

Collective Letter on behalf of the Undersigned Lawyers and Supporters

August 10, 2020

To: Richard Wex, Chairperson;
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**Re: COVID-19 concerns with the resumption of refugee hearings at the
Immigration and Refugee Board**

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As of August 3, 2020, the Immigration and Refugee Board (IRB) has resumed hearings for the Refugee Protection Division (RPD) and the Immigration Appeal Division (IAD) in all locations.

We are a group of concerned lawyers and advocates. We write this letter requesting that the IRB immediately cease scheduling all in-person and videoconference hearings until the concerns set out below are addressed. The IRB's approach and its inconsistent messaging are placing refugee claimants, and others who appear before the Board, and their counsel at risk of contracting COVID-19.

We note that other members of the justice community have also expressed concern at returning to court settings¹ and in one case filed for an injunction.² We further note that the Chief Justice of the Superior Court of Justice has encouraged all judicial officers to be flexible when advised that a participant is uncomfortable attending in person and to accommodate the parties via virtual hearings.³

Specifically, we ask that all parties in receipt of this letter discuss, fund, and implement an accessible system that:

- a) does not place refugee claimants or counsel at risk of contracting COVID-19;
- b) does not require additional expense and resources for refugee claimants or counsel; and
- c) respects privacy requirements for hearings.

Current Situation

Persons appearing before the IRB are vulnerable refugee claimants. Many live precariously in shared accommodation in refugee shelters⁴ and neighbourhoods with high infection rates due to poverty and overcrowding.⁵

The IRB has published minimal information about safety measures being implemented for in-person hearings. It appears from discussions by various organizations and counsel with the IRB that in-person hearings will proceed with Board Members in one room, and counsel and claimants in another room (with some form of plexiglass barriers). Interpreters will be dialing in remotely. Minister's counsel will also be attending remotely.

¹ *Ontario Crown Attorneys Seek to Delay Return to Court Over COVID-19 Fears*. CBC, June 30, 2020

² *Citing Lack of COVID-19 Safety Measures, Courthouse Workers, Lawyers, Push Back Against Ontario Reopening of Courts*. Globe and Mail, June 29, 2020

³ *Notice to the Profession re: Justice Participants Unable to Attend In-Court Hearings in the Ontario Superior Court of Justice (July 21, 2020)*, <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/in-court-hearings/>

⁴ *How a Haven for Refugees Became Home to the Worst COVID-19 Outbreak in Toronto's Shelter System*. The Toronto Star, May 24, 2020

⁵ *Toronto's COVID-19 Divide: The City's Northwest Corner has been 'Failed by the System'*. The Toronto Star, June 28, 2020

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While masks will be mandatory in the common areas, such as hallways, they are optional in hearing rooms but “must be removed when testifying or providing submissions.”⁶ . Also, due to the confidential nature of the proceedings, hearing room doors are closed, and most hearing rooms have no windows.

Counsel are currently being contacted to schedule refugee hearings in-person. If counsel objects to appearing in person, the objection is noted, and counsel are informed that no videoconferencing hearings are currently being scheduled and that they will be placed on a list for a video conferencing hearing. Furthermore, counsel are being informed that when videoconferencing hearings are scheduled in the future, counsel will need to ensure that they can attend the videoconference through Microsoft Teams. Counsel is also told that they will need to ensure that their clients will have access to Microsoft Teams and a host of other technical requirements and conditions.

Counsel are informed that if their clients do not have access to Microsoft Teams, they will need to have claimants in their office to conduct the hearing remotely.

Concerns: In-Person Hearings

In-person hearings are dangerous for refugee claimants, counsel, and our respective families. It is now well-known that COVID-19 spreads through the air. Recently 289 experts have pointed to evidence demonstrating that the coronavirus has become airborne. They have called upon the World Health Organization (WHO) to revise its recommendations to acknowledge the increased risk, particularly indoors.⁷ In response, the WHO has acknowledged that the virus can be aerosolized, particularly in indoor settings when talking, singing or engaging in physical activities. The key factors include poorly ventilated settings, close proximity and prolonged contact. Furthermore, the aerosolized particles can be found in the air for some time.⁸ Independent researchers have confirmed that simply talking in confined spaces may be enough to spread the virus.⁹

Our concerns in respect of in-person hearings include:

- a) The IRB hearing rooms are small rooms with notoriously poor ventilation. These rooms are not comparable to the large courtrooms used by the courts.
- b) Although masks have become mandatory in all public indoor settings, **the IRB has stated that masks “must” be removed during testimony and submissions¹⁰**, placing parties in the room at risk from each other. A face shield may be an alternative but note that a recent warning from Switzerland cautions that face shields alone are ineffective, create a false sense of security and

⁶ IRB, “New COVID-19 health and safety measures,” <https://irb-cisr.gc.ca/en/stay-connected/Pages/covid-health-safety-measures.aspx>

⁷ 289 Experts With One Big Claim: The Coronavirus is Airborne. The New York Times, July 4, 2020

⁸ Q&A: Airborne COVID-19 Spread Possible, Risky in Some Settings. Al Jazeera, July 10, 2020

⁹ Simply Talking in Confined Spaces May be Enough to Spread the Coronavirus, Researchers Say. The Statesman, May 14, 2020

¹⁰ IRB, “New COVID-19 health and safety measures,” <https://irb-cisr.gc.ca/en/stay-connected/Pages/covid-health-safety-measures.aspx>

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should not be worn without a mask. In addition, face shields may not be accessible to claimants due to cost;¹¹

- c) Claimants, counsel and support persons often travel on public transit, thereby increasing the risk of COVID-19 contraction;
- d) The IRB has not published specific health and safety procedures and protocols that will be followed to sanitize hearing rooms, bathrooms and facilities; rather, all information received is anecdotal. The IRB has not published any scientific, medical, or engineering reports from relevant experts about the air quality and ventilation in its buildings.
- e) IRB bathrooms were untidy and unsanitary before COVID-19;
- f) IRB elevators were over-crowded before COVID-19. Often, counsel and clients were required to wait for several elevators before being able to board. With social distancing measures in place, counsel and claimants will need to appear well before their scheduled hearing time. This increases the risk of exposure for both counsel and clients.
- g) Claimants are often in high-risk categories because they live in shelters, or shared accommodation and high-risk neighbourhoods. Some have underlying health conditions that have weakened their immune systems;
- h) Claimants and counsel may have contracted COVID-19 and be asymptomatic. A simple questioning of clients and counsel about COVID-19 symptoms prior to their entry will not suffice in preventing the spread of the virus.
- i) Counsel are tasked with screening claimants in the days before their attendance at the hearing. No other information has been provided to counsel by the IRB regarding screening questions or responses. This is a downloading of responsibility onto counsel.
- j) Out-of-town claimants and counsel may have to travel by train, bus or plane to the city where the hearing is being held. They may need to stay in hotels or shared accommodations. Travelling and staying in hotels would place such claimants and counsel at additional risk.
- k) The lives of refugee claimants are in limbo until they receive a decision. Many will want to have their hearing as soon as possible. They may unwittingly minimize COVID-19 symptoms or exposure to people who may have contracted COVID-19 or travelled in the last two weeks.
- l) Counsel are placed in a potential conflict of interest wherein they may feel the need to prioritize their clients' lives over their own health and the health of their family members and co-habitants.
- m) By requiring claimants to attend in-person hearings without proper safety measures, the IRB is further marginalizing the adverse impact of COVID-19 on racialized groups (which are the majority of refugee claimants).

¹¹ 'Only Those with Plastic Visors were Infected': Swiss Government Warns Against Face Shields. The Local, July 15, 2020

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Concerns: Remote Videoconference Hearings

While most counsel prefer to proceed via remote videoconference hearings, the IRB has not proposed or implemented a system that adequately addresses the following concerns:

- a) Claimants' access to computers and other technical requirements set out as necessary conditions for videoconferencing by the IRB;
- b) Claimants' access to the internet;
- c) Claimants' access to a safe, confidential environment;
- d) Claimants' access to Microsoft Teams; and
- e) Many counsels' ability to attend a videoconference within a confidential environment.

Many refugee claimants do not have a computer, and some do not have their own cell phone. Some do not have a stable internet connection. They often live in shared accommodation or shelters. They often have children with no childcare available. It is often not viable for them to have their hearing while holding up a cell phone, taking care of their children and possibly in an unsecured environment.

Due to social distancing requirements and other safety precautions in counsel offices, it may not be possible to have claimants safely attend their counsel's office to have their videohearing. In addition, by downloading the responsibility of providing the technical equipment and space onto counsel, there is a greater risk of spreading the virus in a multitude of offices. Downloading the responsibility to provide the space and technical requirements onto counsel is an abdication of responsibility by the IRB, which must provide the physical space/requirements to conduct hearings for vulnerable refugee claimants.

In addition, the final concern listed above requires elaboration. Many counsel within the refugee bar are currently working at home. Many legal offices are challenged to meet the social distancing guidelines and have limited space for staff, let alone providing office space and computer equipment for refugee claimants to attend their videohearings. All these entail additional costs for additional office space, computer equipment, the required software, plexiglass, masks, sanitizers and other safety equipment.

Many counsel currently do not have access to an office at all, especially the junior members of the bar who have been exponentially impacted by the financial consequences of the pandemic. Many of these same counsel co-habit with other individuals and cannot attend via videoconference hearings within a confidential environment. They may also have childcare responsibilities.

Conclusion

Unless the above-noted concerns are addressed, the IRB is in effect not providing viable access to justice for refugee claimants. Its current approach has a disproportionate impact on vulnerable claimants due to race, age, disability, and family or marital status. Only by addressing the concerns raised above would the IRB be providing true accommodation for such individuals.

The IRB's approach also has a disproportionate impact on many counsel due to race, age, disability, and family or marital status.

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The IRB has the flexibility to conduct paper-based hearings, with the caveat that no negative decision can be rendered without an oral hearing. **The IRB has stated orally that it would use this flexibility broadly as an alternative to hearings.** Yet the IRB has not implemented a system that can resolve a large backlog of cases by conducting paper-based reviews as a default. **We believe that due to the concerns with both methods of hearings, this safe and efficient alternative needs to be implemented before any hearings proceed. It is the safest and most efficient way to resolve cases expeditiously and would leave only the cases that truly cannot be resolved this way in need of hearings – once hearings can be held safely.**

The IRB should publish a clear written policy stating that, where hearings are needed, both counsel and claimants will be provided with the choice to proceed in-person or via videoconference, without any negative repercussions for counsel or claimants. The IRB should allow counsel to attend remotely and clients to attend in-person if that is their preference.

The IRB should allow access to its own video conference rooms where refugee claimants may attend virtual hearings. The IRB has only opened its hearing rooms for “in-person” hearings in which counsel and claimant must sit together in the hearing room for an average of four hours (for half-day hearings) or an average of seven hours (for all-day hearings).

If a case is going to be scheduled for a hearing (whether counsel/clients elect to do so by videoconference or in-person), the IRB should send **advance notice of the narrowed issues the Board Member wants to be addressed** at the hearing. A more efficient hearing is particularly imperative for in-person hearings to focus on the issues and reduce hearing time, thereby reducing the length of contact and the risk of transmission.

Finally, in the event of a reported case of COVID-19 at the IRB, we request that the bar and community be informed at once.

We understand that many of the above concerns cannot be resolved by the IRB on its own. The **Federal and Provincial governments, as well as legal aid**, must hold discussions with the IRB about creating the necessary physical and technological conditions that protect the health, safety, and confidentiality of vulnerable refugee claimants, counsel, and their respective families.

We look forward to hearing from you as soon as possible. Contact persons:

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139. Matthew T. McGarvey, Barrister and Solicitor (Ottawa, ON)
140. Jenn McIntyre, Director, Romero House (Toronto, ON)
141. Graciela Flores Méndez, Barrister and Solicitor, Jackman & Associates (Toronto, ON)
142. Army Mendoza, Executive Director, Woman Abuse Council of Toronto (WomanACT) (Toronto, ON)
143. Claudia Andrea Molina, Barrister and Solicitor (Montréal, Québec)
144. Mike Morency, Executive Director, Matthew House Refugee Welcome Centre (Windsor, ON)
145. Marvin Moses, Barrister and Solicitor (Toronto, ON)
146. Astrid Mrkich, Barrister and Solicitor, Mrkich Law (Toronto, ON)
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148. Constance Nakatsu, Barrister and Solicitor (Toronto, ON)
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152. Adeena Niazi, Executive Director, Afghan Women's Organization (AWO)
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154. Juliette Ntege, Staff, Canadian Centre for Victims of Torture (CCVT) (Toronto, ON)
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156. Annie O'Dell, Barrister and Solicitor (Toronto, ON)
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160. Tara Pandes, Barrister and Solicitor (Calgary, AB)
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162. Glenda Perry, Barrister (Toronto, ON)
163. John Petrykanyn, Barrister and Solicitor (Toronto, ON)

Collective Letter on behalf of the Undersigned Lawyers and Supporters

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166. Marcie Ponte, Executive Director, Working Women Community Centre (Toronto, ON)
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169. Daniel Radin, Barrister and Solicitor, Radin Law LLP (Toronto, ON)
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171. Sharmin L. Rahman, Barrister and Solicitor (Toronto, ON)
172. Gabriela Ramo, Barrister and Solicitor (Toronto, ON)
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174. Giovanni Rico, Staff, Canadian Centre for Victims of Torture (CCVT) (Toronto, ON)
175. Francisco Rico-Martinez, Co-director, FCJ Refugee Centre (Toronto, ON)
176. Patricia Ritter, Barrister and Solicitor, Czuma, Ritter (Toronto, ON)
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182. Moxi Sahi, Barrister and Solicitor (Brampton, ON)
183. Jasmik Saini (Toronto, ON)
184. John A. Salam, Barrister and Solicitor (Toronto, ON)
185. Leigh Salsberg, Barrister and Solicitor; Past Executive Member, Refugee Lawyers Association (RLA); Past Chair, Access to Justice Committee, RLA (Toronto, ON)
186. Silvia Samsa
187. Richa Sandill, Barrister and Solicitor (Toronto, ON)
188. Priya V. Sankarapapa (Calgary, AB)
189. Maria Deanna Santos, Barrister and Solicitor, Santos Law Office (Toronto, ON)
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191. J. Stephen Schmidt, Barrister and Solicitor (Waterloo, ON)
192. Marcia Pritzker Schmitt, Barrister and Solicitor, PS Immigration Law (Waterloo, ON)
193. Toni Schweitzer, Barrister and Solicitor, Parkdale Community Legal Services (Toronto, ON)
194. Gary L. Segal, Barrister and Solicitor, Founding Chair, Immigration and Citizenship Section, Canadian Bar Association (CBA) (Toronto, ON)
195. Eve Sehatzadeh, Barrister and Solicitor (Toronto, ON)
196. Robin Seligman, Barrister and Solicitor, Past Chair, Canadian Bar Association (CBA) and Ontario Bar Association (OBA), Certified Immigration and Citizenship Specialist, Law Society of Ontario (Toronto, ON)
197. Lindsay Campbell Senese, Barrister and Solicitor (Toronto, ON)
198. Laura Setzer, Barrister and Solicitor (Ottawa, ON)
199. Mojdeh Shahriari, Barrister and Solicitor (Vancouver, BC)
200. Nazia Shaikh, Barrister and Solicitor, Shaikh Law Firm (Toronto, ON)
201. Siavash Shekarian, Barrister and Solicitor (Toronto, ON)
202. Natalia Simoes (Toronto, ON)
203. Mandeep Singh, Barrister and Solicitor, Mohar Law (Calgary, AB)
204. Matthew Smith, Barrister and Solicitor

Collective Letter on behalf of the Undersigned Lawyers and Supporters

205. Michelle Smith, Barrister and Solicitor, Bondy Immigration Law (Toronto, ON)
206. Heath Soave
207. Elena Solokhina, Staff, Canadian Centre for Victims of Torture (CCVT) (Toronto, ON)
208. Dushahi Sribavan, Barrister and Solicitor, Dushahi Sribavan Law Professional Corporation (Toronto, ON)
209. Batia Stein, Barrister and Solicitor
210. Atul Subedi, Barrister and Solicitor, Atul Subedi Professional Corporation (Toronto, ON)
211. Zool Suleman, Q.C., Suleman & Co., Canadian Immigration Lawyers (Vancouver, BC)
212. Ameena Sultan, Barrister and Solicitor (Toronto, ON)
213. Seyfi Sun, Barrister and Solicitor (Toronto, ON)
214. Jeelan Syed, Barrister and Solicitor
215. Karina Thompson, Barrister and Solicitor (Toronto, ON)
216. Rigbe Tsige, Staff, Canadian Centre for Victims of Torture (CCVT) (Toronto, ON)
217. Nadia Umadat, Staff, Canadian Centre for Victims of Torture (CCVT) (Toronto, ON)
218. Victoria Wan, Barrister and Solicitor; Staff Lawyer, Chinese and Southeast Asian Legal Clinic (CSALC) (Toronto, ON)
219. Richard Wazana, Barrister and Solicitor, Wazana Law (Toronto, ON)
220. Gregory Willoughby, Barrister and Solicitor (London, ON)
221. Vanathy Wimalaswarans, South Asian Legal Clinic of Ontario (SALCO) (Toronto, ON)
222. Lisa Winter-Card, Barrister and Solicitor (Welland, ON)
223. Tim Wichert, Barrister and Solicitor (Toronto, ON)
224. Anna Victoria Wong, Executive Director, Community Family Services of Ontario (Scarborough, ON)
225. Rodney L.H. Woolf, Barrister and Solicitor (Toronto, ON)
226. Sharon Worthman, Barrister and Solicitor (Toronto, ON)
227. David Yerzy, Barrister and Solicitor (Toronto, ON)
228. Malathi Yogaraajah, Barrister and Solicitor (Toronto, ON)
229. Kubra Zaifi, Staff, Canadian Centre for Victims of Torture (CCVT) (Toronto, ON)
230. Eugenia Cappellaro Zavaleta, Barrister and Solicitor (Toronto, ON)

Organization Supporters

231. Afghan Women's Organization (AWO)
232. Aura Freedom
233. Barbra Schleifer Commemorative Clinic (BSCC)
234. Canadian Centre for Victims of Torture (CCVT)
235. Chinese & Southeast Asian Legal Clinic
236. FCJ Refugee Centre
237. Focus for Ethnic Women, Waterloo Region, Inc.
238. Hamilton Community Legal Clinic
239. HIV & AIDS Legal Clinic Ontario (HALCO)
240. Interim Place
241. Kitchener-Waterloo Multicultural Centre
242. Matthew House Refugee Welcome Centre - Windsor

Collective Letter on behalf of the Undersigned Lawyers and Supporters

- 243. Mennonite Coalition for Refugee Support
- 244. Neighbourhood Legal Services
- 245. Ontario Council of Agencies Serving Immigrants (OCASI)
- 246. Refugee Lawyers Association (RLA)
- 247. Romero House
- 248. South Asian Legal Clinic of Ontario (SALCO)
- 249. South Asian Women's Rights Organizations (SAWRO)
- 250. The 519
- 251. Times Change Women's Employment Service
- 252. Woman Abuse Council of Toronto (WomanACT)
- 253. YWCA Toronto (Women's Shelter; Shelters, Girls and Family Programs)