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Via email: iepu-upeli@cbsa-asfc.gc.ca

Edward Ludwig, A/Manager
Inadmissibility Policy Unit
Immigration Enforcement, Customs, and External Review Policy Directorate
Canada Border Services Agency
100 Metcalfe St
Ottawa, ON K1A 0L8

Dear Mr. Ludwig:

Re: Potential regulatory amendments related to transborder criminal inadmissibility

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to respond to Canada Border Service Agency's consultation notice on potential regulatory amendments related to transborder criminal inadmissibility.¹

The CBA is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. Our primary objectives include improvements in the law and the administration of justice. The CBA Section has approximately 1,200 members across Canada practising in all areas of immigration and refugee law.

The CBA Section is concerned that CBSA proposal would undermine legal and procedural safeguards. While admitting a person to Canada solely for the purpose of attending an admissibility hearing before the Immigration and Refugee Board (IRB) is not expedient, efficiency does not justify overriding legal safeguards. There are also mechanisms in place to address any risks to the safety of Canadians that these admissions may pose.

A foreign national admitted to Canada solely to attend an admissibility hearing could be kept in immigration detention if it were established that the individual met the requirements of section 58 of the IRPA and could not be released under section 248 of the IRPR. However, with the current reliance on virtual hearings, individuals need not enter Canada to appear at an admissibility hearing. A virtual hearing could permit their attendance from anywhere in the world in accordance with legislation, regulations, and principles of natural justice and procedural fairness.

¹ [Potential regulatory amendments related to transborder criminal inadmissibility](#), November 7, 2020.

If an individual fails to attend a virtual hearing, mechanisms are in place to address CBSA's objectives. If the objective is to disallow the entry to Canada of a person suspected of being inadmissible to Canada, that objective is already satisfied. If the objective is to keep a record of an individual's alleged misconduct in case they subsequently request to enter Canada, that is also satisfied under section 44 of the IRPA. A report would be written about the allegations and referred to the Immigration Division. The lack of a deportation order does not undermine the objective of denying entry to Canada and monitoring in case of a request for re-entry.

The CBA Section strongly opposes shifting decision-making power over subsection 36(2)(d) from the IRB to CBSA. Procedural safeguards, including the right to the assistance of a lawyer and to "know the case to be met", are fundamental components of Canada's justice system. At a port of entry, individuals unfamiliar with the Canadian legal system and often not proficient in English or French would be subject to on the spot enforcement. This expedient process raises questions:

- a) At what stage in the CBSA investigation does the right to a lawyer crystallize?
- b) What procedures will be implemented to ensure that the foreign national has the ability to know the case to be met, to gather relevant evidence to meet that burden, and enjoy a meaningful opportunity to review this information with a lawyer?

These fundamental protections cannot be adhered to at a port of entry. On the spot determinations would eliminate safeguards for foreign nationals who may be acting under duress or otherwise the victims of criminal organizations. Some individuals may have been forced to engage in trafficking firearms or controlled substances into Canada. If they remain in an enforcement regime – dealing with police officers rather than lawyers and tribunals – it is less likely these circumstances will be disclosed. These individuals would face deportation from Canada, with limited to no opportunity for protection. Persons in Canada have a right to a fair proceeding.

While the consultation notice indicates the proposal will apply to "certain straight forward offences", this is not the case. Assessments that are apparently 'fact-based' involve nuance. For example, the consultation notice proposes giving CBSA jurisdiction over admissibility concerning offences under subsection 320.14(1) of the *Criminal Code* – driving while impaired – and section 122 of the IRPA – using altered or non-genuine identity documents. Neither of these assessments are straight-forward. There is significant jurisprudence on the operation of a conveyance while impaired. The assessment of impairment is subject to technological error (i.e., breathalyser) and human misconception (i.e., roadside sobriety testing). While police officers engaged in policing traffic are trained in these devices and methods, there is no indication that CBSA officers have similar training. Even with this training, traffic offences are regularly subject to litigation before Canadian courts. Similarly, under section 122 of the IRPA, the assessment of whether a document is altered or non-genuine may not be straightforward. CBSA officers have no expertise in document forensics.

In distinguishing sections 228 and 229 of the IRPR, CBSA was primarily given jurisdiction over removal orders in cases that had already been decided by a Canadian court (A36(1)(a) and A36(2)(a)), the IRB (A40(1)(c), A40.1(1), A42), or a Parliamentary order (A35(1)(d) and A35(1)(e)). CBSA has investigative and enforcement functions, but it is not an adjudicator, and its officers do not have this expertise. Investigative and enforcement functions must be separated from legal and adjudicative roles to ensure oversight and procedural fairness.

We expect that enforcement-minded decision-making prioritizing expediency and efficiency will have a disparate impact on foreign nationals from Black, Indigenous, and Persons of Colour (BIPOC) communities entering Canada. Conscious and unconscious biases, influenced by security considerations, may lead to disproportionate enforcement actions. Independent tribunals and

courts in Canada are grappling with these concerns and receiving training to recognize and address bias. The CBA Section is troubled that the proposed changes would give additional enforcement tools to CBSA, which has no civilian oversight.

Foreign nationals will have no right to appeal decisions. Judicial review is not an appeal, it is not *de novo* and a foreign national would be bound by the evidence they put before the officer. Given concerns about the individual not knowing the case to meet and not having access to a lawyer, we expect an increase in Federal Court litigation focused on breaches of procedural fairness.

The CBA Section appreciates the opportunity to comment on CBSA's consultation notice. We would be pleased to discuss our comments if you have any questions.

Yours truly,

(original letter signed by Nadia Sayed for Mark Holthe)

Mark Holthe
Chair, CBA Immigration Law Section