Immigration and Refugee Board of Canada
Commission de l'immigration et du statut de réfugié du Canada

IAD Innovation Plan

March 2006

Canada

Table of Contents

Message from the Chairperson

I am pleased to present the Report on the Immigration Appeal Division (IAD) Innovation Initiative (IAD Innovation).

This report represents the vision of the Immigration and Refugee Board of Canada (IRB) for the future of the IAD. It charts a course for the IAD as a less formal, more flexible tribunal that is able to deliver administrative justice more simply and quickly, with the same high standard of fairness. The framework builds on discussions of the IAD Innovation Working Group (Working Group) and consultation sessions held with IAD Members and staff, stakeholders, Citizenship and Immigration Canada (CIC), the Canada Border Services Agency (CBSA), and appellants' counsel. From the outset, this has been an inclusive exercise, and will remain so as we proceed towards implementation.

Over the last several years, the IRB has embraced the government agenda of transformation and innovation. As an administrative tribunal with unique responsibilities within Canada's immigration and refugee protection system, the IRB is committed to continuous improvement in all facets of its work. The responsibilities conferred on us demand no less. The men and women of the IRB are acutely aware of the magnitude of the IRB's mandate and the consequences of their work on the lives of people both in Canada and abroad. The people with matters before the IRB count on us for prompt, high-quality resolutions on life-changing issues.

It was in this context, and faced with unprecedented growth in the IAD's pending inventory, that I launched IAD Innovation as one in a continuing series of measures the IRB has adopted in recent years to be more dynamic and responsive to the people it serves. In particular, there is a human cost resulting from increased case processing time, felt by individuals waiting to be re-united with their family members from abroad, and by appellants and the Canadian public at large in the case of removal order appeals.

The Chairperson's Action Plan for the Refugee Protection Division (RPD), Immigration Division (ID) Renewal and IAD Innovation are a reflection of the IRB's commitment to continuous improvement through innovation. We recognize that the IRB's status as an administrative tribunal gives us the ability to seek innovative ways of delivering justice. I am pleased to say that the IRB and all those associated with IAD Innovation have responded to that challenge, and the efforts they have put forward can be seen in the results contained in this report.

The success of IAD Innovation will require the ongoing involvement and cooperation of all parties, including the timely appointment and reappointment of Governor-in-Council Members (Members). Ultimately, however, its success will depend on the sense of a common cause that was so apparent during the meetings and consultations. It is in this spirit that the next steps of this initiative will involve continued discussions with IAD Members and staff, portfolio partners and stakeholders. Although it has not always been easy, through constructive debate and the respectful exchange of ideas, we have already made great strides towards transforming the IAD. More work remains to be done, however, and I know I can count on all participants involved to remain committed to our ultimate goal of a more responsive and innovative IAD.

I would like to thank the Working Group and all those who participated in the meetings and consultations. In particular, I would like to recognize the work of Sherry D. Wiebe, Consultant to the IAD Innovation Initiative; Sharon M. Silberstein, Special Advisor to the IAD Innovation Initiative; Greg Kipling and Iris Kohler, Project Managers; Carl Baar, Consultant to the IAD Innovation Initiative; and Keith Hanash, Senior Communications Advisor; as well as the leadership of Daniele D'Ignazio, Project Leader. I would also like to acknowledge the contributions of IRB personnel, stakeholders and the other interested parties who participated in the meetings and consultations on IAD Innovation. It is through their efforts that this report was possible.

Executive Summary

Faced with unsustainable growth in the pending inventory and average case processing time of the Immigration Appeal Division (IAD), the Chairperson of the Immigration and Refugee Board of Canada (IRB) struck a Working Group in October 2005 to re-examine and re-think how the IAD functions as an administrative tribunal.

This re-examination has led to the identification of three principal themes underlying the IAD's growing backlog and increased processing time: a need for early information to allow for informed triage and case streaming decisions; a need for resources, mechanisms and processes to support early resolution outside the hearing room; and, finally, a need for effective case management throughout the appeal process.

In order to address the challenges before it, the IAD must make transformative changes in the way it does business. This change is to be guided by the following fundamental principles:

- Members should develop and implement an adjudication strategy that is proactive in nature, shapes IAD jurisprudence and that, in individual hearings, sees Members take greater control over the proceedings.
- A senior public servant will direct the integrated work of specialized case management teams in the regions.
- Whenever possible, appeals should be resolved outside the hearing room, as early as possible, preferably by consensus.
- Efforts should be refocused on the front end of the appeal.

This report outlines the course of action presented below in pursuit of the IRB's core tribunal values of "simple, quick and fair." It is divided into the three phases of the appeal life cycle (Early Information-Gathering; Early Resolution; and Hearing Readiness, Hearing and Post-Hearing Matters).

General

1. The IAD Deputy Chairperson and the Executive Director of the IRB will provide a written annual performance report that accounts for the performance of the IAD in terms of its adjudication strategy and its case management objectives. IAD performance will be measured using key indicators and benchmarks. The report will be submitted to the IRB Chairperson. A summary of the report will be made available on the IRB Web site.

2. The Regional Director will ensure that a senior public servant will lead the work of all specialty case management teams in each region, the number of which will depend on the size of the region. This senior public servant will be responsible for supporting and working closely with the regional Assistant Deputy Chairperson/Coordinating Member, and will oversee regional IAD case management performance in support of the adjudication process.

Stage I – Early Information-Gathering

3. CIC should issue a single refusal letter, accompanied by the Computer-Assisted Immigration Processing System (CAIPS) notes.

4. Appellants to submit an expanded notice of appeal, including the grounds of appeal and the evidence relied on in support of those grounds of appeal.

5. Disclosure time standard tied to the expanded notice of appeal.

6. CIC should provide a copy of the appeal record from the overseas visa office within 60 days. Time monitoring by the IAD for case processing purposes will begin when the notice of appeal is filed rather than upon receipt of the record, as is currently the case.

7. Establish dedicated public service triage teams in each region.

8. Stream files to early review, early resolution or hearing.

Stage II – Early Resolution

9. Establish efficient and effective mechanisms to deal with queries from appellants.

10. Teams to be given a mandate to pursue early resolution.

11. Retain and expand Alternative Dispute Resolution (ADR) to be conducted by public servants and other IRB personnel earlier in the case management process.

12. Pilot a mediation/arbitration (med/arb) model customized to the needs of the IAD as an alternative dispute resolution stream.

Stage III – Hearing Readiness, Hearing and Post-Hearing Matters

13. Establish a public service team in each region to prepare appeals in order to ensure that all scheduled appeals are hearing-ready.

14. Members will be more proactive in the hearing, which will be more focused and Member-driven.

15. The manner of conducting hearings will emphasize the seriousness of the proceedings without being unduly formal. The physical structure of the hearing room will be modified and arranged to provide a more informal, accessible proceeding.

16. CIC/CBSA should tender and disclose certain forms of evidence on a consistent basis. Suitable generic evidence is to be posted on the IRB Web site.

17. In order to achieve both fairness and efficiency in bad-faith marriage appeals, the IAD should adopt an institutional approach that does not encourage the calling of the applicant spouse overseas as a witness, except in limited, specified circumstances. This could be done by encouraging Members not to draw an adverse inference if the overseas applicant is not called by the appellant to testify, except in limited, specified circumstances.

18. Straightforward hearings will be scheduled for a standard two hours, commencing at 8:30 a.m.

19. The IAD will schedule hearings according to its own ability and resources. Hearings should proceed as scheduled, including hearings not attended by the Minister's counsel, unless the circumstances clearly justify a change.

20. The current Divisional goal of rendering between 50 and 70 per cent of reasons orally will be increased. Only reasons rendered orally to the parties immediately following the conclusion of the hearing will be considered oral reasons.

21. The IRB will develop a process to furnish a transcript of the reasons for decision rendered orally directly from the Digital Audio Recording System (DARS) to the parties within 48 hours. A senior public servant will be charged with the duty of ensuring that delivery of the written form of oral reasons complies with accepted time and quality standards.

22. Implement the practice of notifying the appropriate visa post by e-mail of IAD decisions and reasons for decision in sponsorship appeals in order to expedite the handling of sponsorship applications in cases of allowed appeals.

23. Reasons for reserved decisions will normally be completed within 60 days.

24. Streamline ID and IAD processes in removal order appeals involving criminality; eliminate the need for a transcript from the ID proceeding in non-contested hearings.

25. As part of the IAD's adjudicative strategy, develop a Chairperson's Guideline, or other juridical tool, that will guide the exercise of the IAD's discretionary powers in removal order appeals in order to:

    a. guide Members in the exercise of their discretion in removal order appeals;

    b. guide Members when contemplating a stay of a removal order, including the length of stays;

    c. guide the exercise of discretion in imposing non-mandatory conditions and reporting conditions on stayed removal orders; and

    d. adopt a best practice to limit or reduce interim stay reviews to situations where there are strong and valid reasons to do so.

26. Diversion of mentally disordered persons from the removal order process.

Introduction

1. What IAD Innovation Is About and Why It Was Undertaken

In October 2005, the Chairperson of the IRB launched an initiative to rethink and re-examine how the IAD functions as an administrative tribunal. At the time, the IAD was facing significant growth in its caseload and increases in the average case processing time. Confronted with this increase and the prospect of higher numbers in the future, the Chairperson formed the Working Group to study the IAD and to make recommendations in support of the initiative.

The Working Group was given a mandate to propose a plan for change in the IAD over the short, medium and long terms. Though the need to address the growing backlog of immigration appeal cases provided an initial reason for the re-examination, it also presented an opportunity to make an investment in the IAD's capacity to deliver administrative justice, consistently and fairly, over the long term, amid fluctuating and unpredictable work volumes.

2. Brief History

IAD Innovation is one in a series of ongoing IRB initiatives in which the tribunal is examining its processes in order to improve the effectiveness, efficiency and quality of its case processes and decision-making. It is this sense of commitment to continuous improvement that led the IAD to make substantial gains in 1996-97 by simplifying and standardizing its case management processes, and to transform the character of the appeal process in 1998 with the introduction of Alternative Dispute Resolution (ADR). Both of these measures have been successful in helping the Division manage its caseload. There is now an opportunity to build on these changes and to improve the quality and efficiency of the work of the IAD by emphasizing a proactive IAD that leads the search for an early and just resolution of all appeals.

3. The Working Group

The Working Group that led the re-examination was composed of Members and IRB public servants from all regions with a detailed knowledge of the IAD and its challenges. They met for a total of 12 days in Toronto and Ottawa during the months of November and December 2005.

The Working Group also engaged IAD personnel and IAD stakeholders in this initiative. A series of regional consultation meetings were held in December 2005 and January 2006 in all regions with IAD Members and public servants, and with representatives of the CBSA and appellants' counsel. Further, on December 8 and 9, a two-day national consultation meeting with CIC and the CBSA was held in Ottawa.

4. CURRENT CONTEXT FOR THE IAD

IAD decision-makers adjudicate appeals arising principally from Canadian citizens and permanent residents whose applications to sponsor family members to Canada have been refused. The IAD also hears appeals from permanent residents (as well as refugees and permanent resident visa holders) who have been ordered removed from Canada, and from permanent residents who have been determined not to have fulfilled their residency obligations. The Minister responsible for the CBSA may also appeal to the IAD against decisions made by the ID at admissibility hearings.

The IAD's legislative authority is outlined in the *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations* (the Regulations). The *Immigration Appeal Division Rules* (the Rules) govern divisional procedures and processes.

The IAD is functionally divided into three regions – an Eastern Region based in Montréal, a Central Region based in Toronto, and a Western Region based in Vancouver. The IAD has a current complement of 34 Members and approximately 58 public servants. Like the IRB more generally, the IAD has a dual accountability structure in which Members are responsible to the Chairperson through their respective regional Member-managers and the Deputy Chairperson of the IAD, and public servants are responsible, through their respective Regional Directors, to the Director General of Operations and to the Executive Director, who in turn reports to the Chairperson. Regional Directors are also accountable for all physical assets and for the resourcing of administrative offices and hearing room sites in their regions.

The IAD has received over 60,000 appeals since its inception in 1989, when less than 1,000 appeals were filed. Unprecedented increases in 2002-03 and 2003-04 brought the total number of appeals filed to 6,400 annually, and intake is projected to rise again in 2006-07 to roughly 6,700 appeals.

Increased productivity allowed the IAD to finalize approximately 30 per cent more appeals in 2003-04 and 2004-05 than was the case in 2002-03. However, despite maintaining this high finalization rate for the first three quarters of 2005-06, the total number of appeals filed has continued to exceed the number of appeals finalized.

The result is that in each of the past three years, IAD finalizations have failed to keep pace with the number of appeals filed. This has resulted in a large and growing pending inventory, which by March 2006 reached 9,000 cases. The situation is particularly serious when one considers the fact that the pending inventory is continuing to grow despite the IAD's significant productivity gains and a smaller than anticipated increase in appeals filed in 2005. This underscores the fact that the IAD's pending inventory is not a problem that will resolve itself. Rather, only a concerted and unified effort by the IRB will enable it to make the fundamental changes necessary to address the challenges before it.

Both the pending inventory and the growing number of appeals filed have contributed to an increase in the IAD's average case processing time. A peak of 10.7 months was reached in August 2005, which is significantly higher than the six- to eight-month range that characterized all regions from 1999 to early 2004.

Finally, CIC/CBSA resource levels have an impact on the IAD's capacity to finalize appeals. The waiting period for CIC/CBSA to file the sponsorship appeal record with the IAD has increased steadily over the past three years, and the CBSA has faced difficulties in ensuring the availability of a sufficient number of experienced Minister's counsel to support all the hearings scheduled by the IAD.

An expanding pending inventory and an increased processing time have a direct and negative impact on the parties appearing before the IAD. For example, delays in the finalization of sponsorship appeals leave both appellants and applicants in limbo, unable to continue with their lives while they wait for their case to be resolved. As well, immigration program integrity and public safety, both key concerns of the IAD's institutional litigant, CIC/CBSA, may be jeopardized if the IAD is unable to deal quickly, simply and fairly with appeals involving suspected abuse of the sponsorship system or the removal of individuals convicted of serious criminality.

The Challenges

The Working Group identified a number of factors as having contributed to the IAD's growing backlog and increased case processing time. However, among those factors, three principal themes emerged as leading causes: a lack of early information to allow for informed triage (case streaming) decisions; insufficient resources, mechanisms and processes to support early resolution outside the hearing room; and, finally, a lack of effective management of both the hearing and post-hearing phases.

1. Early Information

At present, to file a Notice of Appeal in sponsorship appeals, the appellant needs to submit only the information provided by the CIC visa office as outlined in the letter of refusal. There is no requirement for additional information about, or investment in, the appeal. Without further information to help weigh the merits of the appellant's case, it is difficult for the IAD to direct the appeal into an appropriate stream for resolution.

Currently, filing a Notice of Appeal triggers two possible actions. The first is a notice to the overseas visa office to send the applicant's file to the relevant CBSA hearings office in Canada. The effect of this is a four-month period in which the appeal is stalled. New evidence, which could assist in directing the appeal if made available early on, must wait until receipt of the record before it is considered. The second possible action is the review conducted by the IAD to identify the approximately 10 per cent of cases which appear to have no merit, and which are expected to be resolved in writing.

Not only does the public interest and client service demand that the time elapsed from the filing of the Notice of Appeal to the final disposition of the case be minimized, but appellants are also presumed to be filing their Notice of Appeal with the intent of having the matter resolved as soon as practicality and fairness permit. The public interest also demands that the Minister seek to bring cases to closure as early as possible. Early receipt of information by the IAD is therefore essential and beneficial to all parties and to the public at large.

2. Resources, Mechanisms and Processes to Support Early Resolution

While some cases can only be resolved through a full oral hearing, litigation is the most costly, stressful and time-consuming method of resolving disputes. Therefore, the IAD has a duty to strive to resolve the maximum number of appeals without a full hearing.

Early Review and ADR are the formal mechanisms currently used to achieve early resolution. Both have proven quite successful, but have reached their limits in terms of what they can achieve, as presently constituted. As a result, there are still many appeals which are amenable to an early resolution but which nonetheless proceed to a hearing many months after the appeal record is received. This delays the finalization of appeals allowed on consent, and continues the processing of appeals in which there appears to be no merit.

Limited resources also impact overall case management, which in turn affects the possibility of early resolution. The growing volume of cases brings attendant and expanded demands on all facets of work at the IAD, from the fielding of calls requesting assistance, information and advice, to calls seeking an update on hearing scheduling or the status of reasons. Resources needed to meet those demands are drawn away from those dedicated to case management and early resolution.

3. Hearing Readiness, Hearing and Post-Hearing Management

More rigorous application of the Rules governing postponements, adjournments and late disclosure, as well as attention to punctuality from all individuals involved in the hearing, were identified as factors that could bring about quicker resolution. Other factors related to hearing readiness included issues concerning the identification of exhibits, verification of phone numbers of telephone witnesses, amendments to witness lists, satisfaction that interpreters and witnesses understand each other, and generally a need to ensure that an appeal is ready to proceed to hearing.

An important consideration for efficient resolution is the ability of Members to be more proactive and focus the proceedings in the hearing room. This would affect the time and manner in which both appellants and Minister's counsel present their respective positions and engage in cross-examination.

Members are often not given the evidence that would be most helpful in deciding an appeal, and there is often an imbalance in the abilities of the parties, especially when one party is unrepresented. In bad-faith marriage appeals, the problems associated with obtaining the overseas applicant's testimony by telephone contribute to longer and more inefficient hearings, without measurable benefits.

An increased use of oral reasons for decision by Members, as well as ensuring that written reasons are consistently issued in a timely manner, would also significantly benefit the parties and the integrity of the IAD's process.

Finally, the IAD's growing caseload requires that more hearings be conducted every day. One of the current challenges is that more hearings cannot be scheduled unless there is an increase in the complement of Minister's counsel, or unless Minister's counsel begin to make strategic choices about how to participate in the IAD process.

Framework for Transformation

During the course of its deliberations, the Working Group tabled a series of proposals that, together with additional proposals received by the IAD Innovation Project Leader and facilitators, represent a significant transformation of how the IAD conducts its business. Although many of the recommendations are quite specific in nature, they are all premised on the following fundamental principles:

- Members should develop and implement an adjudication strategy that is proactive in nature, shapes IAD jurisprudence and, in individual hearings, sees Members take greater control over the proceedings.
- A senior public servant will direct the integrated work of specialized case management teams in the regions.
- Whenever possible, appeals should be resolved outside the hearing room, as early as possible, preferably by consensus.
- Efforts should be refocused on the front end of the appeal.

The challenges facing the IAD require an approach predicated on two separate, yet complementary, strategies: one centred on adjudication, the other centred on case management.

1. Adjudication Strategy

An adjudication strategy builds on the principle of institutional deliberation by identifying emerging or unresolved issues that frequently arise in a tribunal's jurisprudence and addressing them systematically. The principle underlying such a strategy was endorsed for administrative tribunals by the Supreme Court of Canada in its decision in *Consolidated-Bathurst.* The effect of this decision is to encourage tribunals to develop consistency in decision-making by having tribunals discuss issues in plenary sessions of decision-makers, while respecting the adjudicative independence of the hearing panel whose case is under discussion. In addition to fostering an adjudication strategy through the decisions of individual panels, the tribunal can further its adjudication strategy by issuing policy instruments that are designed to enhance the quality, consistency and efficiency of decision-making. In the case of the IAD, the Chairperson's power to issue guidelines and jurisprudential guides, as well as the power of the Deputy Chairperson

to identify persuasive decisions, reflect a range of juridical instrument choices available. There are also many other tools available to promote an adjudication strategy, such as effective and consistent Legal Services support, training, distribution of reasons, and internal and external communications.

The need for an adjudication strategy is clear. The composition and volume of a tribunal's caseload is often shifting, and new issues emerge as a result of changed practices in government or new decisions by superior courts. A tribunal's jurisprudence is a work in progress, and the articulation of the tribunal's approach to issues often benefits from a coordinated, rather than an *ad hoc,* approach.

For the IAD, the development of a selective and strategic approach to the adjudication of issues is important not only as a means of dealing with specific challenges, but also to reduce its inventory in a systematic manner and to promote consistency in the treatment of the parties appearing before it, regardless of the region where their appeal is heard.

Crucial to the success of any IAD adjudication strategy is the active engagement of Members. Their unique role as the IAD's decision-makers gives them, along with their Member-managers, sole authority over the articulation and implementation of such a strategy.

2. Case Management Strategy

The IAD's case management strategy is composed of two key elements: the creation of a national file management system to oversee the IAD's caseload, and the establishment of multi-level teams responsible for moving files through the appeal process. The public service will lead the case management strategy.

i) Creation of a national file management system

The IAD will create and continuously maintain a detailed inventory of all files on a national level. This in turn would provide a basis for ensuring that activities are carried out in the same way and within the same time frame in each region in order to allow for maximum use of resources and ensure that the appeal resolution process is the same everywhere. The IAD would enhance its flexibility by being able to distribute work volumes, by gaining a better understanding of its work methods, and by having at all times a clear idea of the activities that need to be accomplished.

ii) Establishment of multi-level teams

Responsibility for processing files would fall to multi-level teams created in each region. Their primary functions would encompass advanced triage, the pursuit of early resolution, and case management. While the teams would be composed largely of public servants at

various levels, they would also include at least one Member assigned as a resource by the Assistant Deputy Chairperson/Coordinating Member. The rationale for involving Members arises from the fact that they have sole authority to determine not only the outcome of individual appeals, but also the overall adjudication strategy of the IAD. As such, public service responsibilities within the processes of resolution and adjudication will be unproductive if their actions are not constantly informed by the substantive advice of Members as decision-makers. For this reason, the assigned Members would act as the teams' resources on substantive matters, as well as fill a role in finalizing decisions outside the hearing room.

3. Framework for Change

With the broad parameters for the proposed changes established, the discussion can now turn to a more detailed overview of this framework in order to make sense of, and respond to, the IAD's challenges. In essence, this framework can be understood with reference to the three distinct phases in the appeal life cycle:

- Stage I – Early Information-Gathering;
- Stage II – Early Resolution; and
- Stage III – Hearing-Readiness, Hearing and Post-Hearing Matters.

Stage I, or Early Information-Gathering, begins with the refusal of the sponsorship application, the CIC decision with regard to the residency obligation or the issuance of the removal order. It extends beyond receipt of the Notice of Appeal and disclosure. This stage is characterized by the efforts of the IAD and the parties to seek out and make available all relevant information that may contribute to triage and to early resolution, which is the second stage of the appeal case management process. Stage II, or Early Resolution, involves any settlement or partial resolution activities identified and performed by a team of triage and early resolution experts. Stage III, or Hearing Readiness, Hearing and Post-Hearing Matters, requires an engaged team of public servants to ensure the readiness of all appeals going to an oral hearing. The hearing itself should be a more informal hearing presided over by a proactive Member, with decisions received by the parties in an expeditious manner.

i) Stages I and II – Early Information-Gathering and Early Resolution

Underlying the transformation of the IAD is the need to have more relevant information on file as early as possible in the appeal process. In this way, more appeals can be resolved at an earlier stage, without a hearing, through written submissions, as well as through formal or informal mediation. Even without a full resolution, the IAD can encourage parties to agree on facts or issues. As for appeals that are unsuitable for early resolution, they can be referred to a hearing sooner than would otherwise be the case.

With regard to obtaining information earlier in the process, a number of critical documents required by the IAD have been identified, regardless of whether or not the appeal record has been received. Also critical in this regard is an early assessment of the appeal by a highly skilled public servant with specialized knowledge of IAD legislation, regulations, rules and jurisprudence. This individual would be part of an integrated team of trained triage and resolution experts, including both public servants and Members, whose responsibilities would more generally include directing incoming files into the stream judged to provide the best chance of resolving the appeal in the earliest and most informal manner possible.

At the same time, it is important that the approach to streaming be flexible and not create process silos. Team accountability for compliance with productivity targets and best practices would be expected and will foster teamwork, seamless advancement of each appeal, and productivity. The teams would also identify and request written submissions in cases where no facts are in dispute, including appeals that can be resolved based on legal arguments. Written applications from the parties ("in-chambers" matters) would also fall within the mandate of the triage and early resolution teams for processing and final disposition determined by the assigned Member(s). Finally, senior public servants would be trained and available to conduct ADR mediation sessions.

The success of the IAD's early information-gathering and early resolution efforts will be closely related to the degree to which appellants and Minister's counsel are required to take responsibility for advancing the appeals. Neither the IAD nor the parties in general are well served by setting aside the Rules for non-compliance, necessitating extra IAD processing time and effort. For this reason, it is imperative that the IAD give notice to the parties clearly articulating its expectations regarding the timing and form of submissions and other expectations related to resolution. Both IAD public servants and Members must ensure that these expectations are met.

ii) Stage III – Hearing Readiness, Hearing and Post-Hearing Matters

It is essential that an early investment be made to ensure that appeals destined for an oral hearing are in fact hearing-ready. Accordingly, a registry team would be assigned the responsibility of taking all steps to prepare appeals for hearing, and would ensure that all scheduled appeals are ready to proceed as scheduled. One measure of this team's success would be a decrease in the in-hearing postponement rate and, to this end, it is vital that registry public servants and Members collaborate to ensure that hearings go ahead at their scheduled time.

The hearing room and its processes are currently unnecessarily formal, judicialized and adversarial. Hearings are presently conducted in a manner that differs sharply from the ADR process, which is held in an informal setting, is less adversarial, is more accessible and understandable to appellants, and facilitates credibility assessments. In recognition of the fact that the IAD is an administrative tribunal and not a court, the IAD intends to adopt a hearing room process and structure that is less court-like and less formal.

Additionally, for the purposes of achieving its mission, the IAD needs to revisit the effectiveness of the existing adjudication model used in its proceedings.

In light of the preceding discussion, IAD Members will be expected to become more proactive in order to:

- make sure that the public interest component of an appeal is addressed and satisfied;
- carry out the functions associated with being a decision-maker in a specialized tribunal;
- rectify imbalances between the parties, while maintaining their impartiality, especially where one party is unrepresented; and
- achieve greater consistency in decision-making.

IAD Members already act in a number of ways that could be described as proactive: they frequently ask questions for clarification, lead unrepresented appellants, limit the number of witnesses, narrow the issues and direct counsel in order to expedite the proceeding. Furthermore, all Members are comfortable raising the issue of jurisdiction on their own motion and, if necessary, going behind the representations of the parties to make their findings.

However, while Members may generally frame the issues that need to be resolved, many may simply allow the parties to lead the evidence and question the witnesses with minimal direction. As such, there will be an emphasis on Members being more proactive through training and in the pursuit of a cultural change in this area. The parties too, will be required to adjust their approaches to proceedings. Hence, a change in local legal culture will be required in order to make IAD practices more uniform and to ensure a more effective, fair and proactive hearing.

The following section outlines the course of action the IAD intends to embark upon in pursuing its core tribunal values of resolving cases simply, quickly and fairly. It suggests the need for the IAD to renew its current best practices though effective, consistent and disciplined use of tribunal processes already in place, and sets out a detailed plan for transformation, with reference to the three stages of the appeal process.

IAD Innovation Plan

The following represents a detailed framework for IAD Innovation, with reference to the three distinct phases in the appeal life cycle: Stage I – Early Information-Gathering; Stage II – Early Resolution; and Stage III – Hearing Readiness, Hearing and Post-Hearing Matters.

General

 # 1

The IAD Deputy Chairperson and the Executive Director of the IRB will provide a written annual performance report that accounts for the performance of the IAD in terms of its adjudication strategy and its case management objectives. IAD performance will be measured using key indicators and benchmarks. The report will be submitted to the IRB Chairperson. A summary of the report will be made available on the IRB Web site.

The IAD Deputy Chairperson will track the development and implementation of the IAD's adjudication strategy and compliance with national and regional standards, as well as ensure that best practices are being followed uniformly across the IAD. The Executive Director of the IRB will provide substantive information on the monitoring of tools supporting the adjudication strategy and case management. In the interests of public accountability and transparency, the combined report will be submitted to the Chairperson, and a summary will be made available on the IRB Web site.

 # 2

The Regional Director will ensure that a senior public servant will lead the work of all specialty case management teams in each region, the number of which will depend on the size of the region. This senior public servant will be responsible for supporting and working closely with the regional Assistant Deputy Chairperson/Coordinating Member, and will oversee regional IAD case management performance in support of the adjudication process.

Reporting to the Regional Directors, these senior public servants will assume responsibility for monitoring their teams' performance, ensuring the enhancement of regional accountability, evaluating procedural effectiveness, and motivating team members.

Stage I – Early Information-Gathering

 # 3 **CIC should issue a single refusal letter, accompanied by the Computer-Assisted Immigration Processing System (CAIPS) notes.**

In a sponsorship appeal, the single refusal letter sent to both the overseas applicant and the appellant with the CAIPS notes attached will be less confusing to the appellant and the applicant, and will allow them to quickly know the case they have to meet. This will enable them to present their detailed response as early as the date of submission of the expanded notice of appeal.

 # 4 **Appellants to submit an expanded notice of appeal, including the grounds of appeal and the evidence relied on in support of those grounds of appeal.**

This one-step process to both initiate the appeal and obtain the appellant's information and disclosure of documents will enable the IAD's triage and early resolution teams to quickly stream the file and encourage early resolution. Appellants will be asked to provide details relating to their appeal, in particular to outline the evidence and facts to be relied on to make their case. This process is contingent on the appellant receiving the CAIPS notes together with the refusal letter.

 # 5 **Disclosure time standard tied to the expanded notice of appeal.**

Early disclosure of information is key to early resolution. Disclosure of documents will coincide with the filing of the expanded notice of appeal. The availability of disclosure documents to IAD triage and resolution teams will allow for a more detailed diagnostic of the appeal, and for an effective evaluation of the merits of the case. In turn, this will permit informed judgments to determine the best way to proceed with the appeal, including the potential for early resolution. For appeals that proceed to hearing, the parties will be given a further opportunity to submit evidence that did not exist or could not reasonably have been obtained at the time of filing.

 # 6 **CIC should provide a copy of the appeal record from the overseas visa office within 60 days. Time monitoring by the IAD for case processing purposes will begin when the notice of appeal is filed rather than upon receipt of the record, as is currently the case.**

Early resolution of appeals is contingent, in large part, on information being made available early. Obtaining the record earlier, and directly from CIC visa posts via the CBSA, will result in the saving of both time and CBSA resources, although it would shift the burden of appeal record preparation to CIC visa posts.

With this refocusing of processing efforts to the beginning of the appeal process, the time between the filing of the appeal and receipt of the record would be accounted for by the IAD. This move by the IAD to account for the time from the date the appeal is filed is more consistent with the IRB's mandate of "simple, quick and fair". It is in the public interest, and it is incumbent upon the IAD to be responsive to the time concerns expressed by appellants awaiting the outcome of their appeals.

 # 7 **Establish dedicated public service triage teams in each region.**

To invest in the front-loading of information and initiate the streaming and early resolution process, it is essential that the IAD employ specially trained staff in sufficient numbers to support a team concept. At least one Member will be assigned to each team by the Assistant Deputy Chairperson/Coordinating Member to act as the authoritative resource on substantive issues.

 # 8 **Stream files to early review, early resolution or hearing.**

The purpose of streaming appeals is to match each appeal to the resolution or adjudication process that best corresponds to the particular demands of that case. The early review process is already in effect and will be continued, expanded and applied consistently in order to maximize the number of appeals resolved through paper hearings. An analysis of appeals at this early stage, even prior to receipt of the record, by highly skilled and proactive public servants will be undertaken to achieve resolution in a majority of appeals without a full oral hearing. Certain appeals may be resolved by written submissions alone, and would be streamed accordingly. Some appeals lend themselves to complete resolution or agreement on issues and facts through ADR. Others will immediately reveal complexities that preclude any form of resolution other than adjudication in an oral hearing. These files would be identified by the triage team and sent directly for hearing preparation and scheduling of the hearing.

Stage II – Early Resolution

 # 9 **Establish efficient and effective mechanisms to deal with queries from appellants.**

The IRB will establish dedicated telephone lines, regionally based in the short term and nationally based in the longer term, to provide appellants with information on the status of their appeals. Similarly, regular information sessions would provide appellants with face-to-face contact with IAD personnel, who, in turn, would be in a position to immediately assess any specific requirements to expedite the appeal process. Over the longer term, and with the implementation of the Integrated Case Management System (ICMS), a centralized line could become a national responsibility, and would be associated with the new national file management system.

 # 10 **Teams to be given a mandate to pursue early resolution.**

Appeals may be resolved through a range of early resolution processes. These include telephone or in-person resolution without the record, in which the parties would generally be asked to provide their final position, such as consent to the appeal being allowed, withdrawn or dismissed. They may also include short hearings, abandonment proceedings, in-chambers matters, and formal mediation. This early contact with the parties may also result in binding agreements as to certain facts or as to which issues are relevant.

 # 11 **Retain and expand Alternative Dispute Resolution (ADR) to be conducted by public servants and other IRB personnel earlier in the case management process.**

ADR is a long-standing IAD program that now operates successfully in all three regions. An ADR conference requires less time to resolve matters than does the average hearing, and the average processing time for a resolved ADR case is significantly shorter than for an appeal that results in a hearing. ADR is a less adversarial and less court-like proceeding. Further efficiencies and gains may be obtained by expanding the ADR program to more types of appeals; by conducting ADR conferences earlier in the process, possibly even before receipt of the record; and by having ADR conferences conducted in most instances by public servants. Appeals that are not resolved at the ADR conference would be scheduled quickly into dedicated hearing slots so that parties to unsuccessful mediation are not penalized by a delay in the eventual adjudication of the appeal.

 # 12 **Pilot a mediation/arbitration (med/arb) model customized to the needs of the IAD as an alternative dispute resolution stream.**

At the IAD it may be viable to introduce a med/arb model as a means of rapidly resolving certain appeals. This could serve as an alternative to the existing ADR/hearing (two-step) stream. Med/arb is a hybrid approach to ADR in which the parties and a third-party neutral (a Member) attempt to reach a voluntary agreement through mediation, which, if unresolved, is automatically submitted to binding arbitration by the same third party. Its main advantage is that it is a one-step process that achieves resolution early and quickly in all cases in that stream. As this variant of dispute resolution has not been tried before at the IAD, a pilot project will be undertaken to determine its viability.

Stage III – Hearing Readiness, Hearing and Post-Hearing Matters

 # 13 **Establish a public service team in each region to prepare appeals in order to ensure that all scheduled appeals are hearing-ready.**

Appeals may not proceed, or may not be completed, because the file is not hearing-ready. File review needs to happen much earlier in order to confirm that the appeal is ready to proceed and to ascertain whether a hearing is in fact required. Files will be reviewed in advance to ensure that all necessary information is available, that disclosure complies with the Rules and that preliminary substantive matters have been resolved. As well, the public service team would verify scheduling of the appropriate interpreter, check receipt of telephone cards and numbers, and consider all other factors that may prevent the appeal from proceeding or being completed as scheduled. Where possible, the team would also attempt to obtain agreement from the parties on the facts, as well as on limiting the issues.

 # 14 **Members will be more proactive in the hearing, which will be more focused and Member-driven.**

The need for the Member to be more proactive is widely recognized. Such a proactive approach has already been adopted for unrepresented appellants, and a Division-wide approach will lead to significant advancement of this objective. A hearing in which the Member is more proactive would be more efficient and would save time because too often a large portion of the hearing is spent on the parties eliciting evidence that is not particularly helpful to the decision-maker. The Member narrowing the issues

and directing the parties as to the evidence required would rectify the imbalance that frequently occurs between the parties, especially where one is unrepresented. The proactive Member will ensure that the public interest is addressed and satisfied, which, in turn, means that this objective can be achieved even in cases where the Minister chooses not to be represented by personal attendance of the Minister's counsel at the hearing.

While the hearing will be Member-driven, it is recognized that parties must be given a meaningful opportunity to present their case on appeal fully and fairly.

 # 15 **The manner of conducting hearings will emphasize the seriousness of the proceedings without being unduly formal. The physical structure of the hearing room will be modified and arranged to provide a more informal, accessible proceeding.**

The ADR experience has demonstrated that a less formal process, including a less formal physical setting, is more conducive to an elucidation of the evidence. Like in the current ADR format, respectful conduct and decorum will be maintained in the hearing room. This smaller, informal physical structure is not suitable for appeals involving criminality or other security-related issues.

 # 16 **CIC/CBSA should tender and disclose certain forms of evidence on a consistent basis. Suitable generic evidence is to be posted on the IRB Web site.**

IAD Members have frequently been faced with deciding appeals in which the Minister's evidence was not tendered, although they knew it was otherwise available. For example, in appeals on health grounds, evidence relating to the cost and supply/demand of health and social services is often not tendered. As an institutional litigant, the Minister may be in a position to disclose generic evidence in appropriate cases. Fairness, transparency and consistency would be achieved if consistent evidence were available in all appeals in which that evidence is relevant and readily accessible to the appellant. Parties would be at liberty to produce further evidence or to contest the evidence posted. The posted evidence would be considered the disclosed evidence of the Minister. The Minister could save time and effort by simply referring parties and the IAD to the posted evidence, as opposed to manually producing and disclosing it on a case-by-case basis.

 # 17

In order to achieve both fairness and efficiency in bad-faith marriage appeals, the IAD should adopt an institutional approach that does not encourage the calling of the applicant spouse overseas as a witness, except in limited, specified circumstances. This could be done by encouraging Members not to draw an adverse inference if the overseas applicant is not called by the appellant to testify, except in limited, specified circumstances.

Given that marriage appeals form the bulk of the IAD's workload, achieving efficiency and fairness in these appeals is key, and requires an institutional approach that does not encourage the calling of the applicant as a witness. Currently, appellants may feel obliged to call the overseas spouse as a witness for fear that if they do not, the Member will draw a negative inference from the spouse's failure to testify. The applicant's testimony involves administrative difficulties and additional hearing time, often without much benefit in terms of providing reliable and relevant evidence in the appeal.

 # 18

Straightforward hearings will be scheduled for a standard two hours, commencing at 8:30 a.m.

A new proactive, informal hearing will have the benefit of being more expeditious. Together with the recommendation to not encourage calling the applicant as a witness in marriage appeals, hearings triaged as straightforward should generally be completed in two hours, while complex hearings will continue to be scheduled for more time. In addition, an earlier start to the day will allow for sufficient time to work toward an objective of three hearings per day. The IAD will establish a standard sitting schedule for a hearing day, such as 8:30 a.m. to 4:30 p.m., with any adjustments that may be required by the presiding member.

 # 19

The IAD will schedule hearings according to its own ability and resources. Hearings should proceed as scheduled, including hearings not attended by the Minister's counsel, unless the circumstances clearly justify a change.

The IAD has a duty to the parties and to the public to deal efficiently and expeditiously with appeals before it. Hearings will be scheduled with sufficient notice to enable the parties to properly prepare. The guiding principle is that hearings should be scheduled properly, once, and proceed as scheduled. The IAD will apply its rules consistently and fairly, treating both parties equitably. Hearings will be scheduled based on IAD resources. If a representative of a party cannot attend, despite having been given sufficient notice, the hearing should proceed in his/her absence, unless the circumstances clearly justify a change. This is an expectation that will be applied equally to both parties. In the case of either party making application for a change of date and time (postponement), in appropriate circumstances, such requests would be considered on their merits.

 # 20

The current Divisional goal of rendering between 50 and 70 per cent of reasons orally will be increased. Only reasons rendered orally to the parties immediately following the conclusion of the hearing will be considered oral reasons.

Fairness dictates that the parties be informed of the decision and reasons for decision at the earliest opportunity. The IRB *Policy on Oral Decisions and Oral Reasons* provides that oral reasons should be the norm in all cases. The vast majority of appeals are straightforward cases that are suitable for oral decisions. Therefore short, concise reasons should be provided at the conclusion of the hearing.

 # 21

The IRB will develop a process to furnish a transcript of the reasons for decision rendered orally directly from the Digital Audio Recording System (DARS) to the parties within 48 hours. A senior public servant will be charged with the duty of ensuring that delivery of the written form of oral reasons complies with accepted time and quality standards.

The IRB currently expends significant resources and encounters delays following the rendering of oral decisions at the conclusion of the hearing, until the time that the written version of the reasons is sent to the parties. In the interim, further processing by CIC/CBSA is on hold. A mechanism for providing the written transcript to the parties within 48 hours of the conclusion of the hearing would result in enormous efficiencies and gains for all involved.

 # 22

Implement the practice of notifying the appropriate visa post by e-mail of IAD decisions and reasons for decision in sponsorship appeals in order to expedite the handling of sponsorship applications in cases of allowed appeals.

Direct electronic communication of sponsorship appeal decisions by the IAD to visa posts overseas will allow visa posts to resume processing of sponsorship applications (in cases of allowed appeals) much earlier, since at present they cannot resume processing until they receive a hard copy of the decision from the CBSA. Furthermore, direct communication between the IAD and the visa post will reduce the CBSA's workload, since it will no longer need to send visa posts a copy of the decision.

 # 23

Reasons for reserved decisions will normally be completed within 60 days.

The parties to a proceeding ought to receive their decisions in a timely manner. If oral reasons are rendered as the norm, Members will be reserving fewer decisions and will be able to complete them in a timely fashion. A policy will be issued outlining the expectation that reasons in reserved decisions will normally be issued within 60 days.

 # 24

Streamline ID and IAD processes in removal order appeals involving criminality; eliminate the need for a transcript from the ID proceeding in non-contested hearings.

The IRB will seek ways to streamline processes currently carried out by the ID and the IAD while preserving the integrity of the separate functions of the two divisions. This would include such process initiatives as making the ID admissibility hearing a paper process where consent is given by the person involved; conducting an early review interview immediately following the ID hearing; and scheduling an IAD hearing immediately after the ID hearing.

Considerable time and resource savings could be achieved if the exhibits alone were provided, and the transcript of the ID hearing eliminated. In appeals in which the removal order is contested on legal grounds, or the issues are otherwise contentious, the transcript could be ordered by either the ID or the IAD.

 # 25

As part of the IAD's adjudicative strategy, develop a Chairperson's Guideline, or other juridical tool, that will guide the exercise of the IAD's discretionary powers in removal order appeals in order to:

a. guide Members in the exercise of their discretion in removal order appeals;

b. guide Members when contemplating a stay of a removal order, including the length of stays;

c. guide the exercise of discretion in imposing non-mandatory conditions and reporting conditions on stayed removal orders; and

d. adopt a best practice to limit or reduce interim stay reviews to situations where there are strong and valid reasons to do so.

a. Guide Members in the exercise of their discretion in removal order appeals.

A Chairperson's Guideline or other juridical tool would provide an effective way to achieve greater consistency in the outcome of removal order appeals, as well as greater efficiency in the processing of those appeals.

b. Guide Members when contemplating a stay of a removal order, including the length of stays.

At present, removal order stays are generally granted for periods ranging from one to five years, and the types of conditions that may be imposed are many. Stay durations are not based on consistent standards or factors. Moreover, in most cases, there would not appear to be justification for the appellant remaining on a stay for a period longer than three years. A Chairperson's Guideline or other juridical tool would outline IAD

expectations when stays of removal orders are granted, including with regard to the length of stays, in order to achieve, most importantly, increased consistency in the outcome of cases and increased transparency to the parties, as well as greater efficiency in decision-making.

c. Guide the exercise of discretion in imposing non-mandatory conditions and reporting conditions on stayed removal orders.

The objective of a Chairperson's Guideline or other juridical tool would be the reduction of non-mandatory conditions that may have little demonstrable value when imposed on stayed removal orders. This could be undertaken alongside the adoption of a best practice and training opportunities for Members to discuss the value of imposing non-mandatory conditions.

d. Adopt a best practice to limit or reduce interim stay reviews to situations where there are strong and valid reasons to do so.

The imposition and execution of interim stay reviews adds to the IAD caseload, often without any discernable benefit. Further, it is unclear whether the IAD, as an adjudicative body, should in fact be involved in monitoring the enforcement of its orders in regular appeal cases. Moreover, if steps are taken to shorten the duration of stays, there is even less justification for ordering interim stay reviews. Limiting or reducing interim stay reviews is best accomplished by means of a Chairperson's Guideline or other appropriate instrument. Since there is no specific statutory mandate or duty to conduct such reviews, a Guideline or other juridical tool would reflect the preferred approach to not order interim reviews. Alternatively, a Guideline or other juridical tool could recommend that interim stays not be ordered unless there are appropriate reasons for doing so, which the Member ordering the interim stay would be required to articulate.

26 Diversion of mentally disordered persons from the removal order process.

Mentally disordered persons are most frequently seen at the IAD as a result of removal orders made against them for criminality. While the actual numbers of these types of appellants are relatively low, the IAD has identified the treatment of mentally disordered appellants who appear before it as a fundamental access to justice issue. The RPD has also identified vulnerable persons as needing to be dealt with in a different manner than other claimants. Borrowing from the experiences of criminal courts, the IAD proposes to lay the foundation for a different approach to the management of mentally disordered persons who come into the immigration appeals process after having been ordered removed as a result of criminality. In this approach, the IAD would adopt a diagnostic adjudication model in which mentally disordered appellants are placed in a diversionary stream involving the use of special procedures. This would be coordinated with the Chairperson's Guideline on dealing with vulnerable persons that is now being developed.