Bill C-11
Submissions to the Standing Committee
on Citizenship and Immigration

I have had the advantage of reading the Refugee Lawyers' Association's brief to this Committee. It reviews the key provisions of Bill C-11 in substantial detail. I agree with the RLA's concerns and key recommendations. Rather than preparing a brief reiterating the same concerns, I will summarize critical points I agree with and develop on some of the themes discussed by the RLA.

Summary:

1 The RPD interview:

The RLA is correct in stating that Bill C-11's requirement of an interview at the Refugee Protection Division, which will replace the current written statement prepared by a refugee claimant (the "personal information form") will not only prove to be unfair to many refugee claimants, but will also create new administrative problems at the Board.

The government of Canada does not seem to respect the legal challenges to this change. It is operating on the incorrect legal assumption that an interview on the merits of the claim, conducted by the RPD, is no different from a CBSA admissibility interview, and that the wording of legislation will trump Charter concerns.

Section 11 of Bill C-11 should be struck. It will not only create injustice, but also impractical impediments to getting refugee claims processed.

2 The appointment process:

Bill C-11 will not improve the quality of appointments to the RPD. It actually threatens to diminish the quality of appointments to the RPD. Having competent and fair decision-making in the first instance goes to the heart of the refugee determination system.

Bill C-11 does nothing to address the deficiency in what is publicly claimed to be an exclusively merit-based GIC appointment system, and does not elevate the Federal Court appointment system above the fray of politically partisan attack.

I will further discuss the problem of establishing a truly apolitical appointment process.

3 Ensuring access to representation:

Bill C-11 and the budgeting for both the new hearing and appeals system, as well as budgeting for enforcement and deportations, will place new strains on provincial Legal Aid plans. As I have extensive experience with Legal Aid, I am setting out a more detailed discussion of this issue.

4 Limits on the "appeal" before the Refugee Appeal Division:

The RAD is not a true appeal. The limits it places on what can be presented will bar many refugee claimants from proving they were telling the truth, or that they are truly at risk. As the RLA states, the limits on what evidence can be submitted will foster injustice.

I have further concerns, in addition to what the RLA has set out.

5 Listing of nationalities and types of claims prohibited from appeal

I have previously testified before this committee that the politicization of decision-making about refugee claims is inadvisable. Efficiency could be accomplished by having a reasonably quick first hearing and appeal. The decision to introduce both an explicit role for the Minister's office in the legislation, and the implicit impact this will have on decision-makers, are a fundamental shift in refugee determination which will compromise the perceived legitimacy of the tribunal process.

The RLA and CCR have discussed this in great detail.

6 Limits on humanitarian and PRRA applications

The RLA has set out complete submissions on the limits being placed on humanitarian and PRRA applications. There is considerable confusion in political and public discourse over whether a humanitarian application in and of itself blocks deportation. The PRRA was introduced to cope with Charter requirements and Canada's obligations under the Convention Against Torture. Although the PRRA was administered in a very arbitrary manner, it is unclear how the PRRA can be barred without arriving at cases where these are violated.

7 Transitional provisions:

As the RLA states, Bill C-11 risks leaving us, as the IRPA did, with half-implemented legislation. In practice the most onerous aspects of the Bill may be implemented without those provisions which counter them.

Further discussion:

The RPD interview:

The entire public discussion around the RPD interview is predicated on omitting the fact that there is already a CBSA admissibility interview before a person is referred to the RPD. The RPD interview is a second interview, which will both create injustice and delay in practice.

The RPD interview will act as an injustice to refugees where it actually is carried out quickly. However in practice it will become an unwieldy cause of delay. It makes no sense for the government to want to reduce administrative delays, yet implement an RPD interview before a hearing takes place. The RPD may find the idea of controlling every instance when a refugee is to present her statements to them appealing, but this will increase the expense and delay in RPD processing of claims.

The Board and the Minister are assuming the Bill as drafted will succeed in barring refugees from being represented by a lawyer in the RPD interview. This raises concern that an intent of the interview is to unfairly limit the refugee in her ability to present her case. There is a difference in legal character between admissibility interviews and interviews on the merits of a refugee claim. The implication of the Supreme Court's decision in *Dehghani* is that there should be a right to a lawyer in an interview on the merits. Read in conjunction with the Federal Court of Appeal's decision in *Thamotharem*, the RPD's intent to prevent the refugee from presenting her own statement with representation will be an unfair limitation which should be challenged.

The RPD interview should be struck from Bill C-11, not only out of concern for fairness, but also because it is totally impractical. I have not found that ordinary Board or CBSA staff who interview refugees on a daily basis believe this provision can be implemented in a way that is efficient. The government's determination to have absolute control over a refugee's ability to present her statement has led it to insist on a power which will become unwieldy.

Section 11(1.1) of Bill C-11 seems to have escaped notice, since the Bill includes so many major changes to the system. It creates a positive onus on refugee claimants to prove they are eligible to be referred to the Refugee Protection Division. In

practice this will lead to greater delays in eligibility determination, and to more cases being litigated before even reaching the Refugee Protection Division. The current legal assumption is that claimants are eligible to be heard unless believed on reasonable grounds to be ineligible. Once a reverse onus is included in the law, it will not be long before we have an increase in pre-Refugee Protection Division litigation, much of which will prove to be gratuitous. Many people will be shut out of getting a refugee hearing based on s. 11(1.1), with no consistency, as this will depend on individual CBSA officers. Where they get access to a lawyer, this will become a whole new area of pre-hearing litigation.

The rush to passage of Bill C-11 will lead to many apparently minor aspects of the law getting through which will prove to have an impact that is not understood by Members of Parliament. The less critical examination a law gets from outside experts, the more likely Members of Parliament will not have an accurate sense of its probably impact.

When an apparently minor provision was introduced as part of the Immigration Act about government-issued identity documents passports being needed for accepted refugees to become permanent residents, the government's witnesses told this Committee it would have no adverse impact on refugees. It led to a generation of Afghanis and Somalis being blocked from getting permanent residence. The devil is in the details. Yet Bill C-11 not only includes details which are poorly understood, but also relies on implementation through critical regulatory and discretionary decisions which the Bill sets no governing standards for.

The appointment process:

With respect to appointment and re-appointment of Board Members, as well as appointments to the Federal Court, Bill C-11 does not move Canada forward.

The Board will be segmented between a Refugee Protection Division, with public service employees and a Refugee Appeal Division, with Governor in Council appointments.

The Refugee Appeal Division will retain currently appointed Board Members, continue to receive new appointments under the existing GIC system, and have its members re-appointed under the existing GIC system.

That system has remained essentially the same since it was established. The GIC system has always delivered a mixture of Board Members of varying degrees of competence and judiciousness.

The backgrounds cited as qualifications in press releases describing Board Members remain just as varied, and sometimes puzzling, as they have since the Board was established.

As stated by the RLA the GIC appointment system has recently delivered some highly ideological appointments. It has also continued to present biographies for new Board Members which set out qualifications that could not even theoretically be linked to judging refugee cases.

Over 20 years of experience with GIC appointments to the Refugee Board proves empirically that we will not readily establish an honest definition of what amounts to relevant qualifications or the promise of judiciousness in a political forum.

In the Plaut report, Rabbi Gunther Plaut tried to come to terms with establishing a fair refugee tribunal. Rabbi Plaut argued that ideally the Refugee Board should have a non-lawyer with a human rights background sitting together with a lawyer knowledgeable about refugee law. His ideal was that the non-lawyer would bring experience in the field and experience with ordinary people, to balance out the analytic tendencies of the lawyer. Meanwhile the lawyer would ensure the panel could deal with and apply the procedural and legal principles at stake.

What government has made of this was that it can appoint lawyers with no background or expertise in refugee law, and pretty well anyone who might loosely described as having a community background. The latter group has been expanded to people who don't even seem to have a background working with any refugee community, or anything tangentially connected to coming into contact with refugees or human rights issues.

Although governments have insisted that the appointment system has become increasingly merit-based, there has been no objective change. Merely reviewing the brief biographies presented over the past year illustrates that the formula has remained a mixture of apparently qualified and unqualified.

When government moved from a two-member panel to one member deciding a case alone, this aggravated the problem of appointments being so varied, since one person decides alone. The potential for arbitrary decisions increased.

A Board Member should have substantive expertise in the field they are being appointed to adjudicate. When two members were hearing a claim together, there could be more flexibility in appointing people without a legal background, along with people with a background in the law. Once only one person was deciding a refugee claim, it became more important that the person understand both the human rights context and the law. Now those same members will be sitting in appeal. Under s. 171(c) of the IRPA one RAD Member can decide an appeal, and a

decision by one RAD member is just as binding as an appeal court decision. In other words, nothing is being done to ensure a uniform minimum standard for RAD Member appointment, but they will be deciding as individuals on appeals of RPD Members decisions. And their decisions will be binding, but possibly just as varied in quality and substance as they are now.

Assessing what resumés give the impression a person is qualified would not be a difficult task for an expert panel, at arm's length from politics. The problem with GIC appointments has been that in the abstract an argument can always be made for anything to be called a qualification. The question of whether there wasn't a single other applicant who seemed to present greater qualifications is never asked and answered. The question of why it is that hundreds of more qualified people would not even think of applying, knowing how the system works, is never even asked.

A harder problem is predicting judiciousness, in the sense of being fair-minded. Looking at resumés is never enough. Competent appointment committees do in depth investigation of a person's background, how they interact with people, and their personal tendency to be fair and responsible in how they treat people. The ideal candidate should care not only about refugee determination or the refugee determination system as an ideal, but also about being fair and responsible with real people.

The problem is not unique to the Refugee Board or to the Federal government. The Refugee Board may be criticized more than less visible tribunals, but this is the norm for how government appointments and contracts are issued under a political party system. It is difficult for elected parties to refuse, once elected, to reward their supporters and to resist the temptation of placing their party's ideological stamp on a tribunal.

The Refugee Board could be a marvelous institution. It could act as an exemplary model of justice, demonstrating how, in a truly democratic society, government is secure enough to leave difficult human rights decisions in the hands of experts. It could be held out as demonstrating that a just society does not allow political trends to influence what ought to be objective decisions applying law. It could also be held out as proof that when people who are sincerely dedicated to a vocation are entrusted with authority, they use that authority more responsibly than people who have no lasting commitment to the field.

A minority government should be the ideal time for that fundamental shift in values to happen. The history of judicial appointments in Ontario has demonstrated this.

Appointments to the Ontario Court of Justice are made by a truly independent committee of experts. The shortlist of nominees recommended to the Attorney General of Ontario is kept very brief, so there is no room to pick and choose unqualified candidates over highly qualified candidates. Though an element of political judgment remains, since a cabinet minister makes the final decision, Ontario has developed a reputation as a province which making judicial appointments that are well respected in the field. In criminal law prosecutors and defense counsel alike tend to have a high regard for the quality of appointments.

In my view it is no accident that Ontario's appointment system came about through a combination of unusual circumstances. Attorney General Ian Scott, under a minority government allying the Liberal and New Democratic parties, put it in place. The combination of a Minister willing to go above the fray of politics and no single party dominating decision-making, led to a systemic improvement in judicial appointments in Ontario. Once a respected system was put into practice, it became difficult for successive governments to seriously tamper with it.

It is a self-perpetuating truth that if the status quo is not ideal, that can be used to perpetuate or even worsen a system. It is harder to attack a sound and respected system.

Regrettably, Bill C-11 worsens the status quo.

Board Members appointed under the current system will now be hearing cases on appeal, and giving their guidance to members who hear refugee claims. Yet nothing has been done to ensure they are more qualified than before.

There will be even **less** accountability in the hiring of Board Members hearing refugee claims in the first instance. As the RLA has commented, the Board might even treat PRRA officers as qualified.

If the Board itself decides who should be given contracts as RPD members, we are left with politically appointed Board Members, without security of tenure, deciding who should be hired as RPD Members. It is hard to understand how that would insulate the appointments process from political influence.

Bill C-11 perpetuates the existing Board's existing problems by establishing no arm's length and expert committee to select the public service appointments.

It also does nothing to address the tenure of decision-makers, which is a major factor in ensuring the freedom to be judicious. Public service contracts, just like GIC appointments, can be temporary.

Bill C-11 assists the Federal Court by assuring a much needed increase in the number of judges appointed, but this comes after the Prime Minister has brought into question whether appointments to the Federal Court are partisan. Having created this doubt, it is all the more important that Parliament come to terms with this rather than accepting the *status quo*.

The decision to appoint new judges to the Federal Court should be taken as an opportunity to elevate the discourse on judicial appointments above the political fray. Legal commentators have previously recommend the adoption of the model in place in Ontario for Federal judicial appointments.

Parliament has a unique opportunity with the presentation of Bill C-11 to rise above partisan politics, and sincerely come to terms with ensuring a non-partisan appointment process.

Canadians have become cynical about politics, and increasingly disengaged in the electoral process. Government should not rely on the public's limited tenacity in sustaining a critical demand for integrity as a perpetual license to refuse to raise its standard. If a minority government is not the moment for political parties to honestly come to terms with this problem, there is something fundamentally wrong with Parliament's party politics *per se*.

Limits on what can be presented in an appeal:

The requirement under s. 13(2) that the Board not hear in person from a refugee claimant in person, combined with the limitation that the only way the Board can make an exception and direct that the person appear before them is if "documentary evidence" raises a question about her credibility will also bias the RAD proceeding against being able to hear a refugee's own explanation for perceived credibility problems.

The adoption of the current test for new evidence applied in PRRA applications will definitely lead, in practice, to refugees not being able to prove they were telling the truth. In some cases the Federal Court has treated the same wording as banning a PRRA officer from considering new evidence the person was telling the truth, on the pretence that she could have thought of getting it at the time of her hearing.

In practice not only refugee claimants but even experienced lawyers cannot predict that the amount of proof they present at a hearing will be treated as inadequate. The following are cases where I acted for a claimant at a hearing, and did not anticipate that the amount of evidence we presented would be treated as inadequate to prove something which seemed obvious to me.

Under s. 110(4) of the proposed legislation, a refugee claimant may only present evidence to the Refugee Appeal Board:

> "that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection."

This adopts the test currently in force for "Pre-Removal Risk Assessment" applications. Since we have experience in litigation of the interpretation of this definition, it is predictable how it will be applied in practice.

In plain terms, a refugee who has a hearing and is rejected is stuck with the evidence she gave at the hearing. If, after being rejected, she realizes she could have brought better evidence, more evidence, that she already had evidence it had not occurred to her to produce, or that there is some other source of evidence she had not thought of consulting -she may be barred from giving it to the RAD.

For example in *Diallo v. MCI* (2009 FC 84) the Federal Court decided that if a woman claimed to be a lesbian at her hearing, but only provided a couple of letters from lesbian support groups confirming this, she could not be allowed to prove this by filing more testimonials and proof in a PRRA application.

The Court's found, applying the same standard the RAD will be interpreting, that she could have thought of getting better evidence before her hearing.

At some point it is impossible to know how much proof is necessary. How far is a woman expected to go to prove what she is?

In *Mobarekeh v. MCI* IMM-4914-08 an Iranian Muslim woman claimed she had fled an abusive husband, found solace with Catholic church and decided to convert to Christianity. She claimed that he had brought her from Iran to the United States, only to hold her captive in his apartment. He had torn up her passport to keep her from running away, but she had found and hidden the pieces. After neigbours helped her break the bars on the window to the apartment and escape, she took all the pieces of her passport with her to the Canadian border. She claimed to have been deeply traumatized by the abuse she suffered from her husband.

Canada Immigration delivered a partial photocopy of the passport to the Refugee Board, copying only the pages with entry stamps. The Board Member decided that she must have been lying about her entire history, because not every page of the passport was copied. From this, the Board Member assumed there must have been pages of the passport with other stamps in them that Ms. Mobarekeh had not given Immigration.

After the hearing, Ms. Mobarekeh produced a complete photocopy of the passport Immigration gave her. It included all the blank pages Immigration had not sent the Board, and proved she was telling the truth. She could not explain why she had not thought to say she had this when she was in the hearing. Women who have been traumatized are often intimidated by the legal process or disorganized. Her application to the Federal Court was dismissed, and she has submitted this evidence in a humanitarian application. Under Bill C-11 the evidence she had could be inadmissible before the RAD, since a less traumatized person would have thought of showing or mentioning it in the hearing. She would also be banned from filing a humanitarian application.

Ms. Mobarekeh also claimed in her hearing that her experiences led her to convert to Christianity in Canada, as she found solace in the church and wanted to distance herself from her past as an Iranian Muslim. She presented a letter from her priest confirming that she was in the process of studying Catholicism to prepare for her conversion. She had chosen that church because they were kind to her and willing to teach her in Farsi.

The Board Member decided she was lying about becoming a Christian, arguing that no woman would choose the Catholic church if she was tired of being oppressed, because the Catholic church does not ordain female priests.

Ms. Mobarekeh subsequently completed her conversion and is an active member of her church. Her priest was shocked and offended by the Board Member's opinions about the Catholic church. He provided an affidavit going into greater depth explaining why he believed Ms. Mobarekeh was sincere and refuting the Board Member's assumption that only a submissive and dishonest woman would join the Catholic church.

If we had a RAD hearing permitting us to simply file evidence without restriction in a situation like this, both the entire passport and the more in-depth testimonial from the priest could be provided. That would allow the RAD to decide based on the truth, rather than having a technicality block the truth from being proved.

A normal person assumes she is not going to be called a liar when she tells the truth. Normal supporting witnesses, especially when they are honest folk, assume that reasonable proof is good enough.

In theory, the advantage of the RAD is that she could simply file better evidence before the RAD, allowing the RAD to decide based on the truth. The wording of s. 103(4) would not necessarily allow this, though. A RAD Member would have to generously interpret the law to allow this.

How much proof is enough to prove that you are really Christian? How much are refugees (including the unrepresented or traumatized) expected to know why they are about to be disbelieved. How much do experienced lawyers have to second-guess rationality and common sense?

In real life, government officials often call people liars when they are telling the truth about virtually anything, no matter how basic.

As problematic as the current inconsistency in the quality of appointments to the Board is, the civil service is no better.

The widely publicized case of Suaad Hagi Mohamud offers an example of a trained civil servant deciding a woman was either not herself or was not the same woman who left Canada for Kenya, even though evidence was available proving she was. If anything, bureaucrats are more likely to dwell on details and miss the forest for the trees. To give a simple example from that case, Ms. Mohamud had a camera in her purse which documented her life in Canada, her actual travel to Pearson Airport, and her entire vacation in Kenya up until she went to the Nairobi airport. If a refugee who attended a hearing had photographic evidence which proved everything she was saying was true, and she were called a liar, would the photographic evidence be admissible on appeal under the new s. 103(4)? Not according to the Federal Court in *Diallo*.

The premise in Bill C-11 is that we don't really care enough about the truth to allow a refugee to prove she was telling the truth all along. This stands in marked contrast to our values in the criminal justice system. The Ontario Court of Appeal recently *thanked* the lawyers who represented Stephen Truscott for proving the truth. Under Bill C-11, and given the values imposed by Federal Court judges restrictively applying the same restriction we find in C-11, the truth is considered obnoxious. The only time there is no restriction on new evidence is when it is the government's evidence proving a refugee lied. That can be introduced on appeal, or at any time under IRPA's existing provisions for "vacation" of status. There is no balancing concern with a refugee proving she was telling the truth all along.

Based on current practice at the RPD, I am also concerned that the RAD will repeat the same natural justice violations which led to the *Singh* decision. Because the Board has so many members with no background in refugee law, some members rely heavily on consultation with the Board's legal department (or with other Board Members) to decide legal issues. This is increasingly resulting in Board Members deciding based on either Board decisions or Federal Court decisions without disclosing this to counsel.

The recent decision in *Michel v. Canada* (MCI) 2010 FC 159, is an example. The Court found the Board Member violated natural justice by making his decision in

part based on a new decision that had never been mentioned to counsel. Unfortunately it seems the current legal department may be actively encouraging this practice, as it is a growing trend. We argue a case, then get a decision based on a flawed interpretation of some decision which came out after the hearing. It is as if there were two hearings, the one we got invited to and a shadow hearing the Board's legal department ran.

Because the RAD will usually decide cases without a hearing, and there will be no systemic improvement in the consistency and quality of GIC appointments, this will be a growing trend. The RAD is not likely to make a substantive contribution to the development of refugee law without tackling the fundamental problem of appointments.

Legal Aid:

Former Deputy Chairperson John Frecker has prepared a study setting out that the availability of competent lawyers to represent refugee claimants actually facilitates the Board's efficiency and decision-making. Recently, former Chairperson Peter Showler has expressed concern that Bill C-11 highlights the national need to ensure access to representation by lawyers.

Though I am known to this committee as a refugee lawyer, I have an extensive and very committed background working with lawyers in all fields of practice in support of Legal Aid being available for the needy. I also believe the legal profession and government have an obligation to ensure the justice system is accessible to the average person, particularly when the issue at stake goes to an individuals basic rights or needs.

I have been at the table in discussions of Legal Aid under successive provincial Attorney Generals in Ontario, whether Conservative, Liberal or NDP. Either as an individual or as part of coalitions and associations, I have made representations to every major study on Legal Aid in Ontario in the past twenty years. I currently chair an association bringing together all the province's major law associations, named the Alliance for Sustainable Legal Aid, though the following statement is made solely as an individual.

When the issue of funding for legal representation is raised, a first retort is often that it is self-interested if the problem is raised by lawyers. Two thirds of lawyers who accept refugee law certificates in Ontario have over 10 years experience. The hourly rate paid to lawyers who do Legal Aid work is a fraction of what they can earn in the private market. Most lawyers who agree to represent refugees with Legal Aid certificates are doing so because for reasons of moral or ethical belief.

If anything the existence of Legal Aid drags down the expectation of what people should be charged. I am always amazed at what lawyers in the United States charge refugees for, and what consultants in Canada charge refugees for. When refugees don't have Legal Aid available, or don't understand that it is available, the market economy is a vicious exploiter. Legal Aid is a public service.

Legal Aid is also a non-partisan issue.

In Ontario, every party has endorsed the need for greater Legal Aid funding. Every party has deplored the inadequacy of Federal funding. Every party has also been through good and bad economic times, and seen Legal Aid budgets have to fend against what are inevitably more popular or photo-op friendly priorities.

When the current Minister of Finance, the Honourable James Flaherty, was Attorney General of Ontario, the chair of Legal Aid Ontario, the Treasurer of the Law Society of Upper Canada and I had the opportunity to sit at a table with him and discuss the need for the Federal and Provincial governments to ensure stable funding for Legal Aid in refugee law. Not long after that, and after meetings with the Liberal cabinet ministers who were then in office federally, a national cost-sharing agreement was established for Legal Aid funding in refugee law. Both the Federal and Provincial governments recognized that the refugee hearing system, in which the Charter right to security of the person is at stake, required stable funding for representation.

The sound administration of all aspects of the justice system should be recognized as a joint responsibility of Federal and Provincial governments. Legislation set federally in all areas, whether immigration, criminal or family law, has both Federal and Provincial implications. The impact of state funding levels for social programs likewise has national implications for what is termed poverty law. Canada is not a country where one level of government acts in isolation, without impact on another.

The judiciary have repeatedly commented on the need for greater support for Legal Aid. Governments tell the judiciary that it should not order funding. The judiciary would clearly prefer that governments act responsibly, without judicial order, and resolve on stable funding for Legal Aid. That responsibility needs to be acted on without pretence.

Bill C-11 clearly increases the amount of work which will be required to give competent legal representation to the average individual refugee claimant.

Although the RPD interview may be meant to replace preparation of a "personal information form", in practice lawyers will be required to both interview their clients, attend the interview and find some way to ensure the refugee's own

statement gets presented to the Board. It will be a net increase in the hours required to represent a refugee claimant.

Lawyers will have to prepare for the refugee determination hearing, as under the current system –whether or not the time allowed for this is abridged.

For those refugee claimants permitted to appeal to the Refugee Appeal Division, a cost is added. As an appeal has an evident purpose, that increased cost is justifiable.

This is without getting into the increase in litigation at the Immigration Division and the Federal Court which will be engendered by increased CBSA spending, and Bill C-11's provision of a new discretionary CBSA power to block refugees from getting a hearing.

Enforcement decisions and spending at the Federal level impact on the need for Legal Aid. When the Federal government increases arrests and deportations, not only individuals but also families and communities will be impacted. There has to be some balance to ensure we avoid excess that will shock the community's sense of fair treatment. The average person will not understand what the budget numbers attached to Bill C-11 are going to mean in practice, but they will have a sense that communities are under attack, and that this isn't fair, when they see individual cases of people they sympathize with being imprisoned and deported without the ability to get due process because they can't get representation.

To put it simply, it is not possible to throw half a billion dollars on one side of the scales of justice without causing an imbalance.

If the government can commit to such a dramatic increase in funding in a time of budgetary restraint for refugee hearings and immigration enforcement it should also be ready to commit to Legal Aid programs across Canada.

There is no national minimum standard for Legal Aid funding. In general, most of the Federal contribution to provincial Legal Aid funding is taken from the Canada Social Transfer. This leaves Legal Aid competing with all other services for funding, and typically underfunded. Legal Aid in Ontario lost significant funding from the time the Federal government shifted general funding from contributions dedicated to Legal Aid to the Canada Social Transfer in the early 1990s. It has never regained the level of funding it had before that shift. This continues to have a detrimental impact on core funding for Legal Aid's infrastructure.

As stated above, refugee law has become somewhat of an exception to this general arrangement. The Federal-Provincial cost sharing agreement has been renewed several times since then, and is currently in effect. Legal Aid Ontario states that

the current agreement runs until March 31, 2011.

The cost-sharing agreement provides that the Federal government provides a contribution, and that individual provinces can take a share of that amount depending on a formula related to number of claimants in the province. Any province accepting the funding must match it.

Ontario receives at least half of all claimants, and has historically matched and exceeded the Federal contribution.

The following table sets out the Federal and Provincial contributions for the fiscal years from 2006-07 to the projected year of 2010-11.

	LAO I&R Expenditures	Federal Contribution	%	Ontario Contribution	%
	$M	$M		$M	
2006-07	19.1	7.4	39%	11.7	61%
2007-08	17.2	7.1	41%	10.1	59%
2008-09	20.4	6.8	33%	13.6	67%
2009-10	21.4	10	47%	11.4	53%
2010-11	21.4	6.3	29%	15.1	71%

Relative to the $540.7 million in new funding the Federal government is ready to dedicate to hearings and enforcement, the budget for Legal Aid for immigrants and refugees in Ontario is miniscule. Although the budget does not include what Ontario spends on the infrastructure required to have a Legal Aid system, which comes out of the CST and provincial revenues, it is obviously dwarfed by what the Federal government is spending.

The imbalance in a heavily funding hearing and enforcement system with a system of legal representation which has such little funding will be extreme. Individual rights will be trampled in such a dramatically imbalanced system.

As it stands, we do not have enough funding to ensure all claimants get counsel in Ontario or in any other province. Some claimants are left unrepresented, including some claimants assessed by lawyers as having claims with merit –where they marginally exceed Legal Aid income eligibility rules.

This would be the case under any system with such limited funding, regardless of the method of representation chosen. Every study has shown that in regions where there is a large enough number of refugee claimants, the judicare model (in

which individual lawyers are responsible to provide representation, and to supervise the work of legal assistants) is the more cost-efficient than staff office models. While provinces with lower numbers of claimants may be better served having clinic lawyers trained in refugee law, every provincial Legal Aid plan has sought to keep budgets restrained. British Columbia, Quebec and Ontario have continued the judicare model. The method of service delivery does not need to be reinvented.

Consistency in the quality and ethics of representation would benefit both refugees and legitimate interests of the Federal government. Sudden arrivals of claimants from unexpected sources have sometimes been linked to consultants, the most obvious example being the arrival of hundreds of claimants from Portugal, many of whom were represented by one consultant office. The stability of an independent bar committed to assisting refugees, and to the integrity of the refugee determination system tends –to an extent government grossly underrates- to ensure not only that claimants are competently represented but also that the advice they get is ethical. That is both in the interests of government and individuals.

One of the most common complaints of community groups is that when people do get representation, it is difficult to ensure a decent standard of representation. In Ontario refugee lawyers and Legal Aid developed minimum ethical standards in representation, which are set out in plain language to ensure they are understandable to refugees in translation. Without being unrealistic, given the level of funding there is for legal representation, these at least cover the most obvious indicators of negligent practice. When we have been able to get these standards enforced, lawyers have been banned from doing Legal Aid work. This is a more effective tool than relying on professional bodies to discipline their members. However it depends on Legal Aid plans being properly resourced, and consulting with an independent bar.

The Federal government should both increase its contribution to the cost sharing agreement nationally and expect provincial Legal Aid plans to enforce the same minimum standards set by Legal Aid Ontario.

The instability of Legal Aid funding also has a detrimental effect on our ability to promote Legal Aid work, particularly among new lawyers. This is despite the keen interest many students show in doing social justice work, and in helping refugees in particular. The Federal government should take the initiative to offer the provinces multi-year, stable, and substantially increased funding for Legal Aid work. Year-by-year funding encourages provincial governments or Legal Aid plans to express doubt about continued support for refugee law. In British Columbia this has had a particularly negative impact on perceptions.

In the context of this discussion, an increase in the Federal contribution to the refugee law cost-sharing agreement is clearly needed under the existing refugee system, and will become a greatly exaggerated need under the new system.

In the broader context of the entire justice system, the Federal government should shift all Legal Aid funding from the Canada Social Transfer to a cost sharing agreement dedicated to Legal Aid, with the amount the Federal government commits chosen to promote an increase in what is currently dedicated to Legal Aid expenditures. Just as the refugee law cost sharing agreement requires that participating provinces at least match the Federal contribution, the Federal government should make a dedicated Legal Aid fund dependant on provinces at least matching what they take. This would promote a consistent minimum national standard for Legal Aid funding.

Ultimately, in nations which don't have fair systems with accessible legal representation, the common-sense recourse of people who fear persecution in their country of origin is to live without legal status. The number of people from refugee producing countries living in the United States without ever having registered with immigration authorities always exceeds the number of people who are registered. The main reason "illegals" who have a valid refugee claim give for avoiding any contact with government is that they do not believe the system will treat them fairly, and there is no accessible Legal Aid plan that could give them a lawyer who could help them cope with it. Spending on enforcement cannot undo the damage done by a loss of faith in justice and the accessibility of justice. People who sincerely believe they have a valid refuge claim should not be discouraged by overwhelming imbalance in the justice system, or the inaccessibility of representation.

If the government can commit to such a dramatic increase in funding, in a time of budgetary restraint, for refugee hearings and immigration enforcement it should also be ready to commit to Legal Aid programs across Canada. The need is immediate and should be understood across party lines.

The judiciary have repeatedly commented on the need for greater support for Legal Aid. Governments tell the judiciary that it should not order funding. The judiciary would clearly prefer that governments act responsibly, without judicial order, and resolve on stable funding for Legal Aid. That responsibility needs to be acted on without pretence.

Bill C-11 has focused attention on one aspect of the justice system, the refugee determination system. It has also focused attention on the pragmatic reality that a system can't work effectively without adequate funding. The Federal government has secured major new funding for hearings and enforcement. The government's

decisions in both hearings and enforcement will lead to greater demand on provincial Legal Aid systems.

With hindsight, we should not have limited ourselves to a cost-sharing agreement in refugee law. Legal Aid programs across Canada are underfunded. There is no national consistency in the level of commitment provincial governments have to Legal Aid. Even when a provincial Attorney General favours greater funding for Legal Aid, core funding has to be extricated from the general funds flowing under the Canada Social Transfer, along with provincial tax revenues. Legal Aid will always come up short in that struggle.

Even Ontario's plan, which is the best-funded Legal Aid plan in Canada, has depended in part on unstable funding sources, such as the interest income on lawyers' client trust accounts, which have plummeted since the Federal government was required to set interest rates at historic lows. Legal Aid area offices across Ontario have recently been closed, as Legal Aid tries to find efficiencies. Legal Aid does not control interest rates. Stability is a fundamental need for Legal Aid funding.

Bill C-11 should not move forward without adequate funding for Legal Aid. The Standing Committee should call for the government to increase its contribution to the cost-sharing agreement for immigration and refugee law representation. The Standing Committee should also call on government to give greater support to the core funding required for Legal Aid programs generally.

Concluding remarks:

Realistically, a rush to passage of a flawed bill is probably the wrong time to expect that Members of Parliament will stop and engage in a serious review of it. It may be an even more unrealistic moment to expect honest reflection on more fundamental questions every government has failed to come to terms with.

Members of Parliament should work together to deal with the sincere concerns raised by the CCR, the RLA and the concerns set out above.

Speaking truth to power can seem as futile as the lone protestor who stood in front of tank at Tiananmen Square.

This government has managed a dominant campaign to push through Bill C-11, whether or not it is fundamentally flawed and regardless of how it avoids basic questions. That would be fine if sound public policy planning, in a democratic society, were as simple as driving a tank.