

Registry No.:

FEDERAL COURT

BETWEEN

CANADIAN IMMIGRATION LAWYERS ASSOCIATION

Applicant

-and-

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION,
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, and
THE MINISTER OF EMPLOYMENT AND SOCIAL DEVELOPMENT CANADA**

Respondents

APPLICATION FOR LEAVE AND JUDICIAL REVIEW

TO THE RESPONDENTS:

AN APPLICATION FOR LEAVE TO COMMENCE AN APPLICATION FOR JUDICIAL REVIEW UNDER SECTION 72 (1) OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT* has been commenced by the Applicant.

UNLESS A JUDGE OTHERWISE DIRECTS, THIS APPLICATION FOR LEAVE will be disposed of without personal appearance by the parties, in accordance with section 72 (2) (d) of the *Immigration and Refugee Protection Act*.

IF YOU WISH TO OPPOSE THIS APPLICATION FOR LEAVE, you or a solicitor authorized to practice in Canada and acting for you must forthwith prepare a Notice of Appearance in Form IR-2 prescribed by the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, serve it on the tribunal and the Applicant's solicitor or, where the Applicant does not have a solicitor, serve it on the Applicant, and file it, with proof after service, at the Registry, within 10 days of service of this application for leave.

IF YOU FAIL TO DO SO, the Court may nevertheless dispose of this application for leave and, if leave is granted, the subsequent application for judicial review without further notice to you.

NOTE:

Copies of the relevant Rules of Court, information on the local office of the Court and other necessary information may be obtained from any local office of the Federal Court Registry or Trial Division in Ottawa, telephone (613) 952-3653.

The Applicant seeks leave of the Court to commence an application for judicial review to seek a declaration of a right to counsel in immigration and refugee applications, interviews and examinations.

There is no file number or decision in this matter.

In the event that leave is granted, the Applicant seeks the following relief by way of judicial review:

1. That this Court issue the following declarations pursuant to section 18.1(3)(a) of the *Federal Courts Act*:
 - a. there is a right to counsel in immigration and refugee applications, interviews and examinations in accordance with the common law and/or sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*;
 - b. section 167(1) of the *Immigration and Refugee Protection Act* is underinclusive and therefore constitutionally invalid under section 52 of the *Constitution Act, 1982*;
 - c. the right to counsel must be legally recognized by:
 - i. enacting amendments to the *Immigration and Refugee Protection Act* and promulgating regulations as necessary; and/or
 - ii. the Respondents revising their existing policies or adopting new policies.
2. An order as to costs; and
3. Such further and other relief as counsel may advise and this Honourable Court may allow.

In the event that leave is granted, the application for judicial review is to be based on the following grounds:

Introduction

1. This Application for Leave and Judicial Review (“ALJR”) seeks the recognition of the right to counsel, at an individual’s own expense, in immigration and refugee related matters with the three

Respondents – the Ministers of Immigration, Refugees and Citizenship Canada (“**IRCC**”), Public Safety and Emergency Preparedness, and Employment and Social Development Canada (“**ESDC**”).

2. While there is no legal bar to individuals retaining and instructing counsel to represent them in these matters, there is no corresponding legal obligation for the Respondents to recognize counsel, interact with them, and accord them participatory rights in interviews and examinations. This Application seeks to confirm the existence of this obligation.

3. The right to counsel, and the corresponding obligation of the Respondents to recognize it, exists under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* (“**Charter**”) and the common law. It extends beyond the contexts where the right to counsel is already conferred by section 167(1) of the *Immigration and Refugee Protection Act* (“**IRPA**”) and section 10(b) of *Charter*. Those provisions apply to proceedings before the Immigration and Refugee Board and detentions, but do not apply to immigration and refugee applications, examinations, and interviews. Moreover, the policies and practices of the three Respondents reflect this limitation and do not recognize this right in these contexts. At times, the Respondents’ public policies and messaging actively discourage individuals from retaining counsel.

4. The Applicant seeks a declaration from the Court that the right to counsel exists in the contexts not covered by section 167(1) of the *IRPA* and section 10(b) of the *Charter*. It would then fall to the Respondents to comply with this declaration by giving effect to this right through effective means. Such means include amending existing policies or adopting new ones, promulgating regulations, and/or enacting amendments to the *IRPA* itself.

Jurisdiction

5. The Court has jurisdiction to hear this ALJR under section 72(1) of the *IRPA*, which applies to “any matter” under the *IRPA*. While most ALJRs under section 72(1) concern challenges to specific decisions, a “matter” extends more broadly to institutional policies and practices which underpin specific decisions. The scope of the term “matter” is explained in section 72(1) as “a decision, determination or order made, a measure taken or a question raised”. In this ALJR, the policies and practices result from: the unlawfulness and/or unconstitutionality of an omission, which is a “question raised” under the *IRPA*; and specific policies denying a right to counsel, which is “a measure taken” by the Respondents.

6. Launching a comprehensive legal challenge to the Respondents’ lack of recognition of the right to counsel under the *IPRA* is the most efficient way to bring the issue before the Court. The alternative, litigating this issue case-by-case on a piecemeal basis in the context of specific decisions to not recognize the right to counsel, would require dozens of proceedings to capture every possible scenario and circumstance. It would strain the resources of the Court, which is already burdened by backlog. It also avoids a multiplicity of proceedings and risks of inconsistent judicial findings.

Public Interest Standing of the Applicant

7. The Applicant, the Canadian Immigration Lawyers Association (“**CILA**”), asserts public interest standing. CILA is a non-partisan and non-profit association focused exclusively on immigration law. It provides professional resources and mentorship and promotes positive change in the Canadian immigration system for all immigrants, newcomers, and persons having dealings with Canadian immigration and citizenship laws. CILA engages in stakeholder consultations with IRCC and other ministries and organizations and makes regular appearances before various committees.

8. CILA meets the three-part test for public interest standing set out in *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45. First, CILA raises a serious justiciable issue in this litigation. Second, CILA has a real stake or a genuine interest in the outcome of the litigation. Third, the litigation is, in all the circumstances, a reasonable and effective way to bring the right to counsel issue before the Court.

Existing laws, policies and practices regarding right to counsel

9. Under section 167(1), there is a right to counsel in proceedings before the four divisions of the Immigration and Refugee Board: the Immigration Division, the Immigration Appeal Division, the Refugee Protection Division, and the Refugee Appeal Division.

10. Section 167(1) of the *IRPA* is limited in scope. It does not apply to large and significant components of the immigration and refugee system. For example, it does not apply to immigration applications, such as permanent and temporary resident applications, and citizenship applications. Nor does section 167(1) apply to examinations at a port of entry, or inland or overseas interviews.

11. Individuals have the right to counsel under section 10(b) of the *Charter* if they are detained or arrested. While *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053 extended the application of section 10(b) to detentions in the immigration and refugee contexts, it adopted a narrow interpretation of what constituted a detention. Specifically, it determined that secondary examinations were not a form of detention.

12. There is no legal prohibition on individuals retaining and instructing counsel to represent them in immigration and refugee matters that fall outside the scope of section 167(1) of the *IRPA*, or section 10(b) of the *Charter* as currently interpreted. But there is no corresponding legal obligation under the *IRPA* and section 10(b) as currently understood for the Respondents to recognize that counsel and

interact with them, and to accord them participatory rights in interviews and examinations, which severely inhibits the exercise of that right and can render it ineffective.

13. For applications, the IRCC purports to recognize the right to counsel through the *Use of a Representative Form*, as does ESDC through its *Appointment of a Third Party Representative Form*. However, IRCC's and ESDC's practices are frequently inconsistent with these forms – that is, they refuse to deal with counsel whose clients have completed these forms, and/or interact directly with individuals who have completed these forms and have counsel of record. Moreover, some IRCC and ESDC portals expressly state that they are unavailable to counsel, which undermines the effectiveness of these forms. Finally, IRCC's *Use of a Representative Form* and its communications discourage the hiring of counsel.

14. For examinations and interviews, IRCC and the Canada Border Services Agency (“CBSA”) policies and practices limit the scope of the role of counsel. Counsel may at most attend and observe an interview and examination, but may not participate in it.

Need for counsel and harms of absence of counsel

15. Counsel can increase the chances of a successful outcome for applications, examinations and interviews. Conversely, the lack of counsel increases the risk of an unsuccessful outcome.

16. Counsel's legal advice in applications includes explaining concepts found in application forms and portal questions (e.g. arrest) whose meaning to laypersons may not match their legal meaning; providing advice on the gap between IRCC's written policies and their administrative interpretation; and determining the applicability of and explaining IRCC policies (e.g. Express Entry) of ever-increasing complexity.

17. Counsel's role in examinations and interviews involves: explaining the purpose of these processes; obtaining disclosure from CBSA or IRCC of the legal issues at stake and supporting evidence (including past applications); explaining the legal issues to clients and advising them of the evidence required to accurately answer those questions and avoid misrepresentations which may lead to negative decisions; preparing the client for the interview; at the interview, raising procedural fairness issues, ensuring the client understands the questions put to them and the officer understands their answers, and taking notes to ensure there is an accurate record; preparing written submissions; and ensuring that the record provides a foundation for a successful judicial review if one proves necessary.

18. The stakes are high when an unsuccessful application for temporary residence can cause significant economic loss, delay family reunification, and prevent an applicant from having a future path to Canadian permanent residence. For example, negative work permit decisions can harm Canadian business. Businesses are subject to Administrative Monetary Penalties and significant and lasting reputational harm for non-compliance with terms related to an offer of employment to a foreign national, and offences for unauthorized employment of foreign nationals.

19. The stakes are also high for an unsuccessful application for permanent residence. A negative decision for an application under an economic stream can have a harsh impact on an individual's employment and ability to make significant decisions in their life.

20. In both temporary and permanent resident applications, incomplete or inaccurate information can further delay processing in a system that is plagued by chronic backlogs, and can affect individuals' ability to come to Canada or arrive in a timely fashion, to pursue professional and personal opportunities. A misrepresentation by a foreign national or permanent resident can lead to denial of entry, removal, or a finding of inadmissibility that lasts five years.

21. Counsel can alleviate the discriminatory impact for individuals with linguistic, cultural, educational, mental health, and trauma-based barriers in applications, interviews and examinations.

Legal basis for right to counsel

22. The legal basis for the right to counsel is found in the common law and the *Charter*.

23. The common law requires a right to counsel in immigration and refugee applications and interviews and examinations, as a matter of procedural fairness under the factors set out by the Supreme Court in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

24. Section 7 of the *Charter* is engaged for *IRPA* matters that can lead to removal or refusal of entry, where individuals are deprived of their liberty and/or because they face a risk of life, liberty or deprivation of security of the person, as a consequence of interviews and examinations that lead to inadmissibility or ineligibility determinations under the *IRPA*, and may trigger removal (for persons in Canada) or refused entry to Canada (*Council for Refugees v. Canada (Citizenship and Immigration)*, 2023 SCC 17).

25. Family life is also protected by section 7. Unsuccessful applications for family reunification that were unintentionally improperly completed can also engage section 7 interests in family life that are protected by liberty and security of the person (*Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 SCR 46).

26. The principles of fundamental justice encompass the right to procedural fairness, and in some circumstances, the right to counsel, as the right to procedural fairness encompasses “an opportunity to present his or her case effectively” (*G. (J.)*, para. 73).

27. Section 15 requires the right to counsel for non-citizens in immigration and refugee applications, interviews, and examinations, because counsel can mitigate the discriminatory effects of barriers based on language, culture, education, mental health and trauma. The right to counsel is required by the duty to accommodate under section 15.

Evidentiary basis for the right to counsel

28. The Applicant will adduce expert and experiential evidence that supports the need to recognize the right to counsel in applications, interviews and examinations, and that will highlight the barriers that individuals face in these contexts due to language, culture, education, and mental health and trauma, and the significance of the right to counsel to diminish the impact of these barriers.

29. Such further and other grounds as counsel may advise and this Honourable Court allows.

The Applicant has not received written reasons as none exist.

In the event that leave is granted, the Applicant proposes that the application for judicial review be heard at Toronto, Ontario, in the English language.

The application was prepared by Sujit Choudhry, Circle Barristers, 325 Front Street West, Suite 200, Toronto, Ontario M5V 2Y1, (416) 436-3679, sujit.choudhry@circlebarristers.com and Maureen Silcoff, Silcoff, Shacter, Barristers & Solicitors, 951 Mount Pleasant Road, Toronto, Ontario M4P 2L7, (416) 322-1480, msilcoff@silcoffshacter.com.

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DATED AT TORONTO, this 22nd Day of May 2025.



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FEDERAL COURT OF CANADA

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Solicitor for the Respondents

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