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Via email: jeff.robertson@cbsa-asfc.gc.ca; IEPU-UPELI@cbsa-asfc.gc.ca

Jeff Robertson
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Dear Mr. Robertson:

Re: Canada Gazette, Part I, Volume 155, Number 25: Regulations Amending the Immigration and Refugee Protection Regulations

I write on behalf of the Immigration Law Section of the Canadian Bar Association (CBA Section) to express our concerns about Canada Border Services Agency's (CBSA) proposal to amend the regulatory framework to the *Immigration and Refugee Protection Act* (IRPA) by making facts established through the prosecution of certain specific organized crime-related offences in the Canadian criminal justice system binding on immigration decision makers.¹ While CBSA purports its proposal would make the decision-making process "more efficient," we fear it will compromise procedural fairness and individual rights.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics, and students across Canada, with a mandate to seek 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.

We know from experience that the ability to challenge evidence in the immigration context is fundamental to Canada's immigration system, including the enforcement of IRPA. Unlike the criminal law context, immigration decision-making occurs at the Immigration and Refugee Board (IRB), a quasi-judicial forum with no strict rules of evidence. Facts derived under the jurisdiction of the Canadian *Criminal Code* cannot be automatically applied to the immigration context under the jurisdiction of the IRPA and used to prejudice the rights of an individual facing admissibility allegations. Immigration admissibility hearings are more fact driven than many other adjudication processes. Staving off the introduction of relevant evidence, including exculpatory evidence, runs contrary to the rules of procedural fairness and natural justice. The proposal would unnecessarily restrict the IRB decision-maker's jurisdiction and discretion. It has the potential to *fetter* the decision-maker's discretion.

¹ [Canada Gazette, Part I, Volume 155, Number 25: Regulations Amending the Immigration and Refugee Protection Regulations](#), June 19, 2021.

Adopting “facts” derived from criminal proceedings is dangerous as it precludes testing evidence in the immigration context that may not have been challenged in the criminal context. Many people in Canada facing criminal allegations that could lead to inadmissibility findings are self-represented. The accused may not have had resources to fully pursue a defense. They may have accepted a plea bargain offered by the prosecution, pleading guilty to be released from detention. The CBSA proposal would deprive a person of the opportunity to challenge the evidence in the immigration context, compromising their right to a fair proceeding. This may also undermine their right under section 7 of the *Charter* to life, liberty and security of the person.

The CBA Section is also troubled about the sources of evidence that may be used under this proposal. Information received or emanated by CBSA that may not have been tested in the criminal context could be derived from a foreign country, law enforcement authority, intelligence service, or government where adducing evidence by torture is an acceptable practice. By removing discretion and independence from the immigration decision-maker, this change may make it difficult to challenge this evidence.

Another grave concern is that if exculpatory evidence comes to light after a criminal decision that could form the basis of a criminal appeal, it may not be admissible in the immigration context under this proposal. This is an inherent breach of the rules of procedural fairness and natural justice.

This proposal would have ripple effects on Federal Court litigation that follows an admissibility determination. The Federal Court would also be compelled to accept facts from a criminal decision, further restricting a litigant from exercising their legal right to forward evidence as they deem necessary, and supportive, of the decision they seek.

The CBA Section respects and shares the government’s commitment to eradicating organized crime and gang activity in Canada. However, the Regulatory Impact Analysis Statement does not show how the proposed changes would achieve these results. The proposal would reduce the obligations on the Minister to have key facts or allegations sufficiently established for the purposes of the IRPA and its regulations while compromising fairness and prejudicing the rights of individuals in Canada’s immigration system.

We are grateful for your ongoing collaboration and would appreciate an opportunity to meet with you to discuss our concerns. We believe careful evaluation at this time will save hardship and difficulty down the line.

Yours truly,

(original letter signed by Nadia Sayed for Mark Holthe)

Mark Holthe
Chair, CBA Immigration Law Section