their claim.

Rule 50 applications must be in writing and be made without delay. If the minister was “a party” to the claim, the application must be served on them. In a refugee claim, the minister is only “a party” if they have intervened in the claim. In the case of an application for cessation or vacation of refugee protection, the minister is always “a party.” The application should state what it is that the claimant wants—that the case be re-opened. The application also needs to show the reasons why the Board should allow the application. The evidence supporting the application must be given by way of affidavit or statutory declaration.

In addition to the Board’s failure to give notice, natural justice encompasses other areas of serious unfairness that could justify an application to re-open. Examples are where the claimant was not given an opportunity to present their case, such as being mentally ill and not appearing for their hearing, or where there were serious interpretation problems at the hearing.

Finally, some cases involving negligence by counsel which caused the claimant to lose their right to a hearing, or which prevented them from being able to present their case, can be seen as a breach of natural justice. There are specific procedures within Rule 62 that must be followed if the application is based upon an allegation against counsel.

A sample application to re-open is provided in Appendix A.

10.5 Federal Court

As mentioned in Section 10.4 above, the other remedy for review of an abandonment decision is going to the Federal Court. Compared to a re-opening at the Board, the disadvantages are as follows:

- The procedure is more formal.
- There are restrict time limits (15 days from the date of notification of the decision in which to file a leave application).
- There is a \$50 filing fee, plus higher legal fees for the procedure are more costly.

- The process is time consuming.
- Since it involves a leave requirement, the application can be dismissed without reasons.

However, where there are breaches of natural justice based on lack of notice and if removal is so imminent that seeking a stay of removal is necessary, it is better to go to Federal Court so that there will be an underlying application on which the stay can be sought.

Note that neither remedy – an application to re-open a claim at the Board, or an application to Federal Court for judicial review – automatically stays the claimant’s removal in most cases. Please refer to the chart in Section 9.2: Negative Decisions.

10.6 Withdrawal of a refugee claim

Withdrawal is a decision by the claimant to end their claim for refugee protection. It involves the claimant taking action to notify the Board of their intention. The claimant must notify the Board in writing or in person at the hearing.

A claimant might want to withdraw a claim if they want to return to their country or has gained status through some other means such as a spousal sponsorship or an H&C application.

Please note that even if an individual is approved for permanent resident status in Canada via another route, the benefits of obtaining refugee protection—such as protection from removal for criminality or medical inadmissibility—must still be weighed and considered.

Usually withdrawal is initiated and controlled by the claimant, unless there is a DR involved and the claimant acts without the DR’s knowledge. Under s.168 of IRPA, the Board has a limited discretion to refuse to allow a withdrawal of the claim to prevent abuse of process, but only where substantive evidence has been taken in the proceedings.

The *RPD Rules*, Rule 59(1) state in which circumstances withdrawal can be an abuse of process, where withdrawal would “likely have a negative effect on the Division’s integrity.”

If no substantive evidence has been accepted, the claimant can still withdraw their claim simply by notifying the Board in writing, or orally at the proceedings. If substantive evidence has been taken, however, the claimant must bring an application under Rule 50.

The Federal Court has answered the question of what it means for substantive evidence to be accepted. In the Federal Court of Appeal case, *Hernandez v. M.C.I.*, [1993] F.C.J.

No. 1008 (C.A.), substantive evidence received meant that the evidence had actually been *introduced at a hearing*. In that case, the hearing had progressed to the point where the claimant had sworn to the personal information form (predecessor to the BOC).

The mere filing of a BOC with the IRB registrar does not mean substantive evidence has been accepted in the proceedings. Were that the case, the Rule allowing a claimant to withdraw as of right by indicating their wish to do so at a hearing would not make sense, since except in the case of abandonment hearings, the BOC would have been filed.

Also, if a refugee claimant withdraws their claim before substantive evidence is heard, they will not be subject to the one-year bar on filing an H&C application which usually (there are two exceptions) follows a negative refugee claim.

Withdrawal of a refugee claim is a serious step that brings the claim to an end, and most importantly, results in the termination of the statutory stay against the claimant's removal.

IRPA states that only one refugee claim is permitted in a lifetime, and this includes withdrawn claims (s. 101(1)(c) of *IRPA*). A person would have only a Pre-Removal Risk Assessment (PRRA) application available to them if they left Canada and then returned after having withdrawn their refugee claim. Moreover, persons who withdraw their claims and remain in Canada are subject to the PRRA bar from the date of their withdrawal (one year for non-DCO countries, and three years for DCO countries): s. 112(2)(b.1) and (c) of *IRPA*.

Before counsel conveys a claimant's desire to withdraw to the Board, counsel should make sure that the claimant understands the consequences and then get written instructions from the claimant. Counsel should ensure that the claimant is not making the decision because of depression or mental illness.

10.7 Reinstatement of claim after withdrawal

A claimant who withdraws their claim can apply for reinstatement provided the claimant has not left Canada. To do so, a written application pursuant to Rule 50 is required. Rule 60 provides that the Board must allow the application if there has been a denial of natural justice or it is otherwise in the interests of justice to allow the application (Rule 60(3) of the *RPD Rules*).

10.8 Vacation and cessation of protection

Under s. 109 of *IRPA*, "vacation" may be sought by the IRB when there is a finding that Convention refugee (CR) status was obtained as a result of directly or *indirectly* misrepresenting or withholding material facts.

Common grounds for an application to vacate CR status include:

- Not in country at time of alleged persecution
- Inconsistent information (such as a spousal sponsorship) on subsequent applications
- False documentation was used

Under s. 108 of IRPA, “cessation” may be sought by the IRB in the following situations under that subsection:

- voluntary re-avilment of the protection of the country of nationality
- voluntary re-acquisition of citizenship of that country
- acquisition of a new nationality in a safe country
- voluntary re-establishment in the country of origin
- the reasons for which the person sought protection have ceased to exist.

The consequences of an application for cessation of CR status are severe. They include:

- Inadmissibility (s. 40.1 *IRPA* Refugee claim is deemed to be rejected (s. 108(3) *IRPA*)
- Loss of permanent resident status (s. 46(1)(c.1) *IRPA*)
- No right of appeal to RAD or IAD (s. 110(2)(c), s. 63(3) *IRPA*)

As a result of the serious consequences, it is strongly urged that new lawyers seek mentorship and assistance from experienced members of the bar when presented with a client who faces an application for either vacation or cessation. Legal Aid Ontario offers a second chair program, as outlined above. For further information and case law on vacation and cessation decisions, refer to the LAO LAW toolkit on representation.

11. Considerations specific to certain types of claims

11.1 Mental health

A client's mental illness may, itself, be a ground of persecution. Violence and stigma toward persons suffering from mental illness can amount to persecution on their own. Medical treatment can also be persecutory, if it includes cruel or dangerous practices. Conversely, lack of treatment linked to discriminatory reasons can amount to persecution. Lack of treatment may also create other grounds of persecution or risk.

A client living with untreated mental illness may act in a way that places them at risk, and the likelihood that they will not receive treatment in their country of origin may form a basis of risk. This is true even where treatment exists in the country of origin, but the person concerned will not be able to access it.

A client's mental illness is relevant to all aspects of their claim:

- Mental illness and/or vulnerability may heighten other risks and must be considered in the cumulative assessment of personal circumstances.
- Mental illness and/or vulnerability must also be considered in weighing what efforts a claimant made to seek state protection, and also the reasonableness of any proposed internal flight alternative.
- A client's testimony and credibility must be evaluated in light of mental illness and/or vulnerability, where appropriate.
- Finally, a client's ability to explain their past circumstances or gather evidence to corroborate their claim must also be assessed in light of relevant limitations.

Medical evidence and psychiatric assessments will be foundational in representing a claim of this type. It may be appropriate to request extensions of time, both for filing the BOC or for the hearing itself, if more time is required. Such requests are much stronger if someone in addition to counsel can write a letter detailing concerns about mental illness, or if counsel can demonstrate due diligence in making appointments or amassing evidence prior to the deadline.

If you are concerned about your client's ability to tell their story accurately because of trauma or mental illness, you may wish to draft a BOC in general terms and, where necessary, provide more details in an affidavit served with other documentation 10 days before the hearing.

Pay particular attention to whether or not a designated representative will be necessary. If you require a designated representative before the BOC deadline, you will have to find one yourself, and apply to the Board to have that person appointed. Social workers, family, or representatives from a mental health advocacy groups make good choices and can help to document the claim and to testify if necessary. Even if your

request for a DR is not adjudicated prior to the BOC deadline, you have laid the groundwork to protect your client's credibility. Do not miss the BOC deadline, but be sure to draft a BOC in general terms with explicit reference to mental illness and the request for a DR.

Finally, alerting the Board to your concerns regarding mental health or limited abilities is important to the evaluation of natural justice. Natural justice arguments about a client's capacity or illness are grounds for argument in abandonment proceedings or an application to re-open a claim.

11.2 Sexual Orientation

Persecution is a serious interference with a basic human right. Accordingly, being forced to hide one's sexual identity from the state and society constitutes persecution.

Acts and behaviours that establish a claimant's homosexuality are inherently private and as a result, there are often difficulties in proving that a claimant has engaged in same-sex sexual activities. A lack of corroborating evidence of one's sexual orientation, without other reasons to doubt a claimant's credibility, is not enough to rebut the presumption that sworn testimony is presumed true.

For a variety of reasons stemming from persecution and discrimination in their country, a claimant may be too fearful to disclose their sexual orientation as the basis for their refugee claim at the Port of Entry. If this applies to your client, seek supporting research through your public library. There are many academic articles written on this topic; Nicole Laviolette and Nicholas Hersh have written useful articles on claims based on sexual orientation and sexual minority status.

It is important to work with your client to see what type of evidence you may be able to gather to establish their sexual orientation or perceived sexual orientation that puts them at risk. This may include activities within Canada or affidavit evidence from former or current partners, family members, friends or other trusted contacts in Canada or in the home country. Look to the laws of the country to determine if homosexual activity is criminalized.

The fact that independent human rights documentation on the situation of sexual minorities continues to be difficult to obtain for many parts of the world means that counsel may have little objective evidence as to whether country conditions constitute discrimination rather than persecution. The Board may conclude that the scarcity or absence of reports demonstrates a lack of persecution. Your case preparation may involve seeking expert evidence on the treatment of sexual minorities or seeking an opinion from Amnesty International or other human rights organizations.

For an examination of case law concerning claims based on sexual orientation, refer to LAO LAW and the toolkit for representation.

Another helpful resource is [UNHCR's guidelines on claims based on sexual orientation](#).

11.3 Generalized risk

Section 97 (1)(b)(ii) states that a claimant is only a “person in need of protection” if the risk they face is present in all parts of the country and that this risk is **“not faced generally by other individuals in or from that country.”** In other words, a “generalized risk” that faces an entire population will not be enough. It is your job to demonstrate that additional factors apply to your client in particular when the entire population or segment of that population faces a risk. For example, while many members of the public might be at risk of being recruited into a gang, you can argue that your claimant has already been targeted and identified for recruitment, which creates additional and personalized risk.

There are divergent lines of reasoning on the difference between “generalized” and “personalized” risk. The Federal Court has attempted clarify how a section 97 analysis should be conducted. For an examination of the case law concerning generalized risk, refer to LAO LAW and the toolkit for representation, p. 43.

11.4 Claimants who are minors

Just as with a vulnerable client, if your client is a minor, you will have to play a much greater role in gathering evidence to support the claim. You will also need to ensure that an appropriate person has been appointed as designated representative, as explained above. While it may be easier for the Board to appoint a family member, consider whether your minor client will be able to testify about all of the details of their claim openly in front of a family member. Object if not, and seek a different designated representative.

Psychological evidence may be crucial to a minor's claim, but a child's capacity to explain what they are afraid of, what happened, and their own perceptions may be limited. Consider what accommodations you will require to allow your client to testify. Are they able to testify at all? A very young or very vulnerable child may not be able to vocalize their fears at all. Affidavit evidence, even pictures drawn, may be a substitute or supplementary form of evidence in these cases.

The Board is required to consider the [Chairperson's Guideline on Child Refugee Claimants](#).

In addition, it may be appropriate to request a vulnerable person designation and accommodations. In extreme cases, you might request that a child testify via video, or at your office or a familiar location instead of in a formal hearing room.

Remember to listen to questions put to a minor and object if you think they are too complex or sophisticated. The Board must tailor its questions properly, and children may

not be able to remember instructions such as “do not answer a question you do not understand.” Be vigilant, and prepare in advance to corroborate the claim with letters, testimony, and documentation, so the child’s testimony is not the only means of establishing the claim.

The elements of a child’s refugee claim are also different than an adult. Although the Board may take a different or “sliding scale” view of a 17-year-old versus a five-year-old, children are generally not expected to access state protection as adults might. Similarly, children are not expected to express subjective fear as adults do.

Finally, the scope of a child’s refugee claim can be much broader than an adult’s. Persecution may comprise what are commonly classed as only H&C-type factors, such as the cumulative impact of lack of access to adequate housing, social services, education, shelter, or even food. A seminal and useful reference is *Canada (MCI) v. Patel*, 2008 FC 747.11.5

11.5 Compelling reasons

Section 108(4) of the *IRPA* states that even if the reasons for refugee protection have ceased to exist, refugee status can be retained when “there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.”

An argument can be made concerning compelling reasons in exceptional situations involving severe torture or abuse. This is also a good tool for changes of circumstances. For example, an agent of persecution has since died, or a claimant was a minor at the time of the persecution. If your client’s case is compelling but for a change in circumstances, you may wish to consider such an argument.

This is a good opportunity to consult with senior counsel, since it may affect advice as to whether a client should pursue a refugee claim or an H&C.

For an examination of the case law on this issue, refer to the LAO LAW website’s Toolkit for Representation, p. 47.

11.6 Discrimination rising to the level of persecution

Sometimes treatment of a claimant might not rise to the level of persecution, and may instead be categorized as mere discrimination or harassment.

When the evidence shows a series of events, each of which may only constitute discrimination and not persecution, the Board must examine the evidence and events in totality, as they may together amount to persecution.

The UNHCR [*Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*](#) provides guidance on when cumulative discrimination might be seen as persecution.

Paragraphs 54 and 55 of the Handbook are as follows:

54. Differences in the treatment of various groups do indeed exist to a greater or lesser extent in many societies. Persons who receive less favourable treatment as a result of such differences are not necessarily victims of persecution. It is only in certain circumstances that discrimination will amount to persecution. This would be so if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities.

55. Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.⁸

For more discussion and case law on cumulative discrimination, please refer to the Toolkit for Representation at page 39.

11.7 Nationality is in issue

A long line of case law establishes that a claimant must prove their identity, especially their nationality, as a preliminary matter before the Board will consider the balance of their claim. Certain countries, such as Somalia or Djibouti, have not regularly produced identity documents for their nationals. Some clients may, in fact, be stateless, if they are caught between different countries' nationality laws.

Where no national identity documents are available, proving nationality in other ways will be essential. This can be done by attestations from cultural or ethnic community groups, calling a family member or acquaintance who knew your client in their country of origin as a witness, and providing an affidavit of identity (an example is in the Appendix). If providing affidavit evidence, it is very important to spell out as much detail as possible the how, why, when, what, who of how a witness can confirm your client's identity. In the case of a community organization, have them provide detail about their process for verifying identity.

Language and knowledge of local details also become extremely important in these cases as a means for the Board to test your client's identity. Credibility will become the central issue. Your client will require focused and extensive preparation on mundane details about their country: currency, language, cultural groups, politics, locations, etc.

Try to gather as much corroborating documentation as possible. Where it is not possible, a claimant should be prepared to describe the efforts they took to get it, and the reasons it is not available. Counsel's submissions will also be particularly important in addressing identity directly, including how the testimony and evidence before the Board is a reliable and credible substitute for national identity documents.

Appendices

Please note that additional templates are available to you through LAO LAW.

Appendix A: Sample letters

1. Notification of counsel and request for POE/CIC notes

[DATE]

Delivered by fax 416-954-1165

The Registrar

Immigration and Refugee Board

74 Victoria Street, Suite 400

Toronto, ON M5C 3C7

RE: [CLIENT'S NAME]

DOB: _____

Client ID No.: _____

Notification of Counsel

Please be advised that I am counsel retained to represent [CLIENT'S NAME] with regard to his/her claim to refugee protection in Canada.

We are writing to request disclosure of the POE notes and any other documents forwarded to the IRB **by CIC or CBSA** concerning [CLIENT'S NAME]. Please contact our office at 416.977.8111 once the package is ready and we will make arrangements for it to be picked up from your office.

Should you have any questions or require additional information please do not hesitate to contact me directly.

Yours truly,

[NAME]

Barrister and Solicitor

2. Letter to client regarding documentation required

(NOTE: Some portions of this letter will need to be removed for a POE claim)

Delivered by XXX

[DATE]

[CLIENT'S NAME

ADDRESS]

Dear CLIENT'S NAME:

Re: Documents required to support your refugee claim

You will need documents to help prove your refugee claim. You already have your XXXXX and your XXXX. You will need to bring your XXXX to Citizenship and Immigration Canada ("CIC") when you start your refugee claim.

CIC will "seize" (hold onto) your XXXX. They do this for all refugee claimants. They must provide you with a certified true photocopy and also a receipt or documentation about the seizure. CIC will return your XXXX to you when you apply for permanent residence in the future, after your refugee claim is completed and successful, or when you apply for permanent residence from within Canada via another type of application.

I have reviewed your file and believe that the following documents are needed to help prove your refugee claim:

1. All education certificates, particularly your XXXXXX
2. A copy of your marriage certificate to, XXXXXX
3. A copy of the birth certificates of your XXXXX, XXXXXX
4. A copy of your membership card to XXXXXXXX, and/or a letter from the organization confirming: XXXX, XXXX, XXXX
5. A letter from your past employer(s), XXXXXX, confirming the following facts: XXXXXXXXXXXX, XXXXXXXXXXXX
6. Any letter(s) from XXXX who can confirm any (or all) of the following facts: XXXXXXXXXXXX, XXXXXXXXXXXX
7. Letter from XXX, confirming any (or all) of the following, XXXXXX
8. A death certificate, if one may exist, concerning XXXXXX
9. A police report, if one may exist, concerning XXXXX
10. A hospital or doctor's report or medical records from your time in XXX hospital or clinic, confirming XXXXXX
11. Any photographs of you with XXXXX, or at the XXXX
12. Any other document you think might be important.

It is important that you obtain these documents, or try to obtain these documents, as soon as possible. Please keep a written diary of who you contacted to ask for documents, how you contacted them, on what date, and their response (or whether there was no response). That way, if you are unable to get documents, you will have a record of your efforts to get them. You will be able to answer questions from the Board at your hearing about *the efforts* you made to try and obtain supporting documents.

**** Please also **keep all envelopes and packaging** that the documents arrive in. This helps to prove that these documents really came from overseas.

If people can fax you documents, they can do so to my attention at the office fax number: XXX. Please call our office and tell [XXX] that these documents might be arriving. Remember not to write on any original documents.

Please bring in the original documents you are able to gather for me to review at our next meeting or drop them off at our office for my review. We will need to have all documents not in English or French translated prior to your hearing.

[FOR SOME CLAIMANTS ONLY-] As I mentioned in our last interview, we are going to attempt to schedule [a psychological assessment AND/OR medical assessment] for you in the near future, to help support your refugee claim. Our office will advise you of the date and time of those appointments. It is **very important** that you attend these appointments, as the reports from these doctors are often very helpful for clients in refugee claims.

***** Supporting documents should be sent to the Immigration and Refugee Board at least 10 days before your hearing.** If you obtain a document after that time period, please bring it to me immediately, as I may be able to have it admitted in support of your refugee claim. If you have any questions about your claim, please contact XXXX at XXXX.

Yours truly,

LAWYER'S NAME

Barrister and Solicitor

3. Letter to RPD notifying of intention to call witness

[DATE]

Delivered by fax 416-954-1165

The Registrar

Immigration and Refugee Board

74 Victoria Street, Suite 400

Toronto, ON M5C 3C7

RE: CLIENT NAME

Client ID: XXX

Hearing Date: XXX

Intention to Call a Witness

Please note that we intend to call a witness to support [CLIENT NAME]'s refugee claim.

The witness's contact information is as follows:

I expect [WITNESS NAME] will testify [EXPLAIN EXPECTED SUBJECT OF TESTIMONY AND RELEVANCE]. I expect this testimony will take [TIME].

The witness will testify [STATE MANNER AND WHETHER AN INTERPRETER IS REQUIRED].

Should you have any questions or require additional information please do not hesitate to contact me directly.

Yours truly,

[NAME]

Barrister and Solicitor

4. Letter to RPD notifying of intention to call expert witness

[DATE]

Delivered by fax 416-954-1165

The Registrar

Immigration and Refugee Board

74 Victoria Street, Suite 400

Toronto, ON M5C 3C7

RE: CLIENT NAME

Client ID: XXX

Hearing Date: XXX

Intention to Call an Expert Witness

Please note that we intend to call an expert witness to support [CLIENT NAME]'s refugee claim.

The witness's contact information is as follows:

I expect [WITNESS NAME] will testify [EXPLAIN EXPECTED SUBJECT OF TESTIMONY AND RELEVANCE]. I expect this testimony will take [TIME]. Pursuant to Rule 44, I am enclosing a signed summary of the witness' expected testimony.

[WITNESS NAME] is a qualified expert. [DESCRIBE QUALIFICATIONS]. I am attaching a Curriculum Vitae for your reference.

The witness will testify [STATE MANNER AND WHETHER AN INTERPRETER IS REQUIRED].

Should you have any questions or require additional information please do not hesitate to contact me directly.

Yours truly,

[NAME]

Barrister and Solicitor

5. Letter to RDP regarding post-hearing evidence

[DATE]

Delivered by fax 416-954-1165

The Registrar

Immigration and Refugee Board

74 Victoria Street, Suite 400

Toronto, ON M5C 3C7

Attention: Board member XXXX

RE: CLIENT NAME

Client ID: XXX

Hearing Date: XXX

Re: Application for post-hearing disclosure

This is an application made pursuant to Rule 43 and Rule 50 of the RPD rules for admission of post-hearing evidence. In evaluating whether it is appropriate to allow post-hearing evidence, Board members are to consider any relevant factors, and in particular, as per Rule 43:

- a) the document's relevance and probative value
- b) any new evidence the document brings to the proceedings and
- c) whether the party, with reasonable effort, could have provided the document as required by rule 34.

I apologize that this evidence is being provided post-hearing. We were unable to provide it earlier because [INSERT EXPLANATION, WITH CORROBORATION IF POSSIBLE. EVEN AN ADMINISTRATIVE ERROR MAY BE USED, AS THE CLAIMANT OUGHT NOT TO BE PREJUDICED BY IT].

The disclosure is relevant and probative because [EXPLAIN THE RELEVANCE OF THE DOCUMENTS. ADDRESS WHY IT IS TRUSTWORTHY AND HOW IT SUPPORTS YOUR CASE. THIS IS ANOTHER OPPORTUNITY TO RESTATE YOUR CASE FOR THE BOARD MEMBER, ALBEIT BRIEFLY.]

As this evidence is clearly relevant to [NAME OF CLAIMANT] claim and as there is to date no decision in this matter, I request that this disclosure please be put before Member [NAME] as soon as possible so it may be considered before a decision is rendered.

I apologize for the inconvenience. Should you have any questions or require additional information please do not hesitate to contact me directly.

Yours truly,

[NAME]

Barrister and Solicitor

6. Letter to client advising on intention to get off record

DATE

Mr. / Ms. Claimant's name

ADDRESS

Dear NAME

My office have has been trying to contact you without success for the past week. Several messages have been left for you but you have not returned these calls. It is important that we speak to you.

If you want me to continue to be your lawyer, please contact this office at once.

If we do not hear from you within two weeks from the date of this letter, we will assume that you no longer wish for us to continue representing you with your claim and we will advise the Immigration and Refugee Board accordingly. In that case, unless you find another lawyer, you could be without a lawyer at your hearing.

Yours truly,

NAME

Barrister and Solicitor

7. Notification to client that you will no longer represent him/her

DATE

ADDRESS

Dear NAME,

RE: TERMINATION OF RETAINER

This letter is to confirm that our office will no longer be representing you with respect to your claim to Convention refugee status.

We will be advising the Immigration and Refugee Board that we will not be representing you in any capacity from now on. Please find enclosed a letter to the Board advising them that we will not be representing you anymore.

We will request that all correspondence from the Immigration and Refugee Board be directed to you personally.

In the event that you have retained new counsel, could you please advise our office immediately.

We will also be closing your file at this office. I wish you all the best in pursuing your refugee claim.

Yours truly,

NAME

Barrister and Solicitor

8. Letter to IRB to be removed as counsel of record

DATE

Delivered by Fax: (416) 954-1165

Immigration and Refugee Board

74 Victoria Street, Suite 400

Toronto, ON M5C 3C7

Attention: The Registrar

Dear Sir/Madam:

RE: CLAIMANT'S NAME

RPD File No: XXX

REQUEST TO BE REMOVED AS COUNSEL OF RECORD

Pursuant to Rule 15 of the RPD Rules, I am writing to notify you that I am no longer able to act for (CLAIMANT'S NAME) and request that I be removed as counsel of record. We will not be attending at the hearing date set for (DATE).

All future correspondence should be directed to the claimant, or to claimant's new counsel if any.

Thank you for your attention to this matter.

Yours very truly,

NAME

Barrister and Solicitor

cc: CLAIMANT

Note

If fewer than three working days are left before the hearing date, you will also have to attend in person and make the request to be removed as counsel of record, pursuant to *Rule 15(2)*.

9. Letter to IRB to request an adjournment

DATE

Delivered by Fax: (416) 954-1165

Immigration and Refugee Board

74 Victoria Street, Suite 400

Toronto ON M5C 3C7

Attention: The Registrar

Dear Sir/Madam:

RE: CLAIMANT'S NAME

RPD File No: XXX

Request for Adjournment of hearing Scheduled for DATE

I am counsel for the above noted claimant. I am writing this letter in order to request an adjournment of CLAIMANT'S hearing in order to appoint a designated representative for her and to conduct a complete psychiatric assessment pursuant to RPD Rule 20(1). I also make this request pursuant to Rule 54(5)(a), that the postponement of the RPD hearing is required in these exceptional circumstances in order to accommodate a particularly vulnerable person.

As our office was only recently retained and we have yet to receive comprehensive medical information regarding her capacity in relation to giving evidence and understanding the nature of the proceedings, I am unable to provide the Division with alternate dates at this time. Given her exceptional circumstances and vulnerable condition, we ask that the Division excuse her from this particular requirement, pursuant to Rule 70(c).

I undertake to provide the Division with a more fulsome BOC and counsel's availability for a hearing date as soon as possible after obtaining the requisite medical information to determine her capacity to participate in these proceedings.

For the above reasons, and given the extremely short timelines, in order for us to be able to thoroughly and accurately prepare the claim, and in order to ensure procedural fairness and natural justice for this vulnerable claimant, we request that the hearing be postponed at this time.

Thank you for your attention to this matter.

Yours very truly,

NAME

Barrister and Solicitor

cc: CLAIMANT

10. Letter to client where claim unsuccessful

[DATE]

Delivered by XXX

[CLIENT'S NAME AND ADDRESS]

Dear [CLIENT'S NAME]:

RE: YOUR REFUGEE CLAIM

We have just received the decision regarding your refugee claim from the Immigration and Refugee Board. Unfortunately the Board has found you not to be a Convention refugee or a person in need of protection.

I would like to speak to you to discuss your options. One option would be trying to appeal/review the decision at the {Refugee Appeal Division OR Federal Court}. If you choose that option, you will need to file a notice with the RAD/court no later than 15 days after you were notified of the Board's decision.

Since the original Legal Aid Certificate covered only the refugee hearing, you will need to re-apply for Legal aid coverage for such a step.

If you choose not to seek review of the Board's decision, the removal order made against you when you initially made your refugee claim will become enforceable, and immigration can start to take steps to remove you.

Please contact us immediately so we can discuss this matter further.

Yours truly,

[LAWYER'S NAME]

Barrister and Solicitor

Note

It is often preferable to deliver this news first via telephone or in person interview, particularly where your client does not speak English or is particularly vulnerable. Consider specifically whether you have concerns about suicide or self-harm and take appropriate precautions to advise your clients in person and to ask them to bring a support person to the meeting.

11. Letter to client where claim successful

DATE

By regular mail

NAME AND ADDRESS

Dear NAME OF THE CLIENT

Congratulations on the success of your refugee claim. You are now entitled to apply for permanent residence (also called “landing”) in Canada. **It is your responsibility to file an application for permanent residence as a protected person.**

You should be aware that it might take up to a year or longer for your permanent residence application to be processed. It is your obligation to advise Citizenship and Immigration Canada if you change your address at any time before you are granted landing. It is your responsibility to renew your work permit when it expires. If you intend to take a course of study that lasts more than six months, you will need to apply for a study permit. If you wish to travel outside of Canada you can apply for a Convention refugee travel document which allows you to travel anywhere, *except* the country where you have been found at risk of persecution. It is important to understand that a lengthy absence from Canada could affect your eligibility for permanent residence.

Please note that if you ever return to the country against which you claimed refugee protection, you could risk your permanent resident and Convention refugee/protected person status. Even if you apply to renew the passport from the country where you fear persecution, you could put your status at risk. Before applying for or renewing a passport or travelling to that country, seek immigration legal advice.

Please also note that **if you receive a criminal conviction in Canada** it could affect your immigration status. If you are ever charged with a criminal offence, obtain advice from a lawyer who specializes in immigration law, **before** pleading guilty to any criminal charge, so that you understand the possible immigration consequences of a criminal conviction.

To safeguard your right to remain in Canada we recommend that you apply for Canadian citizenship as soon as you are eligible to do so.

You are now entitled to **Ontario Health Insurance Program (OHIP) coverage**. When making the application, be sure to indicate that you have been in Ontario for over three months, so that you can avoid the three-month waiting period.

OPTIONAL: We will now be closing your file, as our work on your behalf is completed. Should you need assistance in completing your landing application, you should contact your community organization or your local community legal clinic.

Congratulations once again on the success of your refugee claim. I wish you the best of luck in the future. Please note that if you need copies of your documents from your file, you can pick them up from our office within 30 days from the date of this letter.

Sincerely,

LAWYERS' NAME

Barrister and Solicitor

Note

It is important to highlight the cautionary aspects of the congratulations letter in person, where possible. The consequences of criminality and cessation are too great to overlook.

12. Letter to IRB to request an adjournment (with BOC amendment)

DATE

Delivered by Fax: (416) 954-1165

Immigration and Refugee Board

74 Victoria Street, Suite 400

Toronto, ON M5C 3C7

Attention: The Registrar

Dear Sir/Madam:

RE: CLAIMANT'S NAME

RPD File No: XXX

Amendment of BOC and additional (late) disclosure

I am counsel for the above noted claimant. I am writing this letter in order to disclose an updated and amended BOC for my client. We have followed the format according to RPD Rule 9(1), however, we have not complied with the time limit according to RPD Rule 9(2). The hearing is in six days, and the claimant was just notified of his father's attack yesterday. Along with the amended BOC, we are submitting a copy of the newspaper article that describes this incident, which we submit is highly probative to the claim, and could not have been obtained any earlier, which meets all of the aspects of RPD Rule 36 (a) – (c).

Please forward this material to the Board member scheduled to hear this claim, and I will be bringing the original and its English translation to the hearing.

Thank you for your attention to this matter.

Yours very truly,

NAME

Barrister and Solicitor

cc: CLAIMANT

Appendix B: Affidavit of identity example

IRB File Numbers: TA1-

In the Immigration and Refugee Board Refugee Protection Division

In the Matter of: A.B.

AFFIDAVIT

I, Stuart Bailey, presently of the City of Toronto, in the Province of Ontario, make oath and say as follows:

I am currently residing at 123 Deadend Street in Toronto. I was born in Bigtown, Fredonia on January 14, 1957. I arrived as a landed immigrant in Canada in 1980. I am now a citizen of Canada. Attached to this affidavit as Exhibit "A" is my birth certificate from Fredonia. Attached to this affidavit as Exhibit "B" is my Canadian passport.

I knew A.B. in Fredonia. Her older brother, Randolph, and I were very good friends. I used to visit their house often, and I would often see A.B. there. The last time I saw her there was a few days before my departure for Canada, when I was saying goodbye to my friends. [YOU MAY ALSO WISH TO INCLUDE DETAILS ABOUT THE HOUSE IN FREDONIA, DETAILS ABOUT A.B.'S FAMILY TREE THAT ARE KNOWN TO THE WITNESS, AND ANYTHING ELSE TO DEMONSTRATE THE CREDIBILITY OF THE EVIDENCE]

I met A.B. in Canada in March of this year. I was at the Fredonian Community Centre, where I sometimes work as a volunteer. I began chatting with her, and we talked about where we had lived in Bigtown. When she mentioned her address, I asked her if she was Randolph's sister. As we talked, I realized she was A.B. Although many years have gone by I am certain she is the A.B. I knew in Bigtown.

Since that meeting we have been in touch regularly. I often see her at the Community Centre and we have been at each other's homes for holidays.

I make this affidavit in support of establishing A.B.'s identity and for no other or improper purpose.

Sworn before me in the city of XXX

In the Province of Ontario,

this __ day of _____, 20__

Stuart Bailey

A Commissioner, et